



**RE: 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:

MARY SOVEREIGN

Complainant

AND:

**NANAIMO CHRYSLER LTD.
(Dealer # 5485)**

Motor Dealer

AND:

**MICHAEL KARL LAX
(Salesperson # 120521)**

Salesperson

AND:

**ELWOOD TREVOR FOSTER
(Salesperson # 100959)**

Salesperson

AND:

**DOUGLAS JAMES GREEN
(Salesperson # 100808)**

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: April 2, 2013 at Nanaimo, British Columbia

Appearances for:

The Complainant	Mary Sovereign
The Motor Dealer	Brian Neal, Dealer Principal
Michael Karl Lax	No one
Elwood Trevor Foster	In person
Douglas James Green	In person
Motor Vehicle Sales Authority of BC	Daryl Dunn, Manager of Compliance and Investigations Mike Dorrان, Compliance Officer

INTRODUCTION

[1] A hearing was called due to allegations that Nanaimo Chrysler, Elwood Trevor Foster, Douglas James Green and Michael Karl Lax (collectively the "Respondents") breached the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the "BPCPA") by failing to

advise Ms. Mary Sovereign that the Fiat 500 (the "Fiat") she purchased was subject to a consumer cash incentive of \$2,500.00 provided by the manufacturer.

[2] At the conclusion of the hearing I advised Ms. Sovereign that I would be unable to provide her with a remedy based on the facts she admitted to at the hearing. I reserved my decision on whether the Respondents breached the BPCPA and, if they did, what was the appropriate action to take. These are those reasons.

PRELIMINARY MATTERS

(a) Non-attendance by Michael Lax

[3] Mr. Michael Lax did not attend the hearing. This hearing was originally scheduled for a date in January but was adjourned as I was not able to travel to Nanaimo that day as the flight was fogged in.

[4] I asked if there was evidence that Mr. Michael Lax was made aware of the changed date of the hearing. Mr. Dunn stated he believes he had been, but Mr. Dunn could not provide a letter or any other document to show Mr. Lax was so advised. Mr. Neal of Nanaimo Chrysler advised that Mr. Lax was no longer employed at the dealership. In the absence of evidence of Mr. Lax being notified of the new hearing date; I make no determinations in regard to Mr. Lax.

(b) Companion Case of Gregory Saunders - Investigation 12-70283

[5] This case was heard along with the complaint of Gregory Saunders, Investigation File No. 12-70283. Mr. Saunders was present during some of the discussions between Ms. Sovereign and the Respondents. Mr. Saunders initially went with Ms. Sovereign to assist her in the purchase of a motor vehicle. Mr. Saunders ended up also purchasing a vehicle from Nanaimo Chrysler and also alleges that the Respondents failed to advise him of a \$1,750.00 customer cash incentive. This case and that of Mr. Saunders are companion cases and some of the evidence from this and Mr. Saunders hearing is applicable to both cases.

BASIC FACTS

[6] The basic facts are really not in contention.

[7] On February 20, 2012, Ms. Sovereign, accompanied by Mr. Saunders, went to Nanaimo Chrysler with the intention of purchasing a new vehicle. Ms. Sovereign saw a Fiat 500 that appealed to her and as she relates, she fell in love with the Fiat. Ms. Sovereign desired a standard instead of an automatic but with the same interior and exterior colours and features as the automatic. Nanaimo Chrysler attempted to locate the desired Fiat 500 but determined that it would have to be ordered from the factory. Ms. Sovereign left a deposit and the desired Fiat was ordered.

[8] From Ms. Sovereign's written statement in her complaint form; she was offered the Fiat for \$15,750.00 and the regular price was \$18,695.00. A difference of \$2,945.00.

[9] When the Fiat arrived, Ms. Sovereign arranged to come to the dealership to finalize the purchase agreement and pick up the Fiat. Ms. Sovereign wanted to show co-workers a picture of the Fiat she had purchased. She ended up on a Vancouver area Chrysler dealer website (Ms. Sovereign called it a Chevy Jeep dealer website) which is when she said she found out about the consumer cash incentive of \$2,500 on her Fiat. She went on the Nanaimo Chrysler website

and also saw the \$2,500 rebate advertised on their website. She says no one at Nanaimo Chrysler told her about the cash incentive.

[10] Before finalizing the deal and signing the purchase agreement, Ms. Sovereign confronted Nanaimo Chrysler and said she was not given the cash incentive and that with the incentive she should have bought the Fiat for \$13,750.00. Nanaimo Chrysler agreed to offer the Fiat for \$14,250.00 as the best they could do and Ms. Sovereign agreed to that price.

