



**RE: 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**

BETWEEN:

MICHAEL O'NEIL AND STEPHANIE O'NEIL

Complainants

AND:

**AML HOLDINGS LTD. dba WOODGROVE CHRYSLER
(Dealer # 8485)**

Motor Dealer

AND:

**DUANE MACKIE
(Salesperson # 110197)**

Salesperson

AND:

**JANET DAYNE
(Salesperson # 110906)**

Salesperson

AND:

**ANDREW HEYS
(Salesperson # 103156)**

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: April 28, 2011, at Nanaimo, B.C.

Appearances for:

| | |
|-------------------------------------|---|
| Motor Vehicle Sales Authority of BC | Denis Savidan, Manager of Compliance and Investigations |
| | Mike Dorran, Compliance Officer |
| The Complainants | Stephanie O'Neil |
| The Motor Dealer | Michael Heys & Andrew Heys |
| Duane Mackie | In person |
| Andrew Heys | In person |
| Janet Dayne | In person |

INTRODUCTION

1. Stephanie and Michael O'Neil filed a complaint with the Motor Vehicle Sales Authority of BC (the "Authority") claiming that A.M.L. Holdings Ltd. dba Woodgrove Chrysler ("Woodgrove"), through the above noted salespersons, made misrepresentations to them in the course of their consumer transaction to purchase a 2007 Dodge Ram 3500 SLT pick-up (the "Dodge") contrary to the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the "BPCPA").
2. The Notice of Hearing (Exhibit 1 at this Hearing) identifies the following six concerns:
 - (a) Woodgrove charged the O'Neils \$39,888 for the Dodge instead of \$36,888 as advertised and represented to them;
 - (b) After trade-in allowance, the O'Neils should owe \$26,781.00 instead of \$29,500 as noted on the worksheet;
 - (c) The purchase agreement shows a \$3,000 down payment when none was given;
 - (d) Woodgrove represented to the O'Neils that they had to purchase credit, life and disability insurance, [when these were optional];
 - (e) The documentation fee on the worksheet showed \$595 when \$895 was charged on the purchase agreement; and
 - (f) Woodgrove overcharged the O'Neils on the provincial sales tax.
3. The initial complaint also indicated the Dodge was sold in an unsafe condition. The investigation did not find any evidence of such and that issue was not pursued.

BASIC FACTS

4. On June 30, 2010, Michael O'Neil purchased the Dodge from Woodgrove. During the negotiations there was much back and forth on the price of the trade-in that Woodgrove was willing to offer.
5. The Worksheet used to negotiate the sale shows that the O'Neils would ultimately be responsible to pay \$29,500 plus taxes for the Dodge. This amount

included a credit for the trade-in. The Purchase Agreement shows an amount \$3,000 higher in the sub-total section. The Purchase Agreement also shows a \$3,000 down payment which the O'Neils said they never provided: "Worksheet" and "Purchase Agreement" (Exhibit 2 at the Hearing, Affidavit of Mike Dorran at pages 37 and 38 of the attached exhibits).

6. Obtaining financing for the purchase using only Michael O'Neil failed. Mr. O'Neil contacted his father, Jeff O'Neil, who lives in Calgary and asked him to be a co-signor. His father discussed the purchase with Ms. Dayne of Woodgrove and finally agreed to co-sign and documents were faxed back and forth.

7. The O'Neils wanted to use the Dodge for their wedding that weekend. Woodgrove agreed to let them have the Dodge without the deal being finalized. After the wedding, Michael O'Neil and his father Jeff O'Neil came in and signed the paperwork at Woodgrove to finalize the purchase.

8. On about August 10, 2010, the O'Neils experienced some mechanical issues with the Dodge, including that the four-wheel drive would not engage and the steering felt "sloppy." The vehicle was initially inspected by one Chrysler dealer. The Dodge was eventually inspected by Woodgrove and repairs were made to rectify the complaints. At this time, the complainants said they reviewed their purchase and finance documents. They spoke with others including banks and believe they "were taken advantage of because of our age": Statement of Stephanie O'Neil (Exhibit 2 at the Hearing, Affidavit of Mike Dorran at page 5 of the attached exhibits).

