Motor
Vehicle Sales Authority
of British Columbia

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
APPLICATION FOR RECONSIDERATION

Introduction

[1] On May 10, 2013, Windmill Auto Sales & Detailing Ltd. ("Windmill") and Mr. Sam Romaya applied for a reconsideration of my decision, compliance order and two administrative penalties dated April 10, 2013 (the "Determinations"). Through their legal counsel, Windmill and Mr. Romaya provided written submissions (the "Submissions") and an affidavit from Mr. Romaya (the "Romaya Affidavit"). I have reviewed these documents.

April 10, 2013 Decision

[2] In my April 10, 2013, decision I found Windmill and Mr. Romaya breached the *Business Practices and Consumer Protection Act*, S.B.C. 2004 c. 2 (the "BPCPA") when they sold a 2009 Dodge Laramie (the "Dodge") to Mr. and Mrs. Harris. Based on the evidence, I found the appropriate remedy was for Windmill and Mr. Romaya to take back the Dodge and provide a full refund and for each to pay administrative penalties. The terms of the compliance order and the administrative penalties are summarized at paragraphs 82 to 84 of my April 10, 2013, written decision:

> [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.

Application for Reconsideration

[3] In their application for reconsideration, Windmill and Mr. Romaya seek an order cancelling the Determinations. They also seek a stay of the Determinations pending the outcome of the reconsideration application.

[4] By letter of May 16, 2013, Mr. and Mrs. Harris were advised that the application for reconsideration was received and was before the Registrar. The Authority advised Windmill and Mr. Romaya of the same by way of email to their legal counsel. This triggered section 181(3)(b) of the BPCPA and stayed the Determinations pending the outcome of this reconsideration.

Grounds for Reconsideration

[5] The Submissions identify the following grounds for reconsideration:

(a) Based on representations made by Daryl Dunn, Manager of Compliance and Investigations for the MVSA ("Dunn"), Windmill and Romaya did not know the case they had to meet and did not have a reasonable opportunity to respond to the evidence presented by the MVSA at the hearing. As a result, there was a lack of procedural fairness in the proceeding.

(b) As a result of Dunn's representations, evidence material to the Registrar's decision – particularly to his finding that Romaya intended to mislead the Complainants – was not available at the hearing.

[6] The Submissions then go on to identify certain representations by Mr. Dunn that are alleged to be of concern. The Submissions highlight that from these representations, the conduct of the Authority's staff, and that Mr. Romaya and Windmill pay fees to the Authority; Windmill and Mr. Romaya came to have certain expectations regarding the substantive results of the hearing. To summarize the Submissions and the Romaya Affidavit:

(a) Representations by Mr. Dunn and the paying of certain fees to the Authority gave rise to an expectation and belief that Mr. Dunn and the Authority were working on behalf and in the best interest of Windmill and Mr. Romaya: see paragraphs 7, 11 and 12 of the Submissions and paragraphs 5 and 11 of the Romaya Affidavit.

(b) Mr. Romaya believed the investigator, Compliance Officer Sarah Kilback, was also acting in Windmill and Mr. Romaya's best interest by attempting to settle the dispute during the course of the investigation: paragraphs 8 and 9 of the Submissions and paragraphs 8 of the Romaya Affidavit.

(c) At no time did Mr. Dunn or Ms. Kilback advise Mr. Romaya that the information he provided could be used at a hearing: paragraph 9 of the Submissions.

(d) Mr. Romaya says Mr. Dunn suggested that Mr. Romaya admit to the facts in Sarah Kilback's Affidavit and write a letter to the Registrar describing his and Windmill's attempts to resolve the consumer's concerns. Mr. Romaya further stated that Mr. Dunn advised that by doing so it <u>was likely</u> that (a) the proceeding would be quicker; (b) Mr. Romaya would not have to refund the purchase price of the vehicle; and (c) the Registrar would likely reduce any award for the complainant's use of the vehicle. Mr. Romaya says he asked several times for such assurances and Mr. Dunn apparently advised Mr. Romaya he never saw a situation where a dealer had to pay a full refund (the "Representations"): paragraph 11 of the Submissions, and paragraphs 5 and 10 to 12 of the Romaya Affidavit.

(e) Based on the Representations and the conduct of the Authority's staff, Mr. Romaya believed that the Authority, Mr. Dunn and Ms. Kilback were acting on his behalf and in his and Windmill's best interests. As such, he admitted to the facts in the Affidavit of Sarah Kilback and did not present certain evidence Mr. Romaya and Windmill might otherwise have done at the hearing: paragraphs 13 to 27 of the Submissions, and paragraphs 11 to 28 of the Romaya Affidavit.

The legal position of Windmill and Mr. Romaya is that they were not afforded a proper right to be heard and to know the case they had to meet due to the Representations:

paragraphs 32 to 40 of the Submissions. They also rely on the reconsideration provisions within the BPCPA.

Preliminary Matter – *Ex Parte* Communication

[7] On July 10, 2013, Mr. Ron Harris was able to contact me by phone while I was reviewing this application for reconsideration. A brief conversation ensued.

[8] By letter dated July 15, 2013, legal counsel for the Authority wrote to all parties to advise of this *ex parte* communication and summarized its contents. This letter was addressed to Windmill and Mr. Romaya through their legal counsel, Hamilton Duncan Armstrong + Stewart, and to Ron and Melinda Harris personally. The letter also advised that the *ex parte* communication would not impact on this reconsideration.

[9] Windmill and Mr. Romaya were provided 30 days to provide any submissions they believed appropriate in the circumstances. The letter further advised that if no submissions were received within 30 days of the July 15, 2013 letter, then I would complete the reconsideration process. No such submissions were received.

The Law

[10] Windmill and Romaya submit that I may reconsider this matter in accordance with the BPCPA and the common law principles that allow setting aside a finding due to a breach of procedural fairness. They rely on *Gill v. Canada (Minister of Employment & Immigration),* [1987] 2 F.C. 425 (Federal Court of Appeal) and *Chiu v. Canada (Public Safety and Emergency Preparedness),* 2007 CarswellNat 5727 (IRB) and the cases cited within those decisions.

[11] Once a decision maker has rendered their decision, they are generally considered *functus officio*. This means they have exercised their jurisdiction, the decision is final and they cannot revisit or reconsider their decision. This general principle applies to courts and to administrative tribunals including the Registrar. However, it is applied more flexibly and less formalistically in administrative proceedings. The rationale is to provide finality in the proceedings but to provide more flexibility to administrative bodies in arriving at final decisions: *Chandler v. Alberta Association of Architects* [1989] 2 S.C.R. 848, 1989 CarswellAlta 160 (Supreme Court of Canada).

[12] In *Chandler*, the Supreme Court of Canada identified these exceptions to the *functus officio* doctrine:

(a) To correct a slip in drawing up the order (such as typographical errors);
(b) To correct an error in expressing the manifest intention of the court or tribunal (clarifying the decision and not changing the decision);
(c) Where a tribunal is empowered by their enabling statute to reconsider their decisions, and to the extent allowed by that statute;
(d) Where the tribunal has failed to dispose of a mater properly before it; and

(e) To rehear a matter afresh where the tribunal has not provided procedural fairness.

Discussion

(a) Reconsideration under the BPCPA

[13] The BPCPA specifies the circumstances when reconsideration is available, and importantly, enumerates the powers of the Registrar when conducting a reconsideration:

> Section 180
>
> In this Division, **"determination"** means
>
> (c) a compliance order,
>
> (e) a notice imposing an administrative penalty.
>
> Section 182
>
> (2) The director [registrar] may vary or cancel a determination referred to in paragraphs (a), (c) and (e) of the definition of "determination", only if the director [registrar] is satisfied that new evidence has become available or has been discovered that
>
> (a) is substantial and material to the determination, and
>
> (b) did not exist at the time of the review or did exist at that time but was not discovered and could not, through the exercise of reasonable diligence, have been discovered.

[14] The Submissions and the Romaya Affidavit do not provide any new evidence that did not exist at the time of the hearing. They also do not identify evidence that did exist but was discovered after the hearing and could not have been discovered through the exercise of reasonable diligence. The Submissions and the Romaya Affidavit show Windmill and Mr. Romaya were aware of the evidence or knew where to locate that evidence, but due to the Representations and other alleged conduct, Mr. Romaya and Windmill chose not to take steps to produce that evidence.

[15] I would note that Exhibits A to D attached to the Romaya Affidavit were either before me at the hearing, or is my written decision of April 10, 2013:

(a) Exhibit A is my decision of April 10, 2013.
(b) Exhibit B is a copy of Mr. Romaya's written statement to the Registrar which was presented at the hearing before me.

(c) Exhibit C is the Notice of Hearing dated November 9, 2012, and provided to Mr. Romaya and Windmill. Exhibit C was before me at the hearing.
(d) Exhibit D is a copy of one page of the condition report Mr. Romaya says he viewed on the ADESA website before he purchased the Dodge. This document is also Exhibit K (page 177) of the Affidavit of Sarah Kilback sworn November 7, 2012, which was before me at the hearing.

[16] Windmill and Mr. Romaya's Submissions and Affidavit do not satisfy me that the requirements of section 182(2) of the BPCPA have been met such that I could cancel the Determinations as requested, if that were in fact appropriate.

[17] Their application for reconsideration under the BPCPA is denied.

(b) Breach of Procedural Fairness

[18] *Chandler* and other decisions clearly state that a tribunal may reconsider one of its decisions afresh, if it becomes aware that the tribunal has breached procedural fairness. This is an exception to the *functus officio* general rule.

[19] The clear rationale for this, as articulated in *Chandler*, is that a breach of procedural fairness means the decision made is a nullity. Mister Justice Sopinka in *Chandler* noted that flexibility should be applied to administrative bodies, so that they can be allowed to complete their function. The identified reason for this is if a decision is a nullity, the administrative body should be given an opportunity to properly complete its function by re-hearing the matter afresh:

> 76 ....Apart from the English practice, which is based on a reluctance to amend or reopen formal judgments, there is a sound policy reason for recognizing the finality of proceedings before administrative tribunals. As a general rule, once such a tribunal has reached a final decision in respect to the matter that is before it in accordance with its enabling statute, that decision cannot be revisited because the tribunal has changed its mind, made an error within jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute or if there has been a slip or error within the exceptions enunciated in *Paper Machinery Ltd. v. J. O. Ross Engr. Corp.*, supra.
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> 77 To this extent, the principle of functus officio applies. It is based, however, on the policy ground which favours finality of proceedings rather than the rule which was developed with respect to formal judgments of a court whose decision was subject to a full appeal. For this reason I am of the opinion that its application must be more flexible and less formalistic in respect to the decisions of administrative tribunals which are subject to appeal only on a point of law. Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal.
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> 78 Accordingly, the principle should not be strictly applied where there are indications in the enabling statute that a decision can be reopened in order to

enable the tribunal to discharge the function committed to it by enabling legislation. This was the situation in *Grillas*, supra.

79 Furthermore, if the tribunal has failed to dispose of an issue which is fairly raised by the proceedings and of which the tribunal is empowered by its enabling statute to dispose, it ought to be allowed to complete its statutory task. If, however, the administrative entity is empowered to dispose of a matter by one or more specified remedies or by alternative remedies, the fact that one is selected does not entitle it to reopen proceedings to make another or further selection. Nor will reserving the right to do so preserve the continuing jurisdiction of the tribunal unless a power to make provisional or interim orders had been conferred on it by statute: see *Huneault v. C.M.H.C.* (1981), 41 N.R. 214 (Fed. C.A.).

[20] The case law does not support tribunals having a wide ranging ability to review for a breach of procedural fairness. If a tribunal could review all its decisions for any claim of a breach for procedural fairness, then the *functus officio* general rule would become the exception. The case law supports that it is when the tribunal itself discovers on the face of the record that procedural fairness was not provided, that it may reconsider its decision afresh.

[21] The *Gill* case provided by Windmill and Mr. Romaya is a unique case. Briefly; in 1984, Ms. Gill was denied an oral hearing and was also denied refugee status by the Immigration Appeal Board. Shortly after the Board's decision, the Supreme Court of Canada determined in another case that a person was legally entitled to an oral hearing when the Board was hearing an application for refugee status. Based on the Supreme Court of Canada's decision, Ms. Gill applied to the Board to reconsider her case and provide her with an oral hearing. The Board refused this request on the mistaken belief that because the Federal Court of Appeal refused to hear her application for judicial review, the Federal Court of Appeal had implicitly indicated the Supreme Court of Canada's decision was not applicable to Ms. Gill. Ms. Gill applied to the Federal Court of Appeal for judicial review of the Immigration Appeal Board's decision not to reconsider her case.

[22] In *Gill*, the Federal Court of Appeal reviewed the common law principles regarding administrative bodies reconsidering past decisions. This included the decision of the Supreme Court of Canada in *Posluns v. Toronto Stock Exchange* [1968] S.C.R. 330, 1968 CarswellOnt 68 (Supreme Court of Canada) who in turn considered the decision in *Ridge v. Baldwin* [1964] A.C. 40 (U.K. House of Lords).

[23] The facts of the *Gill* case clearly show that, on the face of the record, the Immigration and Appeal Board's refusal to allow an oral hearing was in breach of Ms. Gill's now recognized legal right and therefore in breach of procedural fairness. At the time Ms. Gill applied for reconsideration, the Supreme Court of Canada's decision had been issued and the Immigration Appeal Board was aware of that decision. It was clear that, in law, the Board was required to provide an oral hearing to Ms. Gill and it was also clear on the record that it had not done so.

[24] The *Chiu* decision relied on by Windmill and Mr. Romaya also highlights that the breach of procedural fairness allowing a tribunal to reconsider a decision, is one that is on the face of the record.

[25] In *Chiu*, a decision had been made by the Immigration Division without reviewing the submissions of the lawyer for Chiu. This was because the Immigration Division had misplaced those submissions. Once the submissions were discovered, the Immigration Division decided to revisit and amend its decision to fix that error, instead of reconsidering the matter afresh as the law required. It was the decision to revisit the order instead of rehearing the matter afresh that was the subject of the Court's review. The fact that the Immigration Division made a decision without considering the lost submissions was clearly in error and it was the Immigration Division that discovered this fact. It was an error on the face of the record and in breach of procedural fairness.

[26] The Supreme Court of Canada's decision in *Posluns* is also instructive. In that case, the court considered whether the action taken against Mr. Posluns by the Board of the Toronto Stock Exchange was compliant with the rules of procedural fairness and natural justice.

[27] In *Posluns*, the Board was reviewing allegations that a company had breached the Toronto Stock Exchange's bylaws or rules. The Board found the company had done so and sanctioned the company. The Board also decided to withdraw its support of Mr. Posluns being a director on that company's board. However, the Board failed to advise Mr. Posluns that he was personally in jeopardy for the same allegations as against the company. He was not put on notice of the case he had to meet and given an opportunity to make submissions in his defense. The Board decided to reconsider the matter afresh and advised Mr. Posluns of the case he had to meet and an opportunity to make submissions. The Supreme Court of Canada said the Board properly reheard the matter by reconsidering it afresh.

[28] Mr. Justice Ritchie noted for the Supreme Court of Canada (Carswell):

> 14 In light of the findings of the Courts below, I do not think that the good faith of the Board of Governors is open to question, but under the authorities they were also required, before taking any final action against the appellant, to inform him of what was alleged against him and to give him an opportunity to present his version and explanation of any such allegations.

[29] In discussing the *Ridge* case, Mister Justice Ritchie noted the facts of that case (Carswell):

> 20 From the above recital of the facts it will be apparent that the circumstances in *Ridge v. Baldwin* were quite different from those in the present case. In *Ridge v. Baldwin* the appellant was never told of the case which he had to meet, whereas Mr. Posluns knew what was complained of in his conduct some days before the first hearing. In *Ridge v. Baldwin* the appellant was given no opportunity to be heard at either meeting, whereas Posluns gave evidence and

had a full opportunity to explain himself at the first hearing and declined, through his counsel, to add anything at the second hearing to the evidence which had already been taken. In *Ridge v. Baldwin* the plea made by the chief constable's solicitor at the second hearing that his client should be permitted to resign was of no avail, whereas after listening to the submissions of Posluns' solicitor at the March 2 hearing, the Board of Governors gave him ten days in which to resign and withheld official publication of the resolution passed against him until that period had expired and Posluns had declined to resign.

[30] It was after Mister Justice Ritchie placed the *Ridge* decision into its proper factual context did he state (Carswell):

22 The learned trial judge expressed the view that it was "an unfortunate error" for the Board of Governors to have proceeded against the appellant personally at the first hearing. I do not find it necessary to express an opinion as to this because, in any event, the circumstances are governed by the general proposition stated in the paragraph above quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin* where he said:

> I do not doubt that if an officer or body realizes that it has acted hastily and reconsiders the whole matter afresh, after affording to the person affected a proper opportunity to present his case, then its later decision will be valid. An example is *De Verteuil v. Knaggs*, [1918] A.C. 557.

[31] In my opinion, *Ridge, Posluns, Gill, Chiu* and *Chandler* speak of the ability to reconsider a decision afresh if a tribunal realizes that it has breached procedural fairness or incorrectly exercised its jurisdiction. It is a realization based on the accepted evidence and facts that are on the record and already before the tribunal. As the decision is in law a nullity; the tribunal may rehear the matter afresh in order to complete its function: *Chandler.*

[32] Those cases do not support the view of a right of a tribunal to adjudicate, based on untested allegations (as is the case here), whether it or a member of the tribunal's staff, who was not the adjudicator, has breached procedural fairness. This is the very thing Windmill and Mr. Romaya ask me to undertake.

[33] I find that Windmill and Mr. Romaya's Submissions and the Affidavit of Romaya do not identify the necessary facts and evidence for me to exercise my discretion to reconsider the Determinations based on a breach of procedural fairness and natural justice: *Chandler, Posluns, Ridge, Chiu,* and see *Gill* (Carswell):

11 However, as was said by Urie J. for this Court in *Plese v. Minister of Manpower & Immigration*, [1977]2 F.C. 567 (Fed. C.A.) :

> It must be remembered that while the applicant may have the right to seek to reopen the hearing before the Board, whether the reopening is allowed in any given case is a matter for the exercise of the Board's discretion.

[34] As Registrar, being the tribunal, I have completed my function and I am *functus officio.*

[35] As to the main allegations that Windmill and Mr. Romaya did not know the case they had to meet and an opportunity to raise a defence, I note that the Notice of Hearing dated November 9, 2012, of which Mr. Romaya for himself and Windmill acknowledged at the hearing receiving a copy, clearly indicated the allegations and the case to be met. The Notice listed in quite some detail the enforcement and remedial action available to the Registrar. Enclosed with that Notice was the Affidavit of Sarah Kilback with documents that were going to be relied on by the Authority. The Notice also advised both to seek legal advice. Windmill and Mr. Romaya knew the case they had to meet.

[36] There were two hearing dates in this matter. The first was adjourned to give Mr. Romaya an opportunity to review new evidence provided for the first time at that hearing. Mr. Romaya and Windmill were given an opportunity to present their case at both of those oral hearings.

[37] Windmill and Mr. Romaya's request for reconsideration based on this ground is also denied.

Conclusion

[38] Windmill and Mr. Romaya's application for reconsideration on both grounds is denied.

[39] In accordance with section 182(6) of the BPCPA, this decision may not be reconsidered.

[40] In accordance with section 167(2) of the BPCPA, the administrative penalties issued to Windmill and Mr. Romaya respectively must be paid within 30 days of them being served a copy of this decision.

[41] Windmill and Mr. Romaya must comply with the Compliance Order within 30 days of being served a copy of this decision.

Dated: August 20, 2013

Ian Christman J.D.,
Registrar of Motor Dealers