Hearing File No. 12-030
Investigation File No. 12-70393

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:

RON HARRIS & MELINDA HARRIS

Complainants

AND:

WINDMILL AUTO SALES & DETAILING LTD. (Dealer # 30476)

Motor Dealer

AND:

SARMAD JAMIL a.k.a. SAM ROMAYA (Salesperson # 102192)

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: January 10, 2013 and March 5, 2013 at Surrey, British Columbia

Appearances for:

The Complainants	Ron Harris & Melinda Harris
The Motor Dealer	Sam Romaya, Dealer Principal
Sam Romaya	In person
Motor Vehicle Sales Authority of BC	Daryl Dunn, Manager of Compliance and Investigations
	Sarah Kilback, Compliance Officer

Introduction

[1] On August 8, 2011, Ron and Melinda Harris (the "Complainants") purchased a 2009 Dodge Laramie pick-up (the "Dodge") from Windmill Auto Sales & Detailing Ltd. ("Windmill"), motor dealer registration # 30476. The Complainants dealt with Sarmad Jamil a.k.a. Sam Romaya ("Mr. Romaya"), salesperson licence # 102192 who is the dealer principal of Windmill and a co-owner.

[2] At the time of the purchase, Windmill, through Mr. Romaya, declared the Dodge had been in an accident and the cost of repairs only $1,800. The Dodge had been imported from the U.S.A. which was also declared.

[3] In May of 2012, the Dodge was struck by another motor vehicle while parked in the Complainants' driveway. The Dodge was taken in for repair and it was discovered the Dodge still had previous damage that had not been repaired. A visual estimate indicated there was some $6,200 in additional repairs to be made from a previous accident.

[4] The Complainants confronted Windmill and Mr. Romaya with this discovery. Initially, Windmill seemed reluctant to take responsibility and offered $5,000 in compensation. This was rejected by the Complainants.

[5] The Complainants and Windmill agreed to have the Dodge inspected by another third party repair shop. After that inspection confirmed the first estimate, it appears Windmill and Mr. Romaya came up with a plan to provide the Complainants with a trade in credit for the Dodge that would have provided substantially a full refund except for the warranty and documentation fee for which the Complainants had paid. The Complainants also rejected this offer.

[6] On July 6, 2012, the Complainants filed their complaint with the Motor Vehicle Sales Authority (the "Authority"). An investigation ensued conducted by Sarah Kilback.

[7] A hearing was called on January 10, 2013. That hearing was adjourned. Windmill and Mr. Romaya had not been given two pieces of evidence until the time of the hearing. A CD-ROM of a phone conversation between the Complainant, Ron Harris and Mr. Romaya had not been disclosed. Also, an invoice in the possession of a witness regarding repairs to the Dodge, before the Complainants purchased the Dodge, was not produced by that witness until the day of the hearing. I adjourned the hearing to allow Windmill and Mr. Romaya an opportunity to review that new evidence.

[8] When the hearing reconvened on March 5, 2013, Windmill and Mr. Romaya did not contest, and admitted to, the facts contained in Sarah Kilback's affidavit with attached exhibits. Windmill and Mr. Romaya also did not contest and admitted the remainder of the exhibits entered at the hearing. Mr. Romaya provided a statement indicating he believes an error occurred, with his bookkeeper not ensuring all the paid invoices were in the deal file at the time of the sale.

[9] The facts of this case are not contested.

Position of the Parties

(a) Complainants

[10] The Complainants feel they are entitled to a full refund. Mr. Harris described the repairs to the Dodge as if it had been put back together with "bubble gum". He noted there is an estimate of $6,200 to fix the remainder of the Dodge's unrepaired damage. However, he also points out that the estimator (Mission Auto Body) does not guarantee there is no other unseen damage. The notes from the estimate say "Estimate does not include hidden damage" and "Estimate not complete until we re-open previously repaired area-may still grow."

[11] Mr. Harris commented on Mr. Romaya's written statement presented at the hearing and basically said it is a smoke screen.

[12] In responding to why they did not take Mr. Romaya's last offer which would have seen them get substantially all their money towards a new vehicle at a dealership of their choosing, they said their lawyer advised they should not deal with Mr. Romaya as they may be liable to whomever Windmill may later sell the Dodge.