9. On September 3, 2010, the Authority received the O'Neils complaint and investigated. Concerns were raised about the differing numbers on the Worksheet and the Purchase Agreement. Also of concern were the allegations about misrepresenting the need to purchase insurance products.

THE LAW

10. Section 5(1) of the BPCPA prohibits a “supplier” of goods or services from committing “deceptive acts or practices” in a “consumer transaction.” Where an allegation is made that a deceptive act or practice has occurred, section 5(2) of the BPCPA places the onus on the supplier to show that the deception did not occur. In this case, Woodgrove and the noted salespersons are “suppliers” and the transaction in question here is a “consumer transaction.”

Chyplyk & Trehitt v. Technique Auto Sales Corporation (June 21, 2011, File 10-U039, Registrar of Motor Dealers) at paragraph 18 and 21, citing BC Supreme Court and BC Court of Appeal decisions

11. A deceptive act or practice is defined in section 4 of the BPCPA and the BC Legislature has set out various forms of conduct that it has deemed to be deceptive acts or practices. Generally, a deceptive act or practice occurs where a supplier makes a misrepresentation to a consumer. The misrepresentation may be innocent, negligent or intentional and the consumer may still be entitled to a remedy: *Chyplyk & Trehitt v. Technique Auto Sales Corporation* at paragraph 18 and 19.

12. A misrepresentation is not the same as a misunderstanding by one of the parties to a contract. A party to a contract may misunderstand the nature of a term, even an essential term, including the price to be paid and they may still be bound by the contract. I have no jurisdiction to deal with a misunderstanding by one of the parties to a contract, but only misrepresentations made by dealers or salespersons.

Estate of George Mann v. Ocean Park Ford (May 19, 2009, File 07-70255, Registrar of Motor Dealers) citing various BC Supreme Court decisions, including *May v. Dunster* 1996 CanLII 3453 (BC Supreme Court)

13. I may not consider whether the complainants made the “right choice” or whether the complainants’ decision was a “good one.” As stated by then Chief Justice of BC Wilson in *Miller v. Lavoie* (1966), 60 D.L.R. (2d) 495 (BC Supreme Court) regarding predecessor legislation to the BPCPA, at page 501:

This Court exists for many purposes and one of these purposes is the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them. The legislation provides one method of exercising that benevolent authority. But the Courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly. [underlining added]

This passage was applied by the BC Supreme Court in relation to the BPCPA in *Bain v. Empire Life Insurance Co.* 2004 BCSC 1577.

14. The pressure referred to by the Court is actual external pressure placed on a consumer by the supplier and not merely pressure felt internally by the consumer: *First City Capital Ltd. v. British Columbia Building Corp.* (1989), 43 BLR 29 at 35 (B.C. Supreme Court).

DISCUSSION

15. Jeff O'Neil, Michael O'Neil's father, was the co-signer and provided a written statement of his conversation with his son and Ms. Dayne before he agreed to co-sign the loan. I am advised that Mr. Jeff O'Neil has passed away since giving that statement. I accept the statement as being necessary, as I could not obtain Mr. Jeff O'Neil's direct testimony at the Hearing: Exhibit 2, Affidavit of Mike Dorran, pages 62-63 of the exhibits.

16. I will discuss each allegation in turn.

(a) Charged \$39,888 instead of \$36,888 for the Dodge

(b) After trade-in allowance, the O'Neils should owe \$26,781.00 instead of \$29,500 as noted on the worksheet

(c) The purchase agreement shows a \$3,000 down payment when none was given

17. Items a, b, and c noted above can be dealt with together.

18. The Worksheet clearly shows that the O'Neils were to get \$7,388 for their trade-in and that ultimately, the O'Neils were to pay \$29,500 plus taxes and

documentation fee for the Dodge. Stephanie O'Neil agreed at the Hearing that she had seen the Worksheet. The \$7,388 trade-in amount is on the Purchase Agreement. I find no misrepresentation was made on this point.