[11] Nanaimo Chrysler led evidence that the Fiat was invoiced to the dealer at \$16,695.00 before taxes. Selling the Fiat for \$14,250.00 plus the \$2,500.00 consumer cash incentive meant Nanaimo made \$55.00 on the Fiat itself, not taking into consideration Nanaimo Chrysler's internal costs such as commissions and preparation. Mr. Elwood Foster was adamant, and very animated at the hearing, that he did tell Ms. Sovereign that she was getting the consumer cash incentive before she agreed to the sale.

MY PRELIMINARY DECISION AT THE HEARING

[12] It is clear from Ms. Sovereign's evidence, especially from her testimony at the hearing, that she believed she had not been given the consumer cash incentive; confronted Nanaimo Chrysler with that fact; and then finally agreed to purchase the Fiat for \$14,250.00 with full knowledge of the existence of the \$2500.00 incentive. In this case, it cannot be said that Ms. Sovereign was somehow misled by Nanaimo Chrysler into purchasing the Fiat to her detriment by its failure to advise her of the \$2,500.00 incentive: *Rushak v. Henneken Auto Sales & Services Ltd.* (1991), 59 B.C.L.R. (2d) 250 (BC Court of Appeal); and *Hercules Management Ltd. v. Ernst & Young* [1997] 2 S.C.R. 165 (Supreme Court of Canada).

[13] It is because of these facts, as admitted by Ms. Sovereign, that I advised her at the hearing that I would not be able to provide her with a remedy in this case. The fact that Ms. Sovereign has not suffered any damages due to what she says was a misrepresentation by Nanaimo Chrysler, does not mean there has been no breach of the deceptive act or practice provisions of the BPCPA: *Robson v. Chrysler Canada, Oshanek v. General Motors* 2001 BCSC 40 (BC Supreme Court) at paragraph 34.

[14] I turn to consider if a deceptive act or practice, as defined by the BPCPA, was committed by any of the Respondents.

The Law

[15] There is a general definition of deceptive act or practice in s. 4(1) of the BPCPA:

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.

[16] The BC Legislature has also deemed certain conduct to be deceptive acts and in this case section 4(3)(b)(vi) of the BPCPA says that making any representations in a consumer transaction and remaining silent about a material fact, the effect of which is misleading, is deemed to be a deceptive act or practice. As stated by Mr. Justice Wilcock of the BC Supreme Court in *Applewood v Ratte & The Registrar* (April 13, 2010, S.C.B.C. No. S094126: Vancouver Registry) at paragraph 34:

[34] The problem with this submission is that it robs significant words in section 4(3)(b)(vi) of any meaning. The Act considers a representation by a supplier that uses exaggeration about a material fact to be deceptive if the effect is misleading, even in the absence of non-disclosure. Similarly, the Act considers a representation by a supplier that employs innuendo or ambiguity about a material fact to be deceptive if the effect of the innuendo or ambiguity is misleading; again, without nondisclosure. The provision that a representation by a supplier that fails to state a material fact is deceptive, if the effect is misleading, is not necessary in order to address cases where there is exaggeration, ambiguity or innuendo. The legislation permits a finding that there has been deception by silence, even where there has not been exaggeration, innuendo or ambiguity. There needs only to be a representation and non-disclosure of a material fact that has the effect of misleading the consumer.

Section 4(3)(b)(vi) of the BPCPA:

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(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,

[17] A material fact is anything that a reasonable person, consumer in this case, would consider important in their decision making process whether or not to make a purchase. It does not have to be a fact that would change a person's mind, but must be of some significance in making the type of decision being made; purchasing a motor vehicle in this case. Where legislation compels disclosure of certain facts, those facts may be taken as being material: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.* 2011 SCC 23, (Supreme Court of Canada).

[18] A deceptive act or practice can be innocent, negligent or deliberate and a consumer may still be entitled to a remedy depending on the facts: *Cummings v. 565204 B.C. LTD. dba Daewoo Richmond*, 2009 BCSC 1009 (BC Supreme Court); *Rushak v. Henneken* (1991), 59 B.C.L.R. (2d) 250 (B.C. Court of Appeal); and *Mikulas v. Milo European Cars Specialists Ltd.* (1993), 52 C.P.R. (3d) 1 (BC Supreme Court), and affirmed by (1995), 60 C.P.R. (3d) 457 (BC Court of Appeal).