(b) Windmill and Mr. Romaya

[13] Windmill and Mr. Romaya state a mistake happened. Eventually once the extent of the mistake was determined, they came up with a deal structure to use the Dodge as a trade-in and gain the tax advantage that structure would provide, and get the Complainants into a vehicle of their choosing from a dealer of their choosing. They note the Complainants have put mileage on the Dodge and there has been a subsequent accident and damage to the Dodge affecting its worth. Mr. Harris stated they had put on about 16,000 miles (U.S.A. vehicle).

[14] Windmill and Mr. Romaya point out they have never had any compliance issues and this was an error.

The Law

(a) Motor Dealer Act - Declaring Damage Over $2,000

[15] A motor dealer has a positive duty to research and declare any damage to a used vehicle where the cumulative cost of repairs exceeds $2,000.

- Section 23(b)(ii) of the *Motor Dealer Act Regulation*
- *Robillard v. Comox Valley Ford Sales (1964) Ltd. and Gordon Leo Rugg (Third Party) and Port Chevrolet Oldsmobile Ltd. (Fourth Party)* 1995 BCJ No. 436 (BC Court of Appeal)
- *Motley v. Regency Chrysler* 2002 BCSC 1885 (BC Supreme Court)
- *Clark v. Abbotsford Imports (1983) Ltd.* 1992 CarswellBC 2044 (BC Supreme Court)

[16] The B.C Court of Appeal in *Brook v. Wheaton Pacific Pontiac Buick GMC Ltd.* 2000 BCCA 332 stated the purpose for this declaration was:

> 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. [Underlining added]

(b) Business Practices and Consumer Protection Act – Deceptive Acts or Practices

[17] A motor dealer's duty to make declarations under the *Motor Dealer Act* (the "MDA"), are also representations. Therefore, the manner in which the declarations under the MDA are made must be compliant with the *Business Practices and Consumer Protection Act* (the "BPCPA").

[18] Section 4(1) of the BPCPA sets out a general definition of a deceptive act or practice which essentially is conduct involving misrepresentations. Section 4(3) identifies types of representations that are deemed to be deceptive acts or practices. Of interest are the following sections:

> (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,
>
> (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,

[19] Section 5(1) of the BPCPA prohibits a "supplier" from committing deceptive acts or practices. Where a consumer alleges a deceptive act or practice occurred and provides some proof of that fact, the onus then shifts to the supplier to show it did not commit a deceptive act or practice: section 5(2) of the BPCPA. The burden of proof is on a balance of probabilities: *F.H. v. McDougall* 2008 SCC 53 (Supreme Court of Canada).

[20] A deceptive act or practice may be innocent, negligent or intentional and a consumer may be entitled to a remedy. What remedy is available to the consumer will depend on the facts of the case.

- *Rushak v. Henneken* (1991), 59 B.C.L.R. (2d) 250 (BC Court of Appeal).
- *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond* 2009 BCSC 1335 (BC Supreme Court)
- *Cummings v. 565204 B.C. Ltd. dba Daewoo Richmond* 2009 BCSC 1009 (BC Supreme Court)

[21] It is not necessary to show a supplier (dealer) intended to mislead a consumer by its representation in order to find it to be an intentional act. If a dealer is found to have acted recklessly in relation to its representation, that will be sufficient to say the dealer acted intentionally: *Casillan*.

(b) Business Practices and Consumer Protection Act - Remedies

[22] My authority as Registrar is statutory and the remedies I may order must be authorized by the BPCPA. The MDA provides no means to provide a consumer with a remedy in a case such as this. I am not a court of equity and I may not order rescission of a contract.

[23] In this case, my authority is to issue a compliance order under section 155 of the BPCPA.

[24] In fashioning any remedy under the BPCPA, I may have regard to all of the law to ensure consistency in the application of the law, where appropriate: *Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services)* [2006] 1 S.C.R. 513 at paragraph 26 (Supreme Court of Canada).

Discussion

(a) Consumer Transaction

[25] I am satisfied that Windmill and Mr. Romaya are "suppliers" and that the transaction with the Complainants was a "consumer transaction" as those terms are defined by the BPCPA.

(b) Deceptive Act or Practice

[26] I am satisfied on the evidence, that Windmill and Mr. Romaya committed a deceptive act or practice in the way they represented the Dodge's damage to the Complainants. They have effectively admitted to this fact.

[27] Based on the evidence, I am also satisfied that Windmill and Mr. Romaya acted with intention in making the damage declaration and representation. I base this on the following findings of fact which are undisputed:

(a) The Tracy, California, ADESA auto auction, from where Windmill obtained the Dodge, declared the Dodge "as is" and warned the airbag had been

deployed and there was a frame damage warning (page 187 of the affidavit exhibits).