19. In oral evidence Ms. Dayne explained how Michael O'Neil did not qualify for financing alone and needed a co-signor. Ms. Dayne also explained that it would be better to show Michael O'Neil had placed some cash down on the Dodge to show to the bank his commitment. This was difficult as the O'Neils did not have that cash down payment.

20. Ms. Dayne told the O'Neils that this could be achieved, at least on paper, by showing a \$3,000 down payment on the Purchase Agreement. However, this required a corresponding increase in the purchase price of \$3,000. This is like a math equation where you have to do to one side of the equation exactly the same as the other side so everything remains equal.

21. Therefore, the purchase price of \$36,888 as noted on the Worksheet became \$39,888 as noted on the Purchase Agreement. The sub-total would also change from \$29,500 owing as shown on the Worksheet, to \$32,500 owing, as shown on the Purchase Agreement. The \$3,000 down payment, which the complainants agree they never provided, noted further down on the Purchase Agreement, would in essence return the amount owing for the Dodge to \$29,500. In her oral testimony, Stephanie O'Neil confirmed that Ms. Dayne did explain all of this to the O'Neils: Transcript of Proceedings, April 28, 2011 at page 41. This confirmation by Stephanie O'Neil is contrary to her written statement to Investigator Mike Dorran: Exhibit 2 at the Hearing, Affidavit of Mike Dorran, at page 5 of the attached exhibits.

22. I would also note that the written statement of Jeff O'Neil indicated he was told the purchase price of the truck would be \$37,604. This exactly corresponds to the Purchase Agreement as noted in the "Balance" box. The subsequent dollar figures noted on the Purchase Agreement relate to the purchase of credit and disability insurance and an extended warranty making for a total of \$45,348.82 that was to be financed. Mr. Jeff O'Neil's written statement also notes he understood the

payments for the Dodge would be \$334.99¹ which also exactly corresponds to the Purchase Agreement. These figures were told to Mr. Jeff O'Neil by Ms. Dayne and before he agreed to co-sign the loan.

23. I therefore cannot find that Woodgrove, through Ms. Dayne, made a misrepresentation as to the purchase price of the Dodge, either before or after credit for the trade-in, or about the \$3,000 down payment. The evidence is clear that the O'Neils were aware of the purchase price really being \$36,888 as originally represented and the manipulation of the \$3,000 down payment, in order to gain financing, made that appear on paper to be \$39,888. The O'Neils, in fact, can be said to have benefited from the manipulation of the numbers as they were able to gain the financing they needed to drive away with the Dodge.

24. I should note that the total cost of some \$52,000 noted on the Purchase Agreement comprises the cost of: (1) the Dodge (\$29,500); (2) the insurances and warranties (\$7,600.82); (3) fees (\$945.50); taxes (\$4,353) ; and (4) the interest (\$9,542.13 - which is the cost of borrowing money instead of paying cash). All of this was financed. I mention this as Stephanie O'Neil's written statement indicates the O'Neils believe this change from \$30,000 to \$52,000 is evidence of how Woodgrove took advantage of their age. It is apparent that the O'Neils were expecting to pay only around \$30,000 for the Dodge and they did not factor in the extra costs associated with purchasing and financing a vehicle. This is not a misrepresentation on the part of Woodgrove, but a misunderstanding on the part of the O'Neils.

25. I would also comment that some confusion here may be related to the way a down payment is treated on a purchase agreement for tax purposes. While it would have been nice to have shown the \$3,000 down payment right before the sub-total box so that the sub-total would actually show \$29,500 as noted on the Worksheet;

¹ I note this amount is the bi-weekly amount. It does closely correspond to the \$668 monthly amount noted on the Worksheet and as initially represented to the O'Neils.

that is not done because of tax rules. Down payments are to be applied after taxes are calculated.²

(d) Woodgrove represented to the O'Neils that they had to purchase Credit, Life and Disability Insurance

26. In Stephanie O'Neil's written statement, she states they felt violated by the finance manager, Ms. Dayne, and specifically stated:

Mike and I are both new at this, as he is 21 and I am 19. I feel we were both violated by the finance manager (JC Dayne) as she convinced us that all the extras (extended warranty, life insurance and disability insurance) were mandatory.

