



**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:

**GREGORY SAUNDERS**

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	Gregory Saunders
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] This 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"). On February 20, 2012 Mr. Gregory Saunders purchased a 2012 Jeep Compass (the "Jeep") trading in his

1998 Dodge RAM 1500 (the "Trade-in"). It is alleged that the Respondents failed to advise Mr. Gregory Saunders that the Jeep he purchased was subject to a consumer cash incentive of \$1,750 provided by the manufacturer. On May 6, 2012, Mr. Gregory Saunders filed a complaint with the Motor Vehicle Sales Authority (the "Authority").

[2] This case was heard along with the complaint of Mary Sovereign, Investigation File No. 12-70282. Ms. Sovereign was present during some of the discussions between Mr. Saunders and the Respondents. Mr. Saunders initially went with Ms. Sovereign to assist her in the purchase of a motor vehicle. Mr. Saunders ended up purchasing a 2012 Jeep Compass from Nanaimo Chrysler. Ms. Sovereign has also alleged that Nanaimo Chrysler did not advise her of a \$2,500 consumer cash incentive for the Fiat 500 she purchased. This case and that of Ms. Sovereign are companion cases and some of the evidence from this and Mr. Saunders's hearing is applicable to both cases.

## **Preliminary Matter**

### **(a) Non-attendance by Michael Lax**

[3] Mr. Michael Lax did not attend the hearing. I did not go forward with the allegations against Mr. Lax for the reasons stated in the decision involving Ms. Sovereign Investigation File No. 12-70282, released on this same date.

## **The Law**

[4] The legal principles found in the Mary Sovereign companion case are applicable to this case.

[5] I would add that where a consumer is trading in a vehicle, that trade-in is its own separate sale even though the value provided to the trade-in is set-off against the purchase price of the new vehicle: *Triangle R.V. v. Barge Holdings Ltd.* 2010 BCSC 247 (BC Supreme Court). There are beneficial tax reasons for doing so. Further, absent evidence to the contrary, the trade-in value noted on a purchase agreement is to be taken as the fair market value of that trade-in. The onus of proof is on the person arguing the value of a trade-in noted on a purchase agreement is not its fair market value: *Triangle R.V.* at paragraphs 34 and 38-39.

[6] The BPCPA is equally applicable to the trade-in sale, being an integral part of Mr. Saunders's purchase of the Jeep.

## **DISCUSSION**

### **(a) Free negotiations vs. deceptive negotiations**

[7] As in my decision involving Ms. Sovereign, I think it is important to note that what is being reviewed here is whether there were misleading representations during the negotiations and the final agreement in this consumer transaction.

[8] 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, including a trade-in, and any discounts a consumer is entitled to, are clearly essential for the parties to both know and agree upon.

**(b) Mr. Saunders's evidence**

[9] Mr. Saunders's evidence was clear and unwavering. He initially wanted \$6,000 for the Trade-in. Nanaimo Chrysler initially offered him \$2,500. He said no. Nanaimo Chrysler then offered a figure of \$3,600 for the Trade-in which Mr. Saunders also rejected. Finally, Nanaimo Chrysler offered him \$4,100 for the Trade-in to which Mr. Saunders agreed.

[10] Mr. Saunders states he was never told the \$1,750 consumer cash incentive from Chrysler was a part of the \$4,100 allowance given for the Trade-in. His evidence is that Nanaimo Chrysler represented to him that he was getting \$4,100 for the Trade-in. Mr. Saunders was also very clear that he would not have continued with the deal if he knew that the \$4,100 included the \$1,750 consumer cash incentive.

[11] Mr. Saunders was questioned why he did not buy back the Trade-in for \$1,500.00, when offered, so he could resell it for at least a \$2,600 profit (\$4,100 - \$1,500). Mr. Saunders said (paraphrased), why would he do that when Nanaimo Chrysler owed him \$1,750 and that he traded in the vehicle because he no longer needed it.

[12] Mr. Saunders states that when he went back to the dealership, along with Mary Sovereign, he confronted Mr. Foster about the \$1,750 cash incentive. Mr. Saunders states that Mr. Foster initially told him he received the rebate when he purchased the Jeep. Mr. Saunders stated his reply was "No I didn't. And I said, show me on there [purchase agreement] where I got the rebate." Mr. Foster then apparently checked his paperwork and he could not find the rebate and offered to put Mr. Saunders's rebate on the purchase of Mary Sovereign's vehicle. Mr. Saunders said he declined and that Mr. Foster admitted he made a mistake: Transcript of Proceedings pages 8 - 9. However, once Mr. Foster spoke to the owner about the customer cash incentive, Mr. Foster apparently advised Mr. Saunders there was nothing more the dealer could do but offer him to buy back his Trade-in for \$1,500.