(b) The ADESA auto auction used vehicle inspection report estimated repairs at $6,921.73 USD, prior to Windmill purchasing the Dodge (pages 181-182 of the affidavit exhibits). The report was available to Windmill and viewed online: (paragraph 24 of the Affidavit of Sarah Killback).

(c) ADESA customer invoice to Windmill shows ADESA checked and advised Windmill regarding several items including "REF DIIF[sic] TUBE BENT AND LEAKING." This invoice was in Windmill's dealer file: (page 153 of the affidavit exhibits). Important to note here is that Mission Auto Body identified the rear differential tube as bent and weeping, and needs re-welding (pages 160 to 163 of the affidavit exhibits).

(d) The ADESA sales contract shows Windmill as the purchaser and Mr. Romaya as the "Buying Representative" (Page 152 of the affidavit exhibits).

(e) The repair invoice from Automind Collision Repair (which was not in the dealer file and provided by a witness at the January 10 hearing) shows body and paint work of $2,658.26 (Exhibit 3). This was paid for by Windmill prior to selling the Dodge to the Complainants. It is also this document which Mr. Romaya said his bookkeeper had not properly advised him about.

(f) At the time of the sale, Mr. Romaya said he could not remember where the damage on the Dodge was located and advised the Complainants that it was just a fender bender: Transcript of Sarah Kilback's interview with the Complainants, page 7, lines 2 – 5 (page 111 of the affidavit exhibits).

(g) The pictures available to Windmill about the Dodge's damage provided by ADESA, and prior to purchase, showed the extent of the damage including to the quarter frame (paragraph 24 of the Affidavit of Sarah Killback and page 184 of the affidavit exhibits).

(h) The purchase agreement between Windmill and the Complainants for the Dodge is specifically marked in the "damage over $2,000" declaration area as "no" and written in is "$1,800" (page 6 of the Affidavit exhibits).

(i) The Complainants state Mr. Romaya provided them with a copy of a repair order showing repairs to the Dodge in the amount of $1,787.63 when they confronted him with the previously unrepaired damage. It is to be noted the date on the bottom of that repair order, which Mr. Romaya apparently tried to black out, shows a date of May 30, 2012 which is 9 months after the sale (repair order is at pages 37-39 of the affidavit exhibits; and see the Transcript of Sarah Kilback's interview of the Complainants: pages 8 & 9 of the transcript and pages 112-113 in the affidavit exhibits).

[28] The Complainants provided evidence that Windmill's declaration of damage being only $1,800 influenced their decision to purchase the Dodge. Mr. Harris said at the time of purchase, they were told the repairs were $1,800 and he thought that could be something "like a new bumper" and that "I am not going to worry about that" amount of repaired damage: Transcript of Interview by Sarah Kilback of the Complainants, pages 110-111 of the affidavit exhibits (page 6 line 18 to page 7, line 5 of the Transcript).

[29] A concern was raised about the airbags in the Dodge.

[30] The side airbags were noted as deployed by the ADESA auction. No receipts were discovered or provided by Windmill that these items had been replaced. In a statement, Mr. Romaya says Windmill must have replaced them as he would be liable if he had not done so: (paragraph 21 of the Affidavit of Sarah Kilback).

[31] Canadian Tire did a provincial private vehicle inspection of the Dodge after it was repaired by Windmill. This is a requirement under the *Motor Vehicle Act* whenever a vehicle is registered in B.C. that was previously from out of province. The Canadian Tire inspection noted the Dodge was compliant with the *Motor Vehicle Act* safety requirements, including the air bags: (pages 23 & 95 of the affidavit exhibits). Canadian Tire appears to be an uninterested entity in these proceedings. The best evidence that I have is that the Dodge's airbags are compliant.

(c) Remedy

[32] It is generally accepted that an intentional misrepresentation can place the contract in jeopardy at common law: *Casillan*, noted above. The measure of damages can be the whole of the amount paid and is assessed as at the time of the breach taking place: *Casillan* at paragraph 29. A person may also be entitled to consequential damages (such as an inspection cost) caused by the intentional misrepresentation: *Casillan* at paragraph 30.