Exhibit 2 at the Hearing, Affidavit of Mike Dorran at page 5 of the attached exhibits

27. I asked Stephanie O'Neil if she could provide me with some details of what Ms. Dayne said to her during the transaction on this point. Ms. O'Neil could not. She stated:

Okay. It was about a year ago or so. I have been trying to rack my brain. As far as I remember, we were under the understanding that it was mandatory for the loan. [underlining added]

Transcript of Proceeding, April 28, 2011, page 10

28. On October 12, 2010, Compliance Officer Mike Dorran emailed Michael and Stephanie O'Neil during his investigation and posed the same question as I did. Ms. Stephanie O'Neil provided quite a bit of detail in her reply email dated October 12, 2010; including getting a "free iPod shuffle" if they purchased the insurances and warranty. This was only six months before the Hearing. Ms. O'Neil's memory has faded very fast in only six months. I find this unusually fast and of concern given the O'Neils received a very specific gift for buying the extra insurances and

² See the Ministry of Finance Tax Bulletin SST 042 for an easy to understand explanation of the law on this point: http://www.sbr.gov.bc.ca/documents_library/bulletins/sst_042.pdf

warranty, which generally would help anchor and preserve a memory: Exhibit 2 at the Hearing, Affidavit of Mike Dorran, at page 66 of the exhibits.

29. Mike O'Neil provided a statement as well:

...When we got back J.C. [Ms. Dayne] said that we needed a co-signor for us to get approved...and J.C. told us that we needed extended warranty and life insurance on the truck and said it would not be too much more so we said ok... [underlining added]

Exhibit 2 at the Hearing, Affidavit of Mike Dorran, at page 13 of the exhibits

30. Ms. Dayne testified that she told the O'Neils about the benefits of these additional coverages. She testified that she never told the O'Neils the extra insurances and warranty were mandatory. She pointed out the Worksheet showing two monthly payments, one with the additional benefits and one without.

31. A review of the Worksheet does show two different monthly payments. One shows one price with no additional benefits. The second price shows with "life/dis/war." The second price was \$49 per month more.

32. I would also note that on the Purchase Agreement a "Protection Package" was offered and "DECLINED" is noted. Alongside this notation are the initials MO - Michael O'Neil.

33. I also note the evidence of how the O'Neils negotiated their trade-in price. This evidence suggests the O'Neils were not somehow intimidated or pressured to accept whatever Woodgrove offered.

34. Stephanie O'Neil's oral testimony lacked detail and the necessary reliability expected given her written statement of only six months prior. The two statements are starkly inconsistent. Ms. O'Neil's written statement is also somewhat inconsistent with that of Michael O'Neil in that Mr. O'Neil's statement suggests a degree of choice was available. I again note Ms. O'Neil's inconsistency described in paragraph 21 above.

35. The documentary evidence, the Worksheet, clearly shows a choice between monthly payments with and without the additional insurances and warranty. The Purchase Agreement clearly shows Michael O'Neil declining the Protection Package. These documents are also some evidence that the O'Neils were given choices to accept or reject the insurances and warranty.

36. I do not find these same types of inconsistencies in Ms. Dayne's evidence. Her evidence was consistent throughout and also consistent with all of the documentary evidence.

37. Due to the inconsistencies in the O'Neils' evidence with each other, Stephanie O'Neils inconsistency with her past statement, and both being somewhat inconsistent with the documentary evidence, coupled with Stephanie O'Neil's inability at the Hearing to recall anything of what Ms. Dayne said on this issue, I prefer the evidence of Ms. Dayne over the O'Neils'. Again, I note the evidence that the O'Neils did not readily accept whatever Woodgrove offered.