**(c) The Respondents' evidence**

[13] Mr. Foster provided most of the evidence for the Respondents. He agreed that Mr. Saunders wanted about \$6,000 for the Trade-in and they went back and forth in negotiations until they reached an agreement on \$4,100.

[14] Mr. Foster felt the Trade-in was in rough shape and its value to the dealer was \$1,500. Mr. Foster did say he initially offered \$2,500 for the Trade-in. This was his starting point to see where Mr. Saunders was with the price he wanted for the Trade-in: Transcript of Proceedings at page 14. This amount is reflected on the worksheet: page 33 of the Affidavit exhibits.

[15] Mr. Foster then increased the dealer's offer to \$3,600.00 stating the Trade-in was a four wheel drive and it was also at this time he said he added in the consumer cash incentive to get the Trade-in value up, to try and get Mr. Saunders's agreement: Transcript of Proceedings page 16 and 22. When Mr. Saunders rejected this offer, Mr. Foster raised the offer to \$4,100.

[16] Under questioning by Mr. Dunn, Mr. Foster said at the time of the sale of the Jeep, he told Mr. Saunders he was getting the consumer cash incentive and that it was incorporated into the Trade-in price. However, also under questioning, Mr. Foster said he could not swear that he told Mr. Saunders the actual amount of the consumer cash incentive he was receiving, but he believes that he did so advise Mr. Saunders: Transcript of Proceedings at page 22.

[17] Mr. Neal provided some additional evidence regarding what he believed occurred. He did state that Mr. Saunders would be entitled to the \$1,750 consumer cash incentive regardless of using a Trade-in or not: Transcript of Proceedings at page 19. Mr. Neal also expressed that the \$1,750 cash allowance was used to increase the Trade-in amount to get Mr. Saunders's agreement: Transcript of Proceedings pages 18-19. Mr. Foster agreed with Mr. Neal on this later point: Transcript of Proceedings pages 19-20. Mr. Neal believed that Mr. Foster was using the \$1,750 cash incentive from the beginning.

[18] The Respondents provided documentary evidence to show it booked the Trade-in as having a \$1,500 actual cash value. Documents also show that reconditioning costs and other internal costs increased the cost of the Trade-in to \$2,650.00 to Nanaimo Chrysler. The Respondent's also provided the purchase agreement showing the Trade-in was subsequently sold for \$4,000. Internal documents from Nanaimo Chrysler notes a net vehicle profit on the sale of the Trade-in, in the amount of \$1,362.50 after paying the salesperson's commission: Exhibit R (page 38) of the Affidavit of Mike Dorran.

[19] As with Ms. Sovereign's case, there was no evidence that Mr. Green dealt with the negotiations about the price for the Jeep or the Trade-in. Mr. Green was documenting the sale and trying to sell additional items such as insurance and warranties. He did state he was not aware of Nanaimo Chrysler failing to provide consumers with the cash incentives they were entitled to receive.

#### **(d) Ms. Sovereign's Evidence**

[20] Ms. Sovereign went back with Mr. Saunders to talk to Mr. Foster about the consumer cash incentive on Mr. Saunders's purchase. Ms. Sovereign's evidence was quite brief. She discussed in general terms that there was some discussions back and forth, "I can't remember" and finally Mr. Saunders told Mr. Foster to deal with Ms. Sovereign's transaction first and they could talk later. Ms. Sovereign said she recalled Mr. Foster calling the owner about the \$1,750 rebate. When asked if she was present for all of the negotiations about the Trade-in; Ms. Sovereign said no: Transcript of Proceedings pages 23 to 25.

[21] Ms. Sovereign's evidence is of little value as she could not recall details and was not present during all the negotiations between Mr. Foster and Mr. Saunders regarding the Trade-in price. Her evidence is not relied on in this decision.

### **DECISION**

#### **(a) Jurisdiction**

[22] I find that Mr. Saunders is a consumer and Nanaimo Chrysler and Mr. Elwood Foster are suppliers as defined in the BPCPA. I further find this case involved a consumer transaction as defined in the BPCPA. Nanaimo Chrysler is a registered motor dealer as defined in the *Motor Dealer Act* R.S.B.C. 1996 c. 316, and Mr. Elwood Foster is a licensed salesperson as defined in the *Motor Dealer Act* and the *Salesperson Licensing Regulation* B.C. Reg. 241/2004.

**(b) Deceptive Act or Practice?**

[23] Based on all of the evidence, I find that on a balance of probabilities, Mr. Foster and Nanaimo Chrysler represented to Mr. Saunders that he was receiving \$4,100 for his Trade-in. I also find on a balance of probabilities that Mr. Saunders was not told he was receiving the consumer cash incentive of \$1,750 as part of his Trade-in.

[24] Mr. Foster has stated that the customer cash incentive did not enter into the negotiation discussions until after Mr. Saunders rejected the initial \$2,500 offer for his Trade-in. Mr. Foster and Mr. Neal stated that this initial offer was to get Mr. Saunders to agree to the deal. Again, I note that Mr. Neal agreed that Mr. Saunders was entitled to the \$1,750 customer incentive cash regardless of the amount of the Trade-in.

[25] If, as Mr. Foster says, the \$1,750 consumer cash incentive was added in after the \$2,500 offer on the Trade-in was rejected, this tells me that Mr. Saunders was never initially advised of the existence of the consumer cash incentive when the price negotiations commenced. Also, Mr. Foster stated he could not swear that he ever told Mr. Foster the actual value of the consumer cash incentive. Mr. Saunders was very clear that he was never told about the \$1,750 consumer cash incentive.

[26] If Nanaimo Chrysler was willing to offer \$2,500 for the Trade-in without factoring in the \$1,750 consumer cash incentive, it seems reasonable that when Nanaimo Chrysler did add the incentive into the Trade-in value, the next offer for the Trade-in would have been \$4,250 (\$2,500 + \$1,750). After all, Mr. Saunders was entitled to all of the \$1,750 consumer cash incentive, as Mr. Neal stated. Instead the next offer, as noted on the worksheet, was \$3,600. The final offer and agreement on the Trade-in was \$4,100, which is still not \$4,250.

[27] At the hearing I kept asking the Respondent's to try and explain how the consumer cash incentive was added into the agreement and specifically the Trade-in price. They never could satisfactorily explain where the \$1,750 was added in to the transaction to correspond with the rest of the evidence and especially the numbers noted on the worksheet.

[28] Again, Nanaimo Chrysler and Mr. Foster evidence was that the \$1,750 consumer cash incentive was built into the price of the Trade-in. The Chrysler Rules indicate the consumer cash incentive should be applied to reduce the selling price of the vehicle to be purchased: Exhibit 4 at the Sovereign Hearing at page 4. While incorporating the customer cash incentive into the Trade-in would provide the same effect, including the tax benefits, it does make things more confusing.

[29] Mr. Saunders's evidence was unwavering in direct testimony and under questioning by the Respondents. He was never told about the cash incentive and was never told, or agreed to the cash incentive being added to the Trade-in. Mr. Saunders's evidence was consistent throughout the hearing and consistent with the documentary evidence.

[30] I do note that there was \$349.00 reduced from the purchase price of the Jeep. However, there was no clear evidence that this was part of the \$1,750 consumer cash incentive. In fact, the evidence of Nanaimo Chrysler and Mr. Foster indicates the \$1,750 incentive was completely built into the price of the Trade-in.

[31] Based on the evidence, I find Mr. Foster and Nanaimo Chrysler breached the *Business Practices and Consumer Protection Act* by representing to Mr. Saunders he was receiving \$4,100 value for his Trade-in, when in fact he was receiving \$1,750 less than that amount. I

also find Mr. Foster and Nanaimo Chrysler breached the *Business Practices and Consumer Protection Act* by failing to advise Mr. Saunders that the purchase he made was subject to a \$1,750 consumer cash incentive. Mr. Foster stated he cannot swear that he ever told Mr. Saunders the actual amount of the consumer cash incentive.

[32] I find a reasonable consumer trading in a motor vehicle to a dealer would want to know the value the dealer was giving for the Trade-in, separate from any cash incentives. A reasonable consumer would want to know this so they can decide to trade-in their vehicle or try and sell it privately. This would be a material fact. As stated by Mr. Justice Punnett in *Triangle R.V. v. Barge Holdings Ltd.* (BC Supreme Court) noted above:

[40] Finally, the appellant claims that once a trade is involved, the values of the trade do not matter to the parties, only the relative value. This does not accord with common sense. Buyers do not want to be cheated on the price they are receiving for their trade-ins. If they feel the value is too low, they may choose to sell their vehicles themselves. While relative value may matter, there is no indication that a buyer would not be as content accepting a lower starting price on the new vehicle if that reflected its true value rather than receiving an inflated trade-in value.

[33] By mixing in a customer cash incentive with the actual value of the Trade-in and not advising the consumer of that fact, a dealer deprives the consumer of making an informed decision of entering into the agreement. How is a consumer to know what value he is getting for the vehicle he is selling to the dealer if its value is mixed in with a manufacturer's incentive, the amount of which is unknown to a consumer.

[34] If a consumer is aware of all the various factors, the actual price being offered for his trade-in vehicle and agrees, then they have made an informed decision. While the Chrysler Rules would not allow the consumer cash incentive to show up as a line item on the purchase agreement, there seems no reason why it could not have been noted down on the worksheet or another piece of paper given to Mr. Saunders.

[35] Nanaimo Chrysler and Mr. Foster have not met the burden of proof placed upon them by the BPCPA.

[36] I do not find that Mr. Douglas Green committed a deceptive act or practice as alleged.

## **REMEDY**

[37] Based on my findings, I find Mr. Saunders is entitled to the \$1,750 customer cash incentive. I have found he was not advised of this incentive. This amount would have reduced the selling price of the Jeep and therefore the taxes payable. Mr. Saunders is also entitled to that lost tax benefit which at the time was 12% HST. Mr. Saunders is entitled to damages in the amount of \$1,960 ( $\$1,750 \times 1.12$ ).

[38] A compliance order will issue against Nanaimo Chrysler and Mr. Elwood Foster who are jointly and severally liable to:

- (a) Pay to Gregory Saunders \$1,960.00;
- (b) Abide by the *Business Practices and Consumer Protection Act*;
- (c) Ensure that they advise consumers of the actual value they are prepared to offer a consumer for any trade-in motor vehicles separate from any consumer cash incentives; and

- (d) Pay to the Registrar \$1,710.38 for investigation and hearing costs related to this matter, care of the Motor Vehicle Sales Authority.

Any words in this compliance order that are defined in the *Motor Dealer Act* or the *Business Practices and Consumer Protection Act* have the meanings as defined in those Acts.

## **COMPLIANCE**

### **(a) General**

[39] I do not have sufficient evidence to suggest this was a deliberate misrepresentation. I would note that I considered whether Nanaimo Chrysler was reckless which is sufficient for finding an intentional misrepresentation: *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond* 2009 BCSC 1335 (BC Supreme Court). I note some similarities in this case to the case of *Casillan*. However, the facts of *Casillan* and this one are sufficiently divergent that I do not find there was any recklessness by Nanaimo Chrysler or by Mr. Foster.

[40] I also do not find this was an innocent misrepresentation. This is not a case where Nanaimo Chrysler and Mr. Foster did all they could do to make their representations to Mr. Saunders about the consumer cash incentive and which ended up being untrue: *Rushak v. Henneken Auto Sales & Service Ltd.* (1991), 59 B.C.L.R. (2d) 250 (BC Court of Appeal).

[41] Nanaimo Chrysler and Mr. Elwood were aware of the consumer cash incentive and Nanaimo Chrysler was advertising it on its website. What I find occurred here was Mr. Foster and Mr. Saunders were caught up in the negotiations and Mr. Foster did not inform Mr. Saunders that the \$4,100 included the consumer cash incentive. I find the representation here was a negligent representation.

### **(b) Administrative Penalty & Registration and Licence Review**

[42] If there is a breach of the BPCPA, the Registrar has been given various powers and legislative tools in order to remedy past non-compliance and ensure future compliance. The role of the Registrar is not to punish past behavior, but use conditions on a licence, administrative penalties or other means to gain future compliance including consideration of deterrence: *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).

[43] If the Registrar is not satisfied on a balance of probabilities that future compliance can be obtained, he can cancel a motor dealer's registration and a salesperson's licence. The B.C. Legislature has made it clear that a motor dealer breaching the BPCPA is a serious matter. The BC Legislature has made even one breach of the BPCPA's deceptive act or practice provisions sufficient grounds for the Registrar to cancel a motor dealers registration: section 8.1(4)(b) of the *Motor Dealer Act*. The discretion to do so lies with the Registrar.

[44] If I am considering imposing an administrative penalty, I am to consider all the facts of the case and those factors noted in section 164(2)(a) to (g) of the BPCPA:

(2) Before the director [registrar] imposes an administrative penalty on a person, the director must consider the following:

- (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.

[45] I turn to consider the above BPCPA factors in relation to Mr. Elwood Foster:

- (a) I note no previous enforcement actions against Mr. Foster.
- (b) I have found Mr. Foster was negligent in his representations to Mr. Saunders and there was no intention on his part. The contravention led to a financial loss of \$1,960. This appears to have been an isolated incident and it did not involve such a grave issue as intentionally selling an unsafe vehicle. Overall, the gravity and magnitude of this contravention is small.
- (c) The harm was isolated to Mr. Saunders and economic in nature.
- (d) I have no evidence that this was a repeated contravention.
- (e) I have found this to be a negligent misrepresentation and not a deliberate one.
- (f) There is no evidence of the benefit Mr. Foster would have received.
- (g) From the evidence, it appears Mr. Foster was attempting to resolve this matter, but believed Mr. Saunders received the customer cash incentive in the deal.

[46] In taking into consideration the whole of the case, I note Mr. Foster seems to have cooperated throughout the investigation and hearing process. It appears he truly believes he advised Mr. Saunders of the consumer cash incentive. Given the factors noted in paragraph 45, Mr. Foster's cooperation during the investigation and hearing process and his past history of compliance, the compliance order with its noted conditions and especially his joint liability to Mr. Saunders of \$1,960; I am not satisfied that an administrative penalty is warranted in this matter. I expect that Mr. Foster will review his selling processes and devise a way that he can better ensure consumers are made aware of the actual trade-in value being offered to them separate from consumer cash incentives.

[47] I turn to consider the factors in paragraph 44 above in relation to Nanaimo Chrysler:

- (a) There have been no enforcement actions of a similar nature against Nanaimo Chrysler.
- (b) For factors (b) to (e), see paragraph 45 (b) to (e) above.
- (c) Factor (f): It appears Nanaimo Chrysler profited \$1,362.50 on the resale of the trade-in.
- (d) Factor (g): Nanaimo Chrysler made an offer to return the trade-in to Mr. Saunders if he would pay \$1,500 so he could try and make a higher profit. It also appears that Nanaimo Chrysler, through Mr. Foster, believed they had provided Mr. Saunders the \$1,750 consumer cash incentive.

[48] In considering the whole of the case, I note Mr. Neal, dealer principal, attended the hearing and appeared to have cooperated with much of the investigation. While there have been several consumer complaints (10) against Nanaimo Chrysler since 2004, they appear to have been errors that were corrected and the issues were resolved. There appears to be no notes of concern from the regional compliance officer, Mike Dorrnan, on the file of Nanaimo Chrysler.



[49] Here too, I believe an administrative penalty is not necessary against Nanaimo Chrysler. Given the history of the dealership as documented in the Authority's file; combined with the compliance order with its \$1,960 liability on Nanaimo Chrysler; and the factors noted in paragraphs 47 and 48; I believe Nanaimo Chrysler will review its documentation of sales, including trade-ins, and ensure they better document and advise consumers of the actual price they are offering consumers for trade-ins separate from consumer cash incentives.

[50] I also do not feel adding conditions to the registration of Nanaimo Chrysler or on the licence of Elwood Foster is necessary. The conditions that would be added are covered by the compliance order.

### **SUMMARY**

[51] No finding is made in relation to Michael Lax's conduct.

[52] I find Mr. Douglas Green did not breach the *Business Practices and Consumer Protection Act*.

[53] I find Nanaimo Chrysler and Elwood Foster did breach the *Business Practices and Consumer Protection Act*.

[54] A compliance order will issue as described in paragraph 38.

[55] No administrative penalty is levied in this matter.

[56] A compliance order may be reconsidered under sections 180 to 182 of the BPCPA. If Nanaimo Chrysler and Elwood Foster wish to seek a reconsideration of the compliance order, they should forward an application to the attention of Daryl Dunn, Manager of Compliance and Investigations and have 30 days to do so. They must also meet the requirements set out in those sections of the BPCPA by providing new evidence that did not exist at the time of the hearing or if it did exist was otherwise undiscoverable.

Date: June 12, 2013



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Ian Christman, J.D.  
Registrar