[33] However, there is authority that the remedy for a breach of the BPCPA is damages for a breach of contract. Citing a decision of the BC Court of Appeal, Justice Dillon of the BC Supreme Court noted in *Casillan*:

> [34] The measure of damages under the BPCP Act, s. 171, is the damage "due to a contravention of this Act". In *Mikulas v. Milo European Cars Specialists Ltd.*, (1993), 52 C.P.R. (3d) 1 (B.C.S.C.), under the previous legislation, the measure of damages was the amount required to repair the engine to the standard represented. On appeal, Lambert J.A. said that "damages must be calculated on the basis of what it cost the plaintiff to be put in the position that it would have been in if the representation had been true": *Mikulas v. Milo European Cars Specialists Ltd.* 1995 CanLII 2431 (BC CA), (1995), 60 C.P.R. (3d) 457 at para. 9 (B.C.C.A.). By this was meant the position for which the plaintiff had contracted.

[34] In *Casillan*, the BC Supreme Court made an order at common law that the dealer take back the vehicle in question and provide a full refund. The Court also

ordered the dealer to pay back the cost to rebuild the engine for which the consumer had paid. The core issue was that the dealer was found to have intentionally (recklessly) misrepresented the vehicle as having a power train warranty when it did not. The remedy under the BPCPA, the court said, was only for the dealer to repay for the engine repairs as that would put the consumer back in the position he had contracted for.

[35] As I noted above, I am not a court of equity and therefore I cannot grant the equitable remedy of rescission of the contract.

[36] I must consider whether an order to reverse the deal or to pay damages is appropriate and that I have statutory authority to do so. By virtue of section 8.1 of the *Motor Dealer Act* and section 29 of the *Motor Dealer Act Regulation*, I have the authority to apply section 155 of the BPCPA, part of which provides:

> 155
>
> (4) The director [registrar] may include one or more of the following orders in a compliance order:
>
> (a) <u>that a person reimburse any money or return any other property or thing received to a consumer</u> or a class of consumers;
>
> (b) <u>that a person compensate other persons or a class of persons who have suffered loss or damage as a result of a contravention of this Act or the regulations</u>;
>
> (c) that a person take specified action to remedy an act or practice by which the person is contravening, is about to contravene or has contravened this Act or the regulations;
>
> (d) that a person reimburse to the director all or a portion of the actual costs of any inspection, including actual legal costs, incurred by the director for the inspection of that person in respect of the contravention referred to in the compliance order.

[37] I would note that section 171 of the BPCPA, referred to in the *Casillan* case above, uses similar language to section 155(4)(b) of the BPCPA noted above - "as a result of a contravention of this Act." However, what is not contained in section 171 of the BPCPA, is language similar to section 155(4)(a) empowering the Registrar to essentially require a motor dealer return the money it has obtained from a consumer. In my opinion the B.C. Legislature has empowered the Registrar to order an appropriate remedy depending on the facts. The Registrar is not limited to ordering a statutory remedy in the nature of damages for a breach of contract where there is a breach of these provisions of the BPCPA. Section 155(4)(a) includes a statutory remedy similar to rescission.

[38] In this case the Complainants believed they were buying a 2009 Dodge 1500 Laramie with 9,200 km and $1,800 in repaired damage. That is not the case.

[39] Can an award of damages, to make all the necessary repairs, place the Complainants back into the position they would have been if the representation was true? The answer is no. The Dodge has over $1,800 in prior damage and will always have over $1,800 in prior damage no matter how well the repairs are made. Given that legislation exists requiring a motor dealer declare damage over $2,000, I find this is a material fact in the purchase of a motor vehicle, as inferred by the Court of Appeal in *Brook*, above:

> 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. <u>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.</u>
>
> See also *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* 2011 SCC 23 (Supreme Court of Canada) at paragraphs 44 to 61, for the common law test for materiality.

i. Refund of the Dodge

[40] The estimate to repair the Dodge has clearly been qualified as requiring further inquiry for hidden damage. Therefore, an award of damages would be too imprecise in this case and the misrepresentation here was sufficiently significant. In this case, there being an intentional misrepresentation, the Complainants should not bear the burden of risking additional costs for any hidden damages the amount of which are unknown.

[41] In this case, I find it is appropriate to order Windmill and Mr. Romaya to refund the purchase price of the Dodge including taxes. The price paid for the Dodge was $35,393 + $4247.16 (12% HST) = $39,640.16. The refund is conditional on the Complainants returning the Dodge within 30 days of the date of the below compliance order and signing over ownership of the Dodge to Windmill or Mr. Romaya.