38. I do not find that Ms. Dayne represented to the O'Neils that the life, disability and warranty were mandatory. It may be that the O'Neils had misunderstood that those items were mandatory. As noted, my jurisdiction is over "misrepresentations" made by a motor dealer or a salesperson. I have no jurisdiction to deal with a "misunderstanding" by a consumer, unless that misunderstanding is shown to be due to a misrepresentation³ by a motor dealer or salesperson. As Madam Justice Russell of the BC Supreme Court noted in a case applying the BPCPA alleging a deceptive act in advertising container recycling fees:

86 In oral submissions, plaintiffs' counsel argued that "capability" is all that is required for a successful claim under the Act. While I agree that the statutes impose a "high standard of candour" on suppliers (*Rushak v. Henneken* (1991), 84 D.L.R. (4th) 87, 59 B.C.L.R. (2d) 250 (B.C. C.A.) at para. 17), it defies common sense to suppose suppliers will always be found liable for any consumer misapprehension. In my view, such a literal interpretation of the provision would permit a deceptive act or practice claim to arise from

³ Or, in the right circumstances which are not found here, a failure of Woodgrove or one of its employees to state a material fact: *Applewood Motors v. Rette & Registrar of the Motor Dealer Council* (April 13, 2010: S.C.B.C. Action No. S094126; Vancouver Registry), Oral reasons for judgment of Mr. Justice Willcock (BC Supreme Court).

nearly any representation, given the potential for imperfect understanding whatever words are used.

87 The cases provided by the plaintiffs themselves, as well as those provided by the defendants, establish that a deceptive act or practice "is one that tends to lead [a] person astray into making an error of judgment": *British Columbia (Director of Trade Practices) v. Household Finance Corp.*, [1976] 3 W.W.R. 731 (B.C. S.C.) at 736, (1976), 29 C.P.R. (2d) 232 (B.C. S.C.); aff'd, [1977] 3 W.W.R. 390, 33 C.P.R. (2d) 284 (B.C. C.A.). Here, there is no evidence that any consumer has been or may have been led into making an error of judgment because of any representation regarding the CRF. [underlining added]

Consumers' Assn. of Canada v. Coca-Cola Bottling Co., 2006 BCSC 863 (BC Supreme Court) additional reason as to costs 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), 384 N.R. 386 (note) (S.C.C.)

39. It is insufficient for the O'Neils to say they misunderstood that the life insurance, disability insurance or the extended warranty were mandatory. There must be some evidence to link this misunderstanding to a misrepresentation⁴ by the motor dealer, through its employees. There is no such acceptable evidence before me to even trigger the reverse onus provision of the BPCPA on this issue.

(e) Documentation Fee

40. The Worksheet clearly shows a documentation fee of \$595. The purchase agreement shows a fee of \$895. Ms. O'Neil testified that she was not advised of this change or the reasons for it. This discrepancy does require explanation by Woodgrove.

41. Ms. Dayne's evidence is that she did advise the O'Neils of the increased documentation fee to \$895 when she went over the purchase agreement with them. The increase related to the extra work the dealer had to undertake to obtain financing for the deal. Also, a co-signor was needed who ended up being Michael O'Neil's father, Jeff O'Neil who lived in Alberta. This required long distance calls and long distance faxes. Ms. Dayne's evidence, and written statements from Woodgrove,

⁴ See footnote 3.

showed they tried at least three different vendors to obtain the necessary financing for the O'Neils.

42. As noted above, I have concerns about the reliability of Stephanie O'Neil's testimony and her fast fading memory. Reliability is different than credibility. Credibility relates to the truthfulness of the witness and their testimony. Reliability relates to the witness's ability to accurately recall past events due to the passage of time or other similar factors.

43. Ms. O'Neil testified that she had been "racking her brain" about this transaction of a year or so ago. She could not come up with any specific representations by Ms. Dayne regarding the additional benefits during oral questioning. She could only speak of her "understanding." Now, she says, she remembers clearly that Ms. Dayne did not say anything about the \$300 increase in the documentation fee: Transcript of Proceedings, April 28, 2011 at page 41.