[19] Under the BPCPA, where there is an allegation and some evidence of a deceptive act or practice, the burden of proof is on the supplier, the Respondents in this case, to show they did not commit the deceptive act or practice:

5 (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

Cummings v. 565204 B.C. LTD. dba Daewoo Richmond, 2009 BCSC 1009 (BC Supreme Court) at paragraph 25.

Casillan v. 565204 B.C. LTD. dba Daewoo Richmond, 2009 BCSC 1335 (BC Supreme Court) at paragraph 27.

DISCUSSION

(a) Free negotiations vs. deceptive negotiations

[20] I think it important to note that what is being reviewed here is whether there were misleading representations during the negotiations and final agreement in this consumer transaction.

[21] To act with self-interest during negotiations is a normal part of a free market economy. Parties are generally free to negotiate an agreement that is in their own individual best interests. What consumer protection legislation such as the BPCPA does is prohibit a supplier from misleading a person or attempt to take advantage of a person's personal weakness during negotiations. This is really no more than an extension of general contract law, that there must be a "meeting of the minds" freely entered into and which requires both parties to know what are their respective rights and obligations and what are the essential terms of the agreement. In this way, they are then free to make an informed decision to enter into an agreement or walk away. Knowing what the price of a vehicle is and receiving any discounts a consumer is entitled to, are clearly essential for the parties to both know and agree upon.

(b) Position of the Respondents

[22] Nanaimo Chrysler and Mr. Elwood Foster were adamant and animated in stating they advised Ms. Sovereign of the manufacturer's consumer cash incentive at the time she was initially at the dealership and agreed to the \$15,750.00 price. Mr. Foster was the sales manager and responsible for negotiating the price of the Fiat with Ms. Sovereign. Mr. Lax was the salesperson involved in this transaction. However, from the evidence at the hearing, it became clear Mr. Lax was still very new as a salesperson and was being guided by Mr. Foster.

[23] At the hearing, Nanaimo Chrysler produced internal financial documents to show Ms. Sovereign received the consumer cash incentive. Nanaimo Chrysler also produced a notice from Chrysler Canada dated January 6, 2012 entitled "2012CY Incentive Program 'Standard Rules'". The Rules require that any consumer cash incentive not show up as a line item on a purchase agreement. The Rules also require the consumer cash incentive be deducted from the price of the vehicle being sold. There are beneficial tax reasons for applying the consumer cash incentive in this way.

[24] Mr. Green was the business manager with whom Ms. Sovereign dealt. During the hearing it became clear that Mr. Green was not a part of the price negotiations for the Fiat. His role was to document the agreement and try and sell additional products such as insurance or

warranties to Ms. Sovereign. Ms. Sovereign's evidence at the hearing and the documentary evidence do not implicate Mr. Green in anyway with the alleged deceptive act.

(c) Ms. Sovereign's evidence

[25] After considering Ms. Sovereign's testimony at the hearing and a review of her complaint form, I find Ms. Sovereign's recollection of events is not wholly reliable. I do not say Ms. Sovereign is in anyway being dishonest, but she clearly had difficulty in recalling significant events and details of this consumer transaction.

[26] In her complaint form submitted to the VSA, which was submitted less than three weeks after the transaction was finalized, Ms. Sovereign states:

...by Friday, April 27th, I went on the internet to find a site to show and tell them [co-workers about the Fiat]. The top site was a Chevy Dealership in Vancouver. I clicked on an example of a Fiat to show my co-workers and it was there that I learned there was a Fiat Manufacturers Rebate for \$2,500.00...

...On Saturday, April 28th I went on the internet looking at Fiat sites. It was the Vancouver site I returned to first. I needed to see if I misunderstood the Rebate. I called the Sales Manager at the Vancouver Chevy Jeep dealer and spoke with a man called Moe.

Ms. Sovereign repeated at the hearing that the first website she went to was a Chevy dealer website. It is to be noted that the dealerships are Chrysler Jeep and Fiat dealerships. This indicates Ms. Sovereign's lack of attention to details.

[27] At the hearing, Ms. Sovereign was asked if her initials appeared on the Nanaimo Chrysler Worksheet where the first price of \$15,995.00 is noted: Exhibit K to the Affidavit of Mike Dorran. She agreed that they were her initials, but does not recall seeing this document. She remembers some informality regarding the price on a piece of paper. She does not recall placing her initials on this document: Transcript of Proceedings, page 12.

[28] In Ms. Sovereign's written complaint to the VSA, she notes:

My Fiat 500 Pop was valued at \$18,695.00

His offer to me was \$15,750.00

This offer did not state the inclusion of the \$2,500 Fiat Rebate

With the Rebate my price should be \$13,250.00

[29] From the documentary evidence, Nanaimo Chrysler's initial offer was \$15,995.00.

[30] Ms. Sovereign was asked about the purchase agreement, which Ms. Sovereign provided to the VSA as part of her complaint package: Exhibit A to the Affidavit of Mike Dorran at page 24. She was asked if she initialed the purchase agreement at certain points and whether Mr. Green went line-by-line through the purchase agreement. Her testimony on this part can be summarized as follows:

- (a) Her initials are on the purchase agreement;
- (b) Mr. Green did go through the agreement with her; and

- (c) She does not recall some of the items discussed and she does not remember that she actually purchased some products such as the globali.com insurance even though her initials appear beside that line item.

Ms. Sovereign stated:

...I want to be sure. I know we talked a lot. I feel perhaps – I feel I do believe you did, we spent a lot of time. I don't feel that – I think I was in a trusting, and yes, initial this, initial that. It was all a very heady experience so I'm not going to say that Doug didn't, but I just don't recollect...: Transcript of Proceedings at page 22.

Ms. Sovereign does go on to explain some of the items on the purchase agreement that she does remember discussing such as life insurance.

[31] The initial discussions on this consumer transaction occurred on February 20, 2012 with the deal being finalized on April 30, 2012: see the Worksheet and the Purchase Agreement. Ms. Sovereign filed her complaint less than three weeks later on May 17, 2012, and the hearing occurred 11 months after the deal was finalized. This is a relatively short time to pass and one would expect someone to recall important facts and details within this time frame.

[32] From all the evidence, including the above, I find Ms. Sovereign's ability to recollect details of this consumer transaction are not reliable. Again, I do not in any way say Ms. Sovereign is being dishonest.

[33] Mr. Saunders did not give any direct evidence at the hearing involving Ms. Sovereign's transaction. From Ms. Sovereign's evidence, Mr. Saunders was not present throughout the discussions between Nanaimo Chrysler and Ms. Sovereign.

(d) Decision

[34] Under these unique facts, especially those arising out of the hearing, I cannot say that there was a deceptive act or practice committed by the Respondents during this consumer transaction. The Respondents have met their burden of proof.

[35] I prefer the evidence of Nanaimo Chrysler and Mr. Elwood that Ms. Sovereign was advised of the consumer cash incentive before agreeing to the initial price of \$15,995.00. Mr. Elwood's testimony was clear; he was very animated under questioning and his oral testimony remained consistent under questioning and consistent with the documentary evidence.

[36] Ms. Sovereign's evidence was not as consistent with the documentary evidence and she failed to recall important details, such as purchasing an insurance product, and information provided to her orally during the consumer transaction.

[37] I specifically note from Ms. Sovereign's evidence, including her written complaint to the VSA, and the other evidence presented at the hearing:

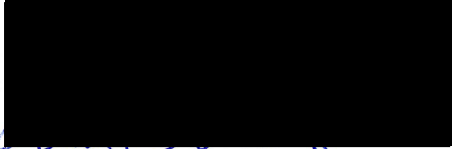
- (a) Ms. Sovereign states the Fiat's original price was \$18,695.00. This is fairly consistent with Nanaimo Chrysler who provided Exhibit 5 to show an original price for the Fiat of \$18,889.00.
- (b) The price she was first quoted was according to Ms. Sovereign, \$15,750.00, which is a reduction of \$2,945.00 from the original price which is greater than the \$2,500 consumer cash incentive.

- (c) Ms. Sovereign stated Nanaimo Chrysler was advertising the \$2,500 consumer cash incentive on its website when she checked after her initial agreement to purchase the Fiat, but before she did purchased the Fiat.
- (d) Ms. Sovereign's written statement on the complaint form is clear (as noted in paragraph 28 above), because the consumer cash incentive was not indicated on the paperwork, she believes she did not get the incentive. The Chrysler Rules do not allow the incentive to be a line item on the purchase agreement.
- (e) The price reduction was made on the purchase price of the Fiat consistent with the Chrysler Rules.

[38] I am satisfied on a balance of probabilities that Ms. Sovereign was aware of the consumer cash incentive and received the consumer cash incentive. The fact that the incentive does not show up as a line-item on the paperwork, or that she does not recall the disclosure, does not mean Ms. Sovereign was not advised of the incentive and did not receive the incentive.

[39] Having found no deceptive act or practice in this consumer transaction, the complaint against the Respondents: Nanaimo Chrysler, Elwood Foster and Douglas Green are dismissed. No finding is made in relation to Michael Lax's conduct in this consumer transaction.

Date: June 12, 2013



Ian Christman, J.D.
Registrar