[42] I have considered if there should be any reduction in the refund amount due to the Dodge having travelled some 16,000 miles and there being an accident on the Dodge while owned by the Complainants. The *Casillan* case is not of much assistance as the engine failed one week after purchase in that case and the misrepresentation discovered fairly quickly.

[43] In other cases where there has been an intentional misrepresentation, or a fundamental breach of the contract, rescission was granted even in situations where the property had been damaged and repaired and used for an extensive period of time.

- *Bahry v. Lindell Beach Holiday Resort Ltd.* 2009 BCSC 632 (BC Supreme Court)
- *Brown & Root v. Aerotech Herman Nelson Inc. et al.* 2004 MBCA 63 (Manitoba Court of Appeal), paragraphs 60 to 67, leave to appeal to the Supreme Court of Canada refused (2005), 334 N.R. 194 (note) (S.C.C. Feb 17, 2005).
- *Lasby v. Royal City Chrysler Plymouth* (1987), 59 O.R. (2d) 323 (Ontario High Court of Justice) leave to appeal to the Court of Appeal refused (Blair, Goodman and Cory JJ.A.; April 27, 1987)

[44] In *Bahry*, a park model trailer was damaged in a storm about 6 months after it was purchased. The damage was repaired. It was discovered during the repairs that the park model trailer did not conform to the allowed use in the trailer park, contrary to the representations of the seller. The BC Supreme Court granted rescission to the buyers in that case, even though they had used the trailer and it had been damaged, and repaired, while in the hands of the buyers.

[45] Further, the fact a vehicle has had damage that is subsequently repaired does not mean its value has automatically depreciated. There must be proof of actual depreciation and the notion of a "stigma" of an accident is insufficient. There is no proof that the damage to the Dodge, while in the hands of the Complainants, since repaired, has cause accelerated depreciation.

- *Miles v. Mendoza* [1994] B.C.J. No. 359 (BC Supreme Court)

[46] Finally, I would note that allowing a discount for the Complainants' use of the Dodge, rent if you will, could effectively allow Windmill to profit from the intentional misrepresentation. As a matter of public policy, a person should not be allowed to benefit from their intentional wrong, especially at the expense of the person who was wronged: *Brown & Root* at paragraphs 60 – 67.

ii. Documentation Fee

[47] The Complainant's paid a documentation fee of $500 on the purchase of the Dodge. Generally, a documentation fee is an additional way for a dealer to profit on the sale. In this case, there is no evidence that the documentation fee went towards another product or service unrelated to the purchase of the Dodge. There is no evidence that the Complainants are benefiting or will continue to benefit from some good or service, apart from the Dodge. In this case it is appropriate to order the refund of the documentation fee and the taxes $500 + $60 (12% HST) = $560.

iii. Extended Warranty

[48] The Complainants purchased an extended warranty for the Dodge. The warranty is with Old Republic. They purchased the Gold plan, good for 60 months or 100,000 km. The policy could be cancelled within 30 days which expired before the Complainants were aware of the misrepresentation.

[49] The Complainants have and continue to have the benefit of the warranty. However, some of the items contained in the Gold Plan, such as internal differential

parts, may not be honoured under the warranty because of pre-existing damage; the bent differential tube noted above. As the policy brochure states in relation to transfer cases and drive axles, "is covered only if damaged by the failure of an internal part." Therefore the warranty would be of no value to the Complainants in case of a failure of some of the driveline components due to pre-existing external damage.

[50] I find the misrepresentation about damage to the Dodge has also affected the purchase of the extended warranty. While the Complainants believed they were getting a full warranty, including all driveline components, the actual facts put in jeopardy the Complainants' actual rights under the warranty plan at least regarding some of the driveline components. This would be deemed a deceptive act captured by sections 4(3)(b)(iv) and (vi) of the BPCPA.

[51] With the return of the Dodge to Windmill, the warranty is of no utility to the Complainants. I would also note that the warranty is transferrable to subsequent owners so long as the proper procedures are followed (Old Republic Warranty Policy; page 77 of the affidavit exhibits). Any subsequent purchaser would need to be made aware of the limitations on the warranty due to the pre-existing damage, and Old Republic should be consulted in this regard.

[52] The amount paid for the warranty is $2,500 + $300 (12% HST) = $2,800. The Complainants are entitled to recover the price they paid for the warranty.

iv. Overall Liability

[53] Windmill and Mr. Romaya are liable to the Complainants for $43,000.16:

Dodge	$39,640.16
Documentation Fee	$560.00
Vehicle Warranty	$2,800.00
Total	$43,000.16

Mr. Romaya was the salesperson who made the misrepresentation. He is directly liable for that misrepresentation while Windmill is also liable for the acts of its principals and employees: section 155(6) of the BPCPA.

Compliance

(a) General Comments

[54] My role as regulator is to ensure compliance with applicable laws. I am provided tools in order to regain compliance such as:

(a) issuing a compliance order under the BPCPA;
(b) issuing administrative penalties under the BPCPA;
(c) adding conditions to a licence under the MDA; or
(d) suspending a licence for a period of time under the MDA.

[55] If based on the evidence I am not satisfied on a balance of probabilities that a licensee will comply with the laws in the future and they pose a continuing risk to the public interest, I may cancel their licence to remove them from the industry.

[56] In fashioning an appropriate regulatory response, I can consider the need for deterrence on the licensee and on the industry as a whole: *Cartaway Resources Corp. (Re),* [2004] 1 S.C.R. 672 (Supreme Court of Canada) and *Hogan v. British Columbia Securities Commission* 2005 BCCA 53 (BC Court of Appeal).

[57] Finally, my role as regulator in this particular case is not the same as a criminal court prosecuting a crime or an offence. In the court, penalties can be substantial and are penal consequences to punish past behaviour and deter future unwanted behaviour. My role here is not to punish, but to remedy the past conduct of, and regain the compliance of, Windmill and Mr. Romaya: *Hogan* (BC Court of Appeal).

[58] In this case I do not believe adding conditions to the registration of Windmill or the licence of Mr. Romaya is necessary. I also do not believe the public interest requires a suspension or a cancellation of registration or licence. I am satisfied on the factual considerations noted below, that future compliance can be obtained and without resort to these measures.

(b) Regulatory action – factual considerations

[59] I note that this case involved an intentional misrepresentation regarding damage to the Dodge. This is a breach of trust issue. Consumers are entitled and expect, and justly so, that when they deal with a licensed motor dealer and a licensed salesperson, they deal with a professional and will be dealt with honestly. The breach of trust affects not only the specific relationship with the Complainants in this case, but puts in jeopardy the relationship of trust between any motor dealer and consumers in general. A breach of trust is a serious issue.

[60] There was no evidence that the Dodge was mechanically unsafe. The evidence provided shows the potential harm to the Complainants was financial.

[61] The statement of Mr. Romaya (exhibit 5) indicates he was willing to provide almost a full refund by using the Dodge as a trade-in in a particular way. This offer came within about two months of the Complainants bringing this issue to Windmill. Mr. Harris agreed this offer was made and was close to a full refund.

[62] Mr. Romaya felt that there should be some reduction in the Complainants' entitlement due to their use of the Dodge for almost a year and there being an accident involving the Dodge. This position is not wholly unreasonable when rescission of a contract is being requested. The reason for this is when rescission is granted, the legal principle of restitution *in integrium* generally applies and the person returning the property is required to return the property in substantially the same condition as when it obtained that property. The accident to the Dodge while in the hands of the Complainants could have made restitution *in integrium* difficult to apply. However, there are always exceptions to the rule, as explained above, and Mr. Romaya clearly

did not appreciate those exceptions applied in this case. Obtaining legal advice would have been advisable for Windmill and Mr. Romaya.

[63] I have considered Windmill's compliance history. I note Windmill has had three other investigations since 2006. However, two of those (07-70224 and 11-70211) were closed as insufficient evidence to show any infraction and no action was taken by the Authority. One file remained open for only 10 days. The Third complaint in 2009 was by the Registrar regarding a Windmill advertisement indicating a vehicle with no accidents when the ICBC report showed an accident of over $4,500 (09-70704). A warning letter was sent. No similar advertising issues have been noted since. In all, Windmill's complaint history and compliance history is good. It is not unusual for a motor dealer to have unsubstantiated complaints as consumers complain about many things not related to compliance, such as the level of service provided.

[64] I have considered Mr. Romaya's compliance and licensing history. Mr. Romaya has been licensed since August of 2004, the year licensing of salespersons was first legislated. He has renewed his licence over these past years without incident and complied with his education requirements without incident. There is no past compliance history or investigations related directly to Mr. Romaya. Overall, Mr. Romaya has complied with the requirements of his licence and complied with the directions of the Authority regarding education without concern.

[65] Based on the evidence available, Windmill paid $20,550 USD (see page 156 of the affidavit exhibits – Washout Calculator) at auction for the Dodge. Windmill would have paid transportation costs to bring the Dodge to B.C. There would be costs to import the Dodge and register it with the Canadian Registrar of Imported Vehicles. The documents in evidence show Windmill had reconditioning and inspection costs of approximately $3,000 – $4,000, not including the free labour applied by Windmill. The Dodge was sold for $35,953. Overall, and based on the available evidence, Windmill stood to gain about $7,000 to $9,000 on the sale of the Dodge.

(c) Regulatory Action – Compliance Order

[66] I find the following compliance order is necessary to remedy Windmill and Mr. Romaya's breach, and to regain their compliance:

Windmill Auto Sales & Detailing Ltd. Dealer Registration # 30476 and Sarmad Jamil a.k.a Sam Romaya, salesperson licence # 102192 are each, jointly and severally[1], required to:

(a) abide by the *Motor Dealer Act* and the *Business Practices and Consumer Protection Act*;
(b) ensure damage declarations about motor vehicles being offered for sale or sold are to the best of their knowledge and belief accurate and made clear;
(c) refrain from making intentional misrepresentations about the products or services they offer to consumers regarding the sale of motor vehicles;

[1] Section 155(6) of the *Business Practices and Consumer Protection Act*.

(d) pay to Ron Harris and Melinda Harris the sum of $43,000.16 which is conditional on Ron and Melinda Harris returning the 2009 Dodge 1500 Laramie (VIN 1D3HV13T69J526034) within 30 days of the date of this compliance order. The payment of $43,000.16 is due upon Ron and Melinda Harris signing over ownership of the Dodge to Windmill or Mr. Sarmad Jamil a.k.a Mr. Sam Romaya.; and

(e) pay to the Motor Vehicle Sales Authority the amount of $1,811.97, being the Registrar's investigation and hearing costs.

Any words in this Compliance Order that are defined in the *Motor Dealer Act* or the *Business Practices and Consumer Protection Act*, have the meaning as described in those Acts.

(d) Regulatory Compliance – Administrative Penalties

[67] In this case, I find that administrative penalties are in order with specific deterrence important and general deterrence of secondary importance. Before setting an amount for an administrative penalty I must consider the factors set out in section 164(2) of the BPCPA, and the facts of the whole case. Past precedents are useful guides in considering an administrative penalty, but are not binding authority: *Hogan* (BC Court of Appeal).

[68] The section 164(2) BPCPA factors to be considered are:

(a) previous enforcement actions for contraventions of a similar nature by the person;
(b) the gravity and magnitude of the contravention;
(c) the extent of the harm to others resulting from the contravention;
(d) whether the contravention was repeated or continuous;
(e) whether the contravention was deliberate;
(f) any economic benefit derived by the person from the contravention;
(g) the person's efforts to correct the contravention.

[69] The maximum penalties allowed are $50,000 on a corporation and $5,000 on an individual: section 165 of the BPCPA.

i. Windmill

[70] Applying the above factors to Windmill:

(a) Apart from a warning letter for advertising, there has been no previous similar enforcement action.
(b) The contravention was limited to the Complainants. It was financial in nature with no evidence the Dodge was sold in an unsafe condition.
(c) The harm was confined to the Complainants.
(d) The contravention was repeated when Windmill provided the Complainants a document purporting to prove the damage to the Dodge was only under $1,800.

(e) I have found the contravention was deliberate.
(f) As noted above, Windmill stood to profit about $7,000 to $9,000 from the sale of the Dodge.
(g) Windmill did make an offer that would have been substantially a full refund within about two months of the Complainants seeking compensation from Windmill. Again, it appears it was Windmill's mistaken belief there should be a deduction for the Complainants' use of the Dodge and the damage to the Dodge while in their possession.

[71] I note the history of Windmill has been good and there appears to be no issue in Windmill complying with the directions of the Registrar in the past. There is no indication it will not comply with the compliance order in this case.

[72] I take into consideration that at the March 5, 2013 hearing, Windmill admitted to and did not contest the evidence produced. It merely indicated an error was made and wanted to bring to the Registrar's attention its past history as a motor dealer.

[73] I take into consideration the evidence of the current value of the Dodge if resold in today's market of about $22,000 to $23,000 (Exhibit 4 (Black Book trade-in value web printout) corroborating Exhibit 5 (Mr. Romaya's statement)). This shows that Windmill is now expected to lose about $7,000 on the Dodge and the deal with the Complainants.

[74] I have considered the following past Registrar's decisions where intentional misrepresentations occurred:

- *Roberts v. Matrix Auto Sales Ltd* (09-7100 & 09-70695: May 4, 2011)
- *Knapp v. Crown Auto* (08-70578: September 21, 2009)
- *Pirvulescu v. Parkwood Auto Sales Ltd. & Beune & Hawes* (07-70285: August 6, 2010)

[75] Overall, I believe an Administrative Penalty of $2,500 is warranted against Windmill in this case. The *Pirvulescu* case is the closest comparator. In that case the dealer deliberately misrepresented damage to the vehicle. However, the damage was very significant, about $26,000, and the vehicle itself was sold for $26,000. Also, the dealer was found to have instigated a system to willfully blind its staff from knowing the extent of any damage so they could not give accurate disclosures to consumers.

[76] The differences in the two cases is the history of Parkwood showed a disregard for complying with the Authority, the degree of the damage undisclosed and clear evidence that its business model hid the facts from those who needed to know it, consumers and salespersons alike. In that case a $7,500 administrative penalty was issued and the dealer's registration was also cancelled.

[77] Overall, I believe the combined loss on the Dodge along with the Compliance Order and the $2,500 penalty is sufficient deterrence in this case, and will assist in gaining future compliance, especially given the past positive compliance history of Windmill.

ii. Mr. Romaya

[78] I must go through the same considerations for Mr. Romaya as for Windmill. In considering the factors under section 164(2) of the BPCPA, I note the following:

(a) Factor (a): there are no prior similar contraventions by Mr. Romaya.
(b) Factors (b) to (e): are the same as for Windmill noted above.
(c) Factor (f): there is no evidence of Mr. Romaya's profit, but as co-owner, he would have profited from the sale of the Dodge.
(d) Factor (g): is the same as for Windmill noted above.

[79] I also take into account the same considerations as Windmill in paragraphs 71 to 74 above.

[80] The past decisions show administrative penalties ranging from $500 to $1,500 for a salesperson in somewhat similar circumstances. The higher end penalties included issues of making false statements to investigators, concerned misrepresenting vehicles as safe when they were not and culminated in cancelling one salesperson's licence.

[81] In considering the past decisions, the Compliance Order that will issue, the loss of profit on the Dodge and Mr. Romaya's past history of complying with the Registrar and Authority, I believe an Administrative Penalty of $500 is sufficient to act as a deterrence in this case and assist in gaining future compliance.

Summary

[82] The following Compliance Order is made:

Windmill Auto Sales & Detailing Ltd. Dealer Registration # 30476 and Sarmad Jamil a.k.a Sam Romaya, salesperson licence # 102192 are each, jointly and severally, required to:

(a) abide by the *Motor Dealer Act* and the *Business Practices and Consumer Protection Act*;
(b) ensure damage declarations about motor vehicles being offered for sale or sold are to the best of their knowledge and belief accurate and made clear;
(c) refrain from making intentional misrepresentations about the products or services they offer to consumers regarding the sale of motor vehicles;
(d) pay to Ron Harris and Melinda Harris the sum of $43,000.16 which is conditional on Ron and Melinda Harris returning the 2009 Dodge 1500 Laramie (VIN 1D3HV13T69J526034) within 30 days of the date of this compliance order. The payment of $43,000.16 is due upon Ron and Melinda Harris signing over ownership of the Dodge to Windmill or Mr. Sarmad Jamil a.k.a Mr. Sam Romaya.; and
(e) pay to the Motor Vehicle Sales Authority the amount of $1811.97, being the Registrar's investigation and hearing costs.

Any words in this Compliance Order that are defined in the *Motor Dealer Act* or the *Business Practices and Consumer Protection Act*, have the same meaning as described in those Acts.

[83] Windmill Auto Sales & Detailing Ltd. Dealer Registration # 30476 is ordered to pay a $2,500 Administrative Penalty.

[84] Mr. Sarmad Jamil a.k.a Sam Romaya salesperson licence # 102192 is ordered to pay a $500 Administrative Penalty.

[85] If Windmill or Mr. Romaya disagrees with the Compliance Order or any of the two Administrative Penalties, they may seek reconsideration pursuant to sections 180 to 182 of the BPCPA. They must satisfy the requirements for seeking reconsideration noted in those sections. Any application and supporting materials for reconsideration should be addressed to the Authority to the attention of Daryl Dunn, Manager of Compliance and Investigations.

Date April 10, 2013

Ian Christman J.D., Registrar