44. I have also considered the written statement of Jeff O'Neil. He noted he was told over the phone by Woodgrove that the total cost of the Dodge would be \$37,604 which is shown on the Purchase Agreement. This amount included the \$895 documentation fee. Also, Mr. Jeff O'Neil and Michael O'Neil came into Woodgrove to sign the purchase agreement a few days after Mr. Jeff O'Neil's phone conversation. Finally, I note that Mr. Michael O'Neil's initials appear on the Purchase Agreement showing he declined the protection package. This is only a few lines up from the noted \$895 documentation fee.

45. Based on all of the above evidence, I find it more likely than not that Ms. Dayne did go over the purchase agreement with the O'Neils including advising them of the changed documentation fee.⁵

⁵ As with real estate transactions, such changes on the price from the worksheet to the purchase agreement should be initialed as an evidentiary best practice. In this case, the surrounding evidence has enabled me to make this decision.

(f) Over-Charged on Taxes

46. The purchase of the Dodge, at least on paper, occurred on June 30, 2010, the day before British Columbia went to the Harmonized Sales Tax (HST).

47. The amount of provincial sales tax claimed to have been over-charged is \$264.25. No evidence was led to suggest in what way the O'Neils were overcharged this tax. It is simply based on $7\% \times \$32,500$ (the sub-total) should equal \$2,275; but \$2,539.25 was charged: Exhibit 1 at the Hearing.

48. However, the \$895 documentation fee was also PST taxable⁶ and must be added to the $\$32,500 + \$895 = \$33,395 \times .07$ (PST) = \$2,337.65. This \$2,337.65 PST figure shows up on the finance documents as the amount of PST on the purchase of the Dodge: Exhibit 2 at the Hearing, Affidavit of Mike Dorran, at page 31 of the exhibits. This leaves \$201.60 in unaccounted for tax.

49. Extended warranties were also PST taxable when bundled with a taxable good, as is the case here⁷. The Purchase Agreement shows the extended warranty was $\$2,880 \times .07$ (PST) = \$201.60.

50. Grouping together all of the then provincial sales taxable items yields:

| Taxable Item | Amount |
|------------------------------------|-------------------|
| Dodge | \$32,500 |
| Documentation Fee | \$895 |
| Extended Warranty | \$2,880 |
| Sub-Total | \$36,275 |
| PST owing at $7\% \times \$36,275$ | \$2,539.25 |

⁶ See the Ministry of Finance Tax Bulletin SST 042 for an easy to understand explanation of the law on this point: http://www.sbr.gov.bc.ca/documents_library/bulletins/sst_042.pdf

⁷ See the Ministry of Finance Tax Bulletin SST 110 for an easy to understand explanation of the law on this point: http://www.sbr.gov.bc.ca/documents_library/bulletins/sst_110.pdf

The \$2,539.25 amount is shown on the Purchase Agreement as the BC provincial sales tax payable.

51. I recognize that by adding the \$3,000 to the purchase price, to correspond to and off-set the fictitious down payment of \$3,000 (see paragraphs 18 to 25 above) the O'Neils paid \$210 in additional PST. However, that is a consequence of the O'Neils having agreed to manipulate the numbers by \$3,000 in order for them to secure financing. They are responsible for the tax consequences of their decision.

52. I do not find that the O'Neils were overcharged provincial sales taxes.

THE SALESPERSONS

53. Based on the documents presented and considering the oral testimony at the hearing, I do not find any evidence that Duane Mackie or Andrew Heys made a misrepresentation to the O'Neils contrary to the BPCPA. I have already found Janet Dayne did not make a misrepresentation to the O'Neils.

DISPOSITION

54. For the above reasons, I dismiss the O'Neil's complaint against Woodgrove and the above noted salespersons.

55. This decision may not be reconsidered under the BPCPA. This decision may be reviewed by way of Petition for judicial review to the BC Supreme Court, pursuant to the *Judicial Review Procedure Act*.

Dated: August 11, 2011

A large black rectangular redaction box covers the signature area. A blue ink scribble is visible above the box, and a blue ink line is visible below it.

Ian Christman LL.B.