Motor
Vehicle Sales Authority
of British Columbia

Hearing File No. 13-08-001
Investigation File No. 13-05-029

IN THE MATTER OF 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:

Motor Dealer Council of British Columbia dba Motor Vehicle Sales Authority of British Columbia

Complainant

AND:

AutoCanada Northtown Auto GP Inc., a general partner of Northtown Auto LP dba Northland Chrysler Jeep Dodge (Dealer Licence: 30541)

Respondent

AND:

Frederick Brent Marshall (Salesperson Licence: 105591)

Respondent

AND:

Murray Leonard Carlson (Salesperson Licence: 114143)

Respondent

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: **February 26, 27 & 28, 2014** at Prince George, British Columbia, and **April 3, 2014** at Surrey, British Columbia

Appearances for:

The Complainant	Robert Hrabinsky
The Respondents	David T. McDonald

INTRODUCTION

[1]. This case results from an investigation brought by the Motor Dealer Council of British Columbia dba Motor Vehicle Sales Authority of British Columbia ("MVSA") against a dealership and salesperson in Prince George, B.C. The investigation related to allegations of deceptive and unconscionable acts arising out of two flyers and the offering for sale of eight vehicles. Some of the allegations were successfully proven, some were not.

[2]. In August 2013 the MVSA issued a hearing notice against Auto Canada Northtown Auto GP Inc., the general partner of Northtown Auto LP dba Northland Chrysler Jeep Dodge (Dealer Licence: 30541) ("Northland"), Frederick Brent Marshall (Salesperson Licence: 105591), and Murray Leonard Carlson (Salesperson Licence: 114143).

[3]. This matter arose from an investigation conducted by the MVSA and not as a result of a consumer complaint.

[4]. The hearing notice was amended in January 2014 to clarify the allegations against Northland and Mr. Marshall, and to remove the allegations against Mr. Carlson. The hearing before me proceeded in relation to allegations against Northland and Mr. Marshall only.

[5]. The MVSA alleged that between May 24 and July 9, 2013 Northland and/or Mr. Marshall contravened Motor Dealer Directive No. 4 made by the Registrar of Motor Dealers, the MVSA Advertising Guidelines and/or ss. 4 and 5 (Deceptive Acts or Practices) and ss. 8 and 9 (Unconscionable Acts or Practices) of the *Business Practices and Consumer Protection Act*, SBC 2004, Chap. 2 (the "*BPCPA*"). The allegations relate to the offering for sale and sale of eight vehicles, and the conduct of the Respondents Northland and Mr. Marshall generally.

[6]. By agreement between the parties, the proceeding has been broken into two phases: a liability phase and, depending on the outcome of the liability phase, a penalty phase. This decision determines the issues in the liability phase of the proceeding.

[7]. The allegations relate primarily to conduct around the sale of vehicles described in two mailout advertisements: the June flyer and the July flyer. Seven of the vehicles at issue were advertised in the June flyer, and one was advertised in the July flyer.

[8]. Mr. Marshall was the primary witness for Northland. He is the dealer principal of Northland, and has been so since August 2005. Mr. Marshall oversees the management team at Northland, a dealership with 14 managers and approximately 100 employees.

[9]. Mr. Marshall was responsible for the creation of both flyers. The process for the creation of the flyers was described by Mr. Marshall at the hearing. Mr. Marshall would draw a quick layout of what the flyers would look like, would take the rough drawing to an ad builder (an external company that physically produced the ads) and would work with his staff to find appropriate vehicles to be advertised in the flyers. Each flyer was a double-sided 11x17 sheet of paper with colour photographs of the vehicles which were for sale. Each vehicle had listed beneath it a stock identification number for the specific vehicle on offer, as well as a brief description of the vehicle such as "2006 Honda Civic", and a price for the vehicle. The flyers both included a disclaimer which read:

> DISCLAIMER: All prices and payments plus taxes and fees ON APPROVED CREDIT. Prices above include $589 Administrative Fee which is mandatory on purchase of all Used vehicles. Lowest cash prices and payments using all dealership incentives. All Vehicles available at time of Printing. Vehicles may not be exactly as shown. File photos used on some vehicles when required.

[10]. The June flyer stated at the bottom "Ad expires 30.06.13" and the July flyer stated at the bottom "Ad expires 31.07.13".

[11]. The June flyer was described by Mr. Marshall as the "out of town" flyer for June. He testified that in June, Northland produced an "in town" flyer and an "out of town" flyer. The in town flyers have new vehicles on one side and used vehicles on the other whereas the out of town flyers have used vehicles on both sides. The June flyer which is the subject of this hearing was the "out of town" flyer with used vehicles on both sides. Similarly, the July flyer was also described by Mr. Marshall as being the "out of town" flyer.

[12]. Neither flyer states the start date at which the ads become effective. There was testimony at the hearing from Mr. Marshall in relation to the effective start date of each flyer. Mr. Marshall testified that once the content of the flyers had been approved by Northland, the ad builder proceeded to have the flyers printed and it was the ad builder's responsibility to take the flyers to Canada Post to be delivered. Mr. Marshall stated that when the ad builder takes the ad to Canada Post, the ad becomes effective. Mr. Marshall stated that when the flyers were on their way to Canada Post, "I have to honour those price[s] because obviously it's going to be in consumers' hands within hours if somebody goes by Canada Post to grab them".

[13]. The MVSA witness Christina Walker produced an email to her from Mark Johnson of Debbie-lee Advertising Inc., the ad builder retained by Northland, wherein Mr. Johnson stated that the June out of town flyer was in the mail on May 28, 2013. In his testimony Mr. Marshall accepted that the June flyer was dropped at Canada Post on May 28, 2013. As such, on the evidence before me I find as a fact that the June flyer was in effect from May 28, 2013 until June 30, 2013.

[14]. The relevant facts in relation to each of the eight vehicles which were the subject of the hearing are set out below.

2008 Pontiac Montana

[15]. Northland advertised a 2008 Pontiac Montana in its June flyer for sale at a price of $8,988. The June flyer represented the 2008 Pontiac Montana to be sold at a price which was "WHOLESALE TO THE PUBLIC!!"

[16]. Mr. Marshall testified that the vehicle was sold to Central Interior Auctions for $2,223. The sales agreement in evidence shows the date of sale to be May 14, 2013.

[17]. Northland presented evidence as to the wholesale pricing for a 2008 Pontiac Montana as at September 23, 2013. The evidence relied on by Northland was a printout from the Canadian Black Book Service which is used by dealers to determine the range of wholesale and retail pricing for used vehicles. The Canadian Black Book information provided by Northland was dated September 2013, several months after the June flyer was printed. Mr. Marshall testified that typically prices decline on vehicles and as such the September pricing would be less than the Black Book wholesale pricing in June 2013. The Black Book values for the 2008 Pontiac Montana ranged from $5,639 to $9,877.

[18]. Mr. Marshall testified that Northland used the Black Book to determine what the wholesale price would be on the 2008 Pontiac Montana if Northland was to recondition it and sell it to the public. Mr. Marshall testified that the vehicle needed to be reconditioned before it could be sold to the public.

[19]. Mr. Marshall testified that the cost to Northland for 2008 Pontiac Montana was $3,541 before reconditioning.

[20]. Because the 2008 Pontiac Montana was not sold to the public, it was not reconditioned. It was in fact sold below Northland's cost.

2007 Jeep Patriot

[21]. Northland advertised a 2007 Jeep Patriot in its June flyer for sale at a price of $9,988. The June flyer also represented the 2007 Jeep Patriot to be sold at a price which was "WHOLESALE TO THE PUBLIC!!"

[22]. Mr. Marshall testified that the vehicle was sold to a business (as opposed to a consumer) for $5,500. The documents in evidence show the date of sale to be May 13, 2013.

[23]. Northland presented a printout from the Canadian Black Book Service, also dated in September 2013, showing wholesale prices for an equivalent 2007 Jeep Patriot to be between $6,484 and $10,552.

[24]. Mr. Marshall testified that the vehicle was not reconditioned before it was sold, and if it had been reconditioned for sale to the public the total cost to Northland for the reconditioned vehicle would have been $8,721.

2013 [sic] Dodge Grand Caravan

[25]. The June flyer advertised a 2013 Dodge Grand Caravan at the sale price of $17,888.

[26]. On May 24, 2013, a 2012 Dodge Grand Caravan, with the same stock number as the advertised 2013 Dodge Grand Caravan, was sold to Mr. Hedstrom and Ms. Tomra for $24,500.

[27]. The 2013 [sic] Dodge Grand Caravan was sold 4 days prior to the June flyer coming into effect. Northland made an admission in the hearing that the "June flyer had a typo that portrayed a 2012 Grand Caravan as a 2013".

[28]. Mr. Hedstrom and Ms. Tomra were clear in their evidence that they always understood they were purchasing a 2012 vehicle.

[29]. There was evidence at the hearing that Mr. Hedstrom and Ms. Tomra were charged for a number of items which they understood were included in the negotiated price of the vehicle, including winter tires, the DFI windshield coat, the tire and rim warranty and the vehicle armour protection. The guest survey document suggested they received a remote entry key for the vehicle which they say they did not receive. The total cost, including financing charges, for the 2013 [sic] Dodge Grand Caravan was $40,939.92.

[30]. Mr. Hedstrom and Ms. Tomra testified that they were not taken through the document to identify all the additional charges which had been added, such as the windshield coat, the tire and rim warranty and the vehicle armour protection. They also said that they had been at the dealership a long time with their infant son, and they felt rushed and overwhelmed during the process of signing the documentation and dealing with the finance manager.

[31]. The 2013 [sic] Dodge Grand Caravan was no longer available for sale on the date the June flyer was issued. At no time did Northland correct the June flyer to indicate that the 2013 [sic] Dodge Grand Caravan was no longer for sale as of the effective date of the June flyer.

2006 Honda Civic

[32]. In the June flyer an ad was placed for a 2006 Honda Civic with a sale price of $9,988. The June flyer showed a photograph of a four door sedan, but the actual vehicle identified by the stock number on the flyer was a two door coupe. Northland and Mr. Marshall made the following admission with respect to the 2006 Honda Civic:

> The 2006 Honda Civic was advertised at a price that didn't include the work being performed on the vehicle as the June flyer was being developed.

[33]. At the time the Civic was selected for the June flyer, certain work had not yet been done to the vehicle. The evidence of Mr. Marshall was that after the information on the Civic was sent to the ad builder, Northland authorized work to be done on the Civic such that its value increased.

[34]. At no time were any changes to the June flyer made to reflect a sale price different than $9,988.

[35]. The Civic was offered for sale at a Mega Sale event in Prince George on June 15, 2013. At this Mega Sale event, many dealers from Prince George move their inventory and sales centres to a big parking lot for the weekend.

[36]. Mr. Marshall and Mr. Nickkols, a business manager with Northland, testified that the Civic was not yet moved into a sales spot on the parking lot at the Mega Sale prior to it being sold to Monica and Michael Miller. However, the Civic was clearly visible to consumers at the Mega Sale and there was no evidence before me which suggested the car was not available for sale at the Mega Sale. The sticker price on the Civic at the time it was seen by the Millers was $14,888. Mr. Miller testified that the Civic was shown to him by a salesman, Dan Sindija, when they were looking at used cars on the lot. The Millers testified that the Civic was with the other used cars at the sale.

[37]. The Millers offered Northland $13,500 for the Civic. Mr. Nickkols testified that he was of the view that $13,500 was a good price in light of the work done. The administrative fee of $589 was then added for a total price of $14,089.

[38]. Mr. Marshall wrote on the margin of the purchase agreement at the time he prepared the documents for delivery to the MVSA, "Family Deal. Ad price plus additional work requested." Mr. Marshall agreed that he was just making assumptions based on the documents when he wrote that. The guest survey also references a request for additional work to be done. There was no evidence that the June flyer price was ever discussed between the salespeople and the Millers, and the Millers denied requesting any additional work. In fact, the weight of the evidence, including all work orders, was that any work that was done had been done at the instance of Northland itself prior to the Millers viewing the vehicle.

[39]. The Millers had not seen the June flyer before they attended the Mega Sale or at any time before the hearing before me. Mr. Miller testified that if he had seen the flyer it would have had a dramatic bearing on his negotiations as it listed a price $3,500 less than what he offered.

[40]. One of the allegations advanced by the MVSA centered on the fact that the Millers were told they were getting a "family deal" on the Civic. The Millers' daughter,

Danica, had been an employee of Northland. As such, her parents were entitled to a "family deal" on the vehicle.

[41]. The evidence about what constitutes a "family deal" was unclear. The Millers understood a family deal to be a little bit more of a discount. Mr. Miller testified that the salesman said, "This is a really good deal considering your daughter worked here".

[42]. Mr. Marshall testified that immediate family members were entitled to a price of $800 over the dealer cost. Mr. Marshall was given an opportunity to provide any documentation which would assist him in showing me that the Millers were in fact charged $800 over the deal cost. No further documents were ultimately produced and, as such, I have no basis upon which I can conclude that the Millers were in fact charged $800 over dealer cost.

[43]. Mr. Nickkols testified that when it came to used cars, a family deal could mean different things depending on how long the vehicle had been on the lot. Mr. Nickkols said that if the vehicle was a "fresh piece" the family member would have to pay the market price. However, if the vehicle had been on the lot for more than 90 days, they would sell it for $100 over cost. Mr. Nickkols said that the Civic was a fresh piece and so the Millers had to pay the market price.

2009 Chevy Impala

[44]. The June flyer advertised a 2009 Chevy Impala for sale at a price of $10,988.

[45]. Northland made the following admission in relation to the 2009 Chevy Impala, "The 2009 Chevy Impala did not have the advertised price affixed to the vehicle on June 2, 2013 when it was purchased." In addition, Mr. Marshall admitted that the advertised price was not made available to the purchaser, Mr. Case.

[46]. On June 2, 2013, Mr. Case attended on the Northland lot and saw the 2009 Impala with a sticker price of approximately $14,800.

[47]. In discussion with the salesman, Mr. Jordan Corrigal, Mr. Case agreed to a price of $11,500 for the 2009 Impala. The administrative fee would be charged in addition to the $11,500.

[48]. Mr. Marshall testified that the June flyer had not been delivered to Northland on June 2, 2013 as it was a Sunday and the dealership was not typically open on Sundays. However, I have found as a fact that the June flyer was in effect on June 2, 2013 and that the prices advertised in the June flyer were therefore in effect when Mr. Case attended the dealership. Mr. Case also testified that he remembered seeing the flyer prior to attending at the dealership.

[49]. Mr. Marshall and Mr. Corrigal testified that there was a promotion going on at the dealership on June 2, 2013 such that all vehicles purchased would include a 52" TV. There was considerable disagreement between the witnesses for Northland and Mr. Case on this issue.

[50]. The relevance of the TV comes into play in relation to Northland's explanation for the sales price of $11,500. When preparing documents to be delivered to the MVSA, Mr. Marshall annotated the sales agreement for the Impala with the comment, "Sold for $11,500 with 52" TV ($10,988 ad price plus $500 towards TV)".

[51]. Mr. Case was very clear in his understanding of the purchase. He said that while he remembered seeing TVs about the store, he did not have a conversation with the salesman about a TV being included in his deal. Mr. Case said that if he had been provided a TV it would have easily fit in his truck and he would have taken it away with him. Mr. Case says a TV was never discussed nor was it delivered.

[52]. The salesman, Mr. Corrigal, testified that Mr. and Mrs. Case asked for a TV and that the TV would not fit in the car they were driving when they attended on the lot.

[53]. Mr. Case testified that he attended on the lot with a truck, that his wife came with a car, and that they picked up the Impala the following day, June 3, 2013. Mr. Corrigal did not recall that Mr. Case drove a pickup truck to the lot, and testified that Mr. Case drove the Impala home on June 2, 2013.

[54]. The last Northland witness who gave evidence about the Case transaction was Mr. Steve Nickkols, the business manager who was involved in the sale of the 2009 Impala to Mr. Case. Mr. Nickkols testified that Mr. Case did not complete the transaction on Sunday, June 2nd but that Mr. Case said that he would come back the following day to pay for the car. This is consistent with Mr. Case's testimony.

[55]. While Mr. Corrigal had a distinct recollection of Mr. Case asking for a TV as part of the transaction, his memory is directly contradicted by Mr. Case's memory. Mr. Corrigal's memory was also inconsistent with the evidence of Mr. Case and Mr. Nickkols in relation to when the transaction completed, and was inconsistent with Mr. Case's evidence about the vehicle he drove to the dealership that day.

[56]. On balance of the evidence, and having listened to and questioned the witnesses myself, I find as a fact that Mr. Case was not offered a TV as part of his purchase of the 2009 Impala and that the price negotiated of $11,500 was not a price which included an amount in recognition of a 52" TV.

2012 Dodge Journey

[57]. The 2012 Dodge Journey was advertised in the June flyer at a price of $18,888.

[58]. The 2012 Dodge Journey was purchased by Mr. Naaykens on May 28, 2013 for the price of $20,239. The administrative fee was not included in this purchase price.

[59]. Mr. Naaykens testified that he didn't recall seeing the June flyer but if he had seen it, it would have had a bearing on his negotiations.

[60]. While Mr. Naaykens could not remember the exact sticker price on the vehicle when he attended on the lot, he was certain that the sticker price would have been higher than $20,239, which was the offer he made on the vehicle prior to the $589 administrative fee being added to the purchase price.

[61]. Mr. Naaykens testified that the salesman Will Gilbert offered to include a 52" LCD TV in the deal.

[62]. Mr. Naaykens testified that while the purchase agreement and all documents associated with the purchase were executed on May 28, 2013, he in fact had attended the dealership several days before to negotiate the transaction and that on May 28 his wife attended in his place to pick up the vehicle and execute the documents which had been negotiated on either May 25 or 26, 2013. However, on further examination, Mr. Naayken agreed that he did sign the guest survey

document, which is the worksheet filled in by the salesperson as the sale is being negotiated, on May 28, 2013. As Mr. Naayken was clear that he did sign the guest survey document on May 28, 2013, and all other sales documents were similarly executed on May 28, 2013, I find that the agreement to purchase was finally negotiated and concluded on May 28, 2013.

2009 Dodge Grand Caravan

[63]. In the June flyer a 2009 Dodge Grand Caravan was advertised for sale at $12,888.

[64]. The 2009 Dodge Grand Caravan was sold to Jean Payne on June 10, 2013 for $15,477. The sale price was calculated as $12,888 (the price advertised on the flyer) plus a $2,000 cash back offer accepted by Jean Payne plus a $589 administrative fee.

[65]. Ms. Payne testified by telephone at the hearing. Ms. Payne testified that she saw the June flyer prior to purchasing the 2009 Dodge Caravan. She and her husband drove from their home in Valemount to Prince George for the car sale. Ms. Payne said she did not recall any discussion with the salesperson about the administrative fee of $589. In addition, she did not ask to purchase a tire and rim warranty for $789, yet it appears as a line item on the purchase agreement. She recalled a discussion about a DFI windshield coat. She recalls that she and her husband were told by the salesperson that there was coating on the windshield already and they were asked if they would require another one. Her husband replied that they didn't need another one if there was one on already. Nevertheless, the Paynes were charged $499 for a DFI windshield coat.

[66]. After the Paynes took the car for a test drive, they noticed several items in the car were missing, such as back headrests and certain panel coverings. They also noticed the wheels seemed out of alignment. The salesperson was unable to replace the missing parts, but aligned the tires. There was no evidence before me that a charge was levied for the alignment.

[67]. Ms. Payne does not recall any of the line items on the purchase agreement being brought to her attention by the salesperson. She testified that when the agreement was being signed, the space they were in was busy and noisy. I took from her evidence that the environment in which the documents were reviewed and signed was a stressful one and Ms. Payne did not appreciate all the content of the document she signed. Ms. Payne was also questioned about how the $2,000 cash back originated. I asked her whether she made a specific request to the dealership for an additional $2,000 to be added to the financing for the vehicle. She said she did not make that request.

[68]. Mr. Michael Nelson attended for Northland with respect to the 2009 Dodge Grand Caravan transaction. Mr. Nelson testified that Ms. Payne called the dealership on the 5th and that somewhere between June 5th and June 10th she changed the deal by saying that the original deal wasn't going to work for her and she needed $2,000 cash back.

[69]. I do not accept the evidence of Michael Nelson. Under questioning by me, Mr. Nelson confirmed that he actually had no recollection of the Paynes and no recollection of the transaction involving the 2009 Dodge Grand Caravan. The evidence which he gave in chief was based on assumptions he drew from the documents in relation to that transaction. As such I do not find his evidence to be reliable. I find as a fact that the $2,000 cash back offer did not originate as a request from Ms. Payne and that she

was not advised by the dealership that in taking the $2,000 cash back offer she would be required to pay the $589 administrative fee.

[70]. In order to give Mrs. Payne the $2,000 cash back, Northland notionally increased the purchase price of the vehicle on the purchase agreement, to allow for the true price of the vehicle and the $2,000 to be financed. In adding $2,000 to the sales price of the vehicle, Ms. Payne was required to pay financing charges in relation to the additional $2,000, and also was required to pay tax in relation to the additional $2,000 as a part of the purchase price of the vehicle, and $589 as the administrative fee. Leaving aside the financing costs associated with the additional $2,000, the administrative fee plus the GST and PST on the additional $2,000 resulted in additional cost to Ms. Payne of $829 in relation to the $2,000 cash back. I find that Ms. Payne was not advised of the financial ramifications of the $2,000 cash back offer at the time it was accepted by her.

2013 Dodge Ram

[71]. In the July flyer Northland advertised a 2013 Dodge Ram Crew Cab. The 2013 Dodge Ram was described as a "C/Cab" and the image shown was of a Crew Cab. Northland made the following admission, "The July flyer listed a 2013 Ram Regular Cab stock number under a 2013 Ram Crew Cab image".

[72]. Northland and Mr. Marshall admitted that the July flyer listed a 2013 Ram Regular Cab (stock ID number 13Q1724710) under a 2013 Ram Crew Cab image. Mr. Marshall produced the document which he provided to the ad builder for the July flyer. The document lists a long series of vehicles including their stock ID numbers. Mr. Marshall had circled two stock numbers and written by hand the words "should be this one" pointing at stock number 13AV581410. When the ad builder created the ad however he inserted the next stock ID, which stock number was also within the circle drawn by Mr. Marshall. This was a mistake which was not caught by Mr. Marshall before the ad went to print.

[73]. Mr. Marshall testified that the price shown on the July flyer was a Crew Cab price, as opposed to a Regular Cab price.

[74]. The 2013 Dodge Ram was not sold during the effective period of the July flyer.

ISSUES

[75]. The issues to be decided in this case are:

(a) Have either or both of Northland and Mr. Marshall engaged in any deceptive acts or practices in respect of a consumer transaction, contrary to sections 4 and 5 of the ***Business Practices and Consumer Protection Act*, S.B.C. 2004 c. 2**, in relation to any of the eight vehicles at issue in this proceeding?

(b) Have either or both of Northland and Mr. Marshall engaged in unconscionable conduct in relation to the sale of the 2006 Honda Civic to Mr. and Mrs. Miller, contrary to section 9 of the ***Business Practices and Consumer Protection Act*, S.B.C. 2004 c. 2**?

(c) Have either or both of Northland and Mr. Marshall engaged in a pattern of conduct that is calculated to deceive and mislead consumers, contrary to sections 4 & 5 of the ***Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2**, or contrary to the public interest as set out in section 5 of

the ***Motor Dealer Act***, or sections 6 or 7 of the ***Sales Personnel Licencing Regulation*** **(BC Reg. 241/2004)?**

THE LAW

[76]. Pursuant to s. 29 of the *Motor Dealer Act Regulation (*BC Reg. 447/78) (the "*Regulation*"), the Registrar has the authority to review infractions of ss. 4 to 6 and ss. 7 to 9 of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "*BPCPA*"). Also pursuant to s. 29, the Registrar has the power to investigate alleged deceptive and unconscionable acts or practices and to impose administrative penalties or make compliance orders in respect of any violations by a motor dealer of ss. 4 to 10 of the *BPCPA*.

[77]. The proceeding before me was brought pursuant to the powers set out in s. 29 of the *Regulation,* and also ss. 4 and 5 of the *Motor Dealer Act*, R.S.B.C. 1996, c. 316 and ss. 6 and 7 of the *Sales Personnel Licensing Regulation*, (BC Reg. 241/2004), which deal respectively with the conduct of a motor dealer or salesperson where the Registrar finds that the public interest does not allow for the continued registration or licensing of the motor dealer or salesperson as the case may be.

[78]. In relation to this proceeding, the relevant parts of s. 4 of the *BPCPA* are as follows:

> **4. Deceptive acts or practices**
>
> **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.
>
> (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,
>
> …
>
> (v) are available if they are not available as represented,
>
> …

(b) a representation by a supplier

…

(iv) that a consumer transaction involves or does not involve rights, remedies or obligations that differs from the fact,

…

(vi) that uses exaggeration, innuendo or ambiguity about a material fact or that fails to state a material fact, if the effect is misleading,

…

(c) a representation by a supplier about the total price of goods or services if

(i) a person could reasonably conclude that a price benefit or advantage exists but it does not,

…

[79]. Section 5(1) of the *BPCPA* prohibits a supplier from committing deceptive acts or practices. Where it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof is on the supplier to establish that such deceptive act or practice was not committed or engaged in: s. 5(2) *BPCPA*.

[80]. A deceptive act or practice may be found even if there was no intention on the part of the dealer or salesperson to deceive. *Cummings v. 565204 B.C. Ltd*., 2009 BCSC 1009 at paras. 21 and 22.

[81]. Section 9 of the *BPCPA* prohibits a supplier from engaging in an unconscionable act or practice in respect of a consumer transaction.

[82]. An unconscionable act or practice is defined in s. 8:

Unconscionable acts or practices

8 (1) An unconscionable act or practice by a supplier may occur before, during or after the consumer transaction.

(2) In determining whether an act or practice is unconscionable, a court must consider all of the surrounding circumstances of which the supplier knew or ought to have known.

(3) Without limiting subsection (2), the circumstances that the court must consider include the following:

(a) that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

(b) that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the

consumer transaction, or any other matter related to the transaction;

(c) that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

(d) that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

(e) that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

(f) a prescribed circumstance.

[83]. As with deceptive acts and practices, where there has been an allegation that a dealer or salesperson has engaged in unconscionable practices, the onus shifts to the dealer or salesperson to prove that in fact the transaction was not unconscionable: s. 9(2) *BPCPA.*

ANALYSIS

[84]. This proceeding addressed the advertising for sale of eight specific vehicles, but it also gave rise to a number of general issues, which I will address at the outset:

(a) does the *BPCPA* apply in circumstances where there has been no completed consumer transaction, i.e. where a vehicle has been advertised but no sale to a consumer has occurred in relation to the advertised vehicle;

(b) is non-reliance on the advertisement at issue by the ultimate consumer a defence to the allegations against Northland and Mr. Marshall;

(c) what is the effect and application of the Advertising Guidelines created by the MVSA;

(d) is Northland entitled to charge its administrative fee of $589 in all circumstances where a customer requests anything other than the transfer of the vehicle subject of the advertisement with no additional features or services;

(e) did Northland and Mr. Marshall have an obligation to correct advertisements when the advertised vehicles were not available either at all or at the advertised price;

(f) did the conduct of the MVSA during the investigation process breach a duty of procedural fairness owed to Northland and Mr. Marshall; and

(g) is Mr. Marshall personally responsible for any of the acts alleged to have contravened the *BPCPA*?.

Does the *BPCPA* apply where there has been no completed consumer transaction

[85]. Northland and Mr. Marshall raised a question as to the applicability of the *BPCPA* to advertisements or other conduct in relation to vehicles where there had been no completed consumer transaction. They submitted that ss. 4 and 5 of the *Act* were inapplicable to transactions where the product in question was not sold to a consumer.

[86]. Specifically, Northland and Mr. Marshall argued that a "deceptive act or practice" is defined in the context of a "consumer transaction" in the *BPCPA*. They argued that if there is no consumer transaction, then there can be no contravention of the *BPCPA*.

[87]. Their analysis focused on the definition of consumer transaction in s. 1(1) of the *BPCPA* which reads:

> **"Consumer Transaction" means**
>
> (a) a supply of goods or services or real property by a supplier to a consumer for purposes that are primarily personal, family or household or
>
> (b) a solicitation, offer, advertisement or promotion by a supplier with respect to a transaction referred to in paragraph (a)
>
> …

[88]. In essence, Northland and Mr. Marshall argued that the solicitation, offer, advertisement or promotion referenced in subparagraph (b) only came into effect where there was completed supply of goods or services by a supplier as referenced in subparagraph (a) of the definition.

[89]. The MVSA says that the interpretation of the *BPCPA* advanced by Northland and Mr. Marshall could not be correct as it would allow motor dealers to put out advertisements making deceptive representations which may attract many potential buyers to the lot, and as long as the representations related to vehicles which were not available for sale on the lot, there would be no deceptive practice under the *Act*. The MVSA says this interpretation could not be correct as one of the ills the legislation seeks to address is to prevent dealers from making untrue representations as an inducement to bring people to the lot.

[90]. The MVSA referred to s. 172 of the *BPCPA* which, although not at issue in this proceeding, does guide me in the construction of the *Act* generally. Section 172 states that the Registrar can initiate a court proceeding in circumstances where it is seeking "a declaration that an act or a practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction, contravenes this *Act* or the *Regulations*" (emphasis added). Section 172 speaks to acts which the supplier has not yet engaged in: the supplier is "about to be engaged in". If the *Act* intended to only sanction acts taken in relation to completed consumer transactions, this portion of s. 172 would have no meaning.

[91]. Section 4(3)(a)(v) of the *BPCPA* confirms that a deceptive act can occur if a representation is made about a product that is not available for sale as represented. As a deceptive act described in s. 4(3)(a)(v) relates to a product which is not available for sale as represented, I do not accept that a consumer transaction must be completed in relation to such product for the *Act* to have application.

[92]. In addition, I refer to *Casillan v. 565204 B.C. Ltd.*, 2009 BCSC 1009 at para. 29 where the court found that a webpage at issue in that action was "specifically misleading to Casillan and had the capacity to mislead purchasers generally". The court in that case found that this conduct was a deceptive practice within the meaning of the *Act*. I note that the court in *Casillan* did not restrict the application of the *Act* to the webpage and its effect on the complainant in that case. The court also extended the interpretation of deceptive acts to the webpage which had the capacity to mislead purchasers generally.

[93]. It is well established that the *BPCPA* is consumer protection legislation, and is to be construed favourably towards consumers. I find that the purpose of the legislation is to ensure that suppliers both do not make statements which actually deceive or mislead a consumer, and also do not make statements which are capable of or tend to deceive or mislead consumers. It is not essential that a consumer transaction be completed, but rather it is only essential that a consumer transaction be contemplated in the making of the statements which have the capability, tendency or effect of deceiving or misleading a consumer.

[94]. As such, I find that the June flyer and the July flyer, and the representations made therein, are all subject to the *BPCPA* whether or not a consumer transaction was ultimately completed in relation to any of the vehicles.

Reliance by Consumer

[95]. Northland and Mr. Marshall submitted that no deceptive act or practice has been committed where it is established that the ultimate consumer did not rely on the advertisement at issue.

[96]. In making this submission Northland and Mr. Marshall rely on the case of *Loychuk v. Cougar Mountain Adventures Ltd*, 2012 BCCA 122, a case where two people sued Cougar Mountain in negligence in relation to the operation of zip line tour, for which they had both signed releases. The plaintiffs in *Loychuk* argued that the releases were not valid because Cougar Mountain had issued a webpage which made statements which could have misled the public about the safety of the operation. The Court of Appeal found that a consumer must establish that he or she relied on the statement alleged to have been deceptive or unconscionable in order to establish that the statement was in fact deceptive or unconscionable: "Absent such a nexus a statement would not be a 'representation', as it would not have been used or relied upon by a supplier in connection with a consumer transaction."

[97]. *Loychuk* was an action for damages brought by consumers, and in that circumstance the court looked to whether the consumers were able to establish a deceptive act such as to void a release which would otherwise prevent a claim in damages. The proceeding before me is quite different.

[98]. While the *BPCPA* does provide for claims for damages to be brought before the court by consumers by way of s. 171, the proceeding before me is not a claim for damages. It is a complaint brought by the regulator, whose interest is in ensuring that dealers and salespersons are compliant with the relevant legislation. The *BPCPA* has a broader purpose than simply providing an action in damages for consumers. The Supreme Court of Canada in *Seidel v. Telus Communications Inc.,* 2011 SCC 15 at para. 6, in reviewing the purpose of s. 172 of the *BPCPA*, found:

> … Section 172 provides a mandate for consumer activists or others, whether or not they are personally "affected" in any way by any "consumer transaction". … The clear intention of the legislature is to supplement and multiply the efforts of the Director under the *BPCPA* to implement province-wide standards of fair consumer practices by enlisting the efforts of a whole host of self-appointed private enforcers.

[99]. The *Motor Dealer Act* and the *BPCPA* have a public interest purpose. They provide for the regulator to investigate and make orders against dealers and salespeople who have contravened the Acts or regulations, or who are about to contravene the Acts or regulations.

[100]. In relation to the powers of the regulator which found the proceeding before me, I conclude that reliance by the consumer is not a defence to an allegation of a deceptive act or practice.

Advertising Guidelines

[101]. The MVSA creates guidelines for the industry. In 2009 the MVSA created Advertising Guidelines which state that "adherence to the Advertising Guidelines is a condition of registration and licencing and will be enforced by the Registrar."

[102]. The Advertising Guidelines also state that they are: "intended to provide the dealer/salesperson with a comprehensive and plain language description of the requirements for advertising a motor vehicle".

[103]. The Advertising Guidelines set out in detail how the MVSA expects dealers and salespeople to conduct themselves when advertising vehicles for sale. Much of the hearing was taken up with whether Northland and Mr. Marshall breached various Advertising Guidelines.

[104]. Northland and Mr. Marshall say that while the MVSA is entitled to make informational guidelines, it is not empowered to make Rules which have the force of legislation and the Advertising Guidelines cannot bind the Registrar's discretion nor create individual offences that may be prosecuted.

[105]. The MVSA in final argument agreed with Northland and Mr. Marshall. The MVSA said that the Advertising Guidelines are "a shorthand way of the MVSA saying 'Look, you have certain responsibilities under the *Motor Dealer Act*, and under the *Business Practices and Consumer Protection Act*, and we present to you as a guideline that if you engage in conduct of this nature, we may well find that you have breached the legislative provision.'" The MVSA clarified that the breaches of the Advertising Guidelines which were addressed in evidence were presented to allow me to make findings of fact which, in the submission of the MVSA, lead to determinations of breaches of the relevant legislation.

[106]. I accept the position of the parties that the Advertising Guidelines are not binding on me in the sense that they create offences. The Advertising Guidelines clearly set out the legislation which is relevant to each guideline, and include selections of the relevant legislation as reference materials. The Advertising Guidelines are helpful for the industry in understanding its responsibilities under the legislation through the use of concrete examples, and provide useful guidance which dealers and salespeople ought to incorporate into their conduct to avoid possible contravention of the relevant legislation.

[107]. The task before me in this proceeding is to determine whether Northland or Mr. Marshall have breached the provisions of the *BPCPA* and the *Motor Dealer Act* and associated Regulations. The Advertising Guidelines are useful in my analysis, and demonstrate what information has been provided to the industry to assist in understanding the relevant legislation. However, ultimately this proceeding will be decided with reference to the obligations on Northland and Mr. Marshall under the *BPCPA*, the *Motor Dealer Act*, and associated regulations.

Administrative Fee

[108]. Much of the evidence before me centered on what price was offered and paid by consumers, and the circumstances in which Northland was required to honour its statement in the June and July flyers that the prices were inclusive of an administrative fee of $589.

[109]. Mr. Marshall was adamant in his evidence that as soon as a consumer does anything to "change the deal", the administrative fee can be charged as the deal is no longer what is advertised. He also was very clear that at any time the consumer could revert to the advertised price, with no changes or modifications to the vehicle or services as offered, and the administrative fee would be included in the price as advertised.

[110]. Mr. Marshall testified that in 99% of the cases consumers change the deal in some way such that the administrative fee is charged on top of the negotiated price.

[111]. Northland and Mr. Marshall submitted that in a case where the consumer has made a counter offer, the consumer can no longer be said to have assented to the terms of the original offer. As such, the original offer is no longer on the table, and the dealer or salesperson is entitled to charge the administrative fee as the parties negotiate a new deal. Northland and Mr. Marshall go as far as to submit that the making of a counter offer by a consumer actually "displaces the charges of deceptive acts or practices with regard to accepting a higher price than was listed on the advertisement flyer."

[112]. Mr. Marshall testified that his understanding came from information received from Mr. Sharein, who was a former compliance officer with the MVSA. Northland and Mr. Marshall submitted that if Mr. Marshall was incorrect in his understanding of how the administrative fee may be applied, such understanding arose from an officially induced error based on representations made by Mr. Sharein.

[113]. Mr. Sharein testified at the hearing. He said that over the years he spoke with several people at Northland about this issue. He stated it was his understanding that "the customer is allowed to negotiate and add – ask for different prices, different things, add and subtract, but nowhere can I find that it says the dealer can't do the same thing." Mr. Marshall asserted a more definitive statement was made by Mr. Sharein, but this was not confirmed by Mr. Sharein in his testimony.

[114]. Northland and Mr. Marshall advanced a defence of officially induced error in reliance on the representations made by Mr. Sharein. I do not find this defence, as articulated in *Levis (city) v. Tetreault*, [2006] 1 SCR 420, to be available to Northland or Mr. Marshall on the facts of this case. I do not find the representations by Mr. Sharein to amount to a blanket assurance that in all cases a dealer may add an administrative fee the moment a consumer expresses an interest in obtaining any features on a vehicle, without regard for the prohibitions on deceptive or

unconscionable practices contained in the *BPCPA*. Rather, I find that Mr. Sharein merely confirmed that the dealer was entitled to engage in negotiations in the same way that any consumer can engage in negotiations.

[115]. Northland and its salespeople take the position that they are entitled to negotiate to add in the administrative fee in circumstances when a customer requests additional features to the vehicle. If Northland and its salespeople take that position, they must be crystal clear with consumers that the administrative fee will be added into the price as a consequence of such negotiations. Otherwise, they are not truly negotiating the addition the administrative fee; they are simply, without notice, adding a fee which was otherwise included in the price which was the starting point for the negotiations.

[116]. Based on the testimony of a number of the consumers who appeared before me, I am concerned that consumers are not alerted to the fact that if they start a conversation with a salesperson about any additional features for the vehicle they do so at the risk of paying the $589 administrative fee. Rather, the salespeople engage in the conversation about additional features, and no mention is made of the administrative fee at all. It is shown on the purchase and sale agreement without any discussion as to how a cost which was advertised as being included in the sale price became a charge over and above the sale price. The effect of this is that, for example, a person may ask for a set of floor mats to be added to the vehicle, but the cost of those floor mats will effectively be the cost of the mats, plus $589. If consumers were alerted to the true cost of the floor mats, they very well may not seek to have them included in the purchase price of the vehicle.

[117]. While the administrative fee is clearly marked on the purchase agreement, the evidence from a number of consumers, which I accept, was that at the time they were taken through the agreement, they were rushed and overwhelmed, and that they did not understand why the administrative fee had been added to the purchase price. This raises concerns with respect to how forthright the salespeople are in advising consumers about how their negotiations will result in the administrative fee being included in the cost of the vehicle.

[118]. As such, with respect to each vehicle I will consider whether the conduct of Northland or its sales people in relation that specific negotiation raises any concerns which could support a conclusion of a deceptive or unconscionable act or practice in the application of the administrative fee.

Correction of Advertisement

[119]. A representation by a supplier that goods are available, if they are not available as represented, is a deceptive act or practice as expressly set out in s. 4(3)(a)(v) of the *BPCPA*.

[120]. At the hearing before me, it became clear that a number of the vehicles in the June flyer were sold and not available prior to the effective period of the June flyer. The 2008 Pontiac Montana and the 2007 Jeep Patriot were both sold in mid May 2013, and the 2013 [sic] Dodge Grand Caravan was sold on May 24, 2013.

[121]. In addition, Northland and Mr. Marshall submitted that the wrong price was listed on the June flyer for the 2006 Civic.

[122]. The June flyer was not corrected to show these vehicles as sold, or to show an amended price for the 2006 Civic.

[123]. The Advertising Guidelines require all advertisements to be corrected if any errors are identified. While Northland and Mr. Marshall's failure to correct the June flyer is a clear breach of the Advertising Guidelines, the issue before me relates to whether there has been a breach of the *BPCPA.*

[124]. Advertising a vehicle for sale when it is not actually available for sale is a deceptive act pursuant to s. 4(3)(a)(v) of the *BPCPA.* Had Northland and Mr. Marshall complied with the Advertising Guidelines, they would not find themselves in breach of s. 4(3)(a)(v) of the *BPCPA*, which I find they were.

[125]. If the June flyer states a vehicle is available at a certain price, and the advertisement is not corrected, the vehicle must be sold at the advertised price. To sell it at a higher price would be a deceptive act, even if the higher price was, in the view of the supplier, the correct price.

Conduct of MVSA in Investigation

[126]. Northland and Mr. Marshall raised a concern with how the MVSA conducted the investigation in this case. They submitted that the MVSA ought to have worked with them to remedy breaches as they were identified, to more clearly identify that there was an investigation ongoing, to have conducted the investigation through Ron Sharein, the northern compliance officer, rather than Christina Walker, a new compliance officer, and to have followed the investigation process which Mr. Sharein had used over the years. The result, as submitted by Northland and Mr. Marshall, was that the process adopted by the MVSA was procedurally unfair.

[127]. Northland and Mr. Marshall during the course of this investigation provided materials as requested by Ms. Walker, and were provided with a Notice of Hearing dated August 7, 2013 which set out in detail all of the allegations the MVSA was making against them. The hearing notice was supported by an affidavit of Ms. Walker which set out the evidence gathered by the MVSA in support of the allegations.

[128]. On January 6, 2014 the hearing notice was amended to clarify the basis upon which the MVSA would proceed.

[129]. Northland and Mr. Marshall were not prevented from speaking with the MVSA between August 7, 2013 and the hearing.

[130]. Northland and Mr. Marshall do not take the position that the hearing before me was procedurally unfair.

[131]. The prejudice which Northland and Mr. Marshall say flows from the improper investigation is the fact that they had to come to the hearing to defend themselves, rather than have the matter dealt with in a more informal way. No law was cited in support of the proposition that the MVSA was required to address an investigation in a particular way, or that the MVSA had a legal obligation to address the investigation through progressive discipline.

[132]. Northland and Mr. Marshall rely on *Baker v. Canada*, [1999] 2 SCR 817 in support of their submission on procedural fairness. However, *Baker* stands for the proposition that before a decision maker an applicant is entitled to a fair process. The doctrine of legitimate expectations, as relied on by Northland and Mr. Marshall, takes into account the promises or practices of administrative decision makers; it does not refer to investigatory practices.

[133]. The MVSA investigators are not decision makers. In this proceeding the Registrar is the decision maker. The duty of procedural fairness arises in the context of the hearing before me.

[134]. Procedural fairness requires a party in the position of Northland and Mr. Marshall to know the case against them, and to be given an opportunity to address the case against them. The MVSA met its duty of procedural fairness, by clearly identifying the case asserted against Northland and Mr. Marshall, and this hearing process afforded them a full opportunity to meet the case against them. There is nothing untoward about amending the hearing notice before the hearing. In fact, this is to be encouraged to the extent it clarifies the basis upon which the MVSA will be proceeding.

[135]. While Northland and Mr. Marshall may not be happy about being investigated, the MVSA was within its statutory powers to investigate and based its investigation on facts which, subject to contrary evidence being presented by Northland and Mr. Marshall, were capable of supporting the alleged breaches of the *BPCPA* and *Motor Dealer Act*.

[136]. I therefore find that there has been no breach of procedural fairness in relation to this proceeding.

Is Mr. Marshall personally responsible for any of the act alleged to have contravened the BPCPA

[137]. The MVSA has asserted all allegations against both Northland and Mr. Marshall personally. Mr. Marshall submits that as he was not personally involved in any of the sales at issue, he cannot be found to be engaged in a deceptive or unconscionable act or practice under the *BPCPA*. Mr. Marshall relies on a previous decision of the Registrar: Re: *Leslie Landsberg*, Hearing File No. 10-054, June 27, 2011, wherein the general manager, Mr. Landsberg, was found not responsible for the conduct of staff at his dealership, and was found not to have personally made any improper representations to consumers. The facts of the *Landsberg* case are quite different from the facts in this case.

[138]. The majority of the allegations in this case relate to representations contained in the June and July flyers, for which Mr. Marshall was directly responsible. As the dealer principal of Northland and the person responsible for the creation of the flyers, Mr. Marshall is responsible for ensuring that the prices which he has set in the flyers are made available to consumers, including by ensuring that the appropriate people affix the sale prices to the offered vehicles during the effective period of the flyers. He is also responsible for ensuring that his managers and staff know and offer the pricing in the flyers to consumers during the effective period of the flyers.

[139]. In this proceeding, to the extent I find a deceptive act relates to the representations in the June or July flyers, I find that Mr. Marshall is equally responsible with Northland.

Allegations in Relation to Specific Vehicles

[140]. Having reviewed the general issues raised in this case, I move to consider each of the allegations raised in relation to the specific vehicles, and the conduct of Northland and Mr. Marshall generally.

2008 Pontiac Montana and 2007 Jeep Patriot

[141]. Both the 2008 Pontiac Montana and 2007 Jeep Patriot were advertised for sale in the June flyer at a price which was described as wholesale to the public. Ultimately neither vehicle was sold to a consumer. Both vehicles were sold in business to business transactions. The 2008 Pontiac Montana was sold on May 14, 2013, and the 2007 Jeep Patriot was sold on May 13, 2013.

[142]. For the reasons stated above, I find that the representations made in relation to the 2008 Pontiac Montana and the 2007 Jeep Patriot were subject to the *BPCPA*, even though those vehicles were ultimately sold to businesses and not consumers.

[143]. The onus was on Northland and Mr. Marshall to prove on the balance of probabilities that the statement in the June flyer that these two vehicles were sold at prices wholesale to the public was not a deceptive representation. I find that Northland and Mr. Marshall did meet the onus upon them of proving that the statements were not deceptive.

[144]. Mr. Marshall explained in the hearing that in order to sell the vehicles to consumers there would have to be additional work done on the vehicles to make them road safe. Indeed, the bills of sale for both vehicles were stamped with a statement that there was no implied warranty of merchantability or fitness for a particular purpose applicable to the vehicles.

[145]. While the MVSA referred to the prices at which the vehicles were sold to businesses as being dramatically lower than the advertised prices on the June flyers, I accept the evidence of Mr. Marshall that those prices reflect a business decision by Northland to move the inventory off the lot without expending any further resources in bringing the vehicles up to the state at which they could be sold to consumers. Northland and Mr. Marshall presented evidence of Black Book values which set out a range of wholesale values for the vehicles and the prices set in the June flyer were within this range.

[146]. There was no evidence before me from any party as to whether Northland intended to charge additional amounts to complete any required repairs to these vehicles at the time of sale to consumers. In the absence of such evidence I cannot find that any additional charges would have been levied against consumers in order to bring those vehicles up to the correct standard for consumer sales. Given that the vehicles were not ultimately sold to consumers, and I accept that the advertised price was consistent with a wholesale price as stated in the Black Book, I have no basis to find that the representations as to price made in the June flyer were misleading or deceptive in any way.

[147]. Both vehicles continued to be advertised on the June flyer even though they were sold prior to the effective date of the June flyer. I will return to this point in relation to my conclusions below on the general conduct of Northland and Mr. Marshall.

2013 [sic] Dodge Grand Caravan

[148]. The 2013 [sic] Dodge Grand Caravan was sold on May 24, 2013, prior to the effective period of the June flyer. The sole allegation proceeded with by the MVSA in relation to the 2013 [sic] Dodge Grand Caravan was that the vehicle was incorrectly described in the June flyer as a 2013 model when it was in fact a 2012 model.

[149]. The year of a vehicle is a material fact. A misrepresentation as to the year of an advertised vehicle has the capability of misleading a consumer who may attend the dealership with a view to buying the vehicle manufactured in the year advertised.

[150]. I accept that the year of the vehicle in the June flyer was an unintentional mistake. However, as the intention of the supplier is not relevant to the analysis under ss. 4 and 5 of the *BPCPA*, I find that the advertisement for the 2013 [sic] Dodge Grand Caravan is a deceptive act under the *BPCPA*.

[151]. I also find that in relation to the purchase of the 2013 [sic] Dodge Grand Caravan there was no actual confusion on the part of the consumers Mr. Hedstrom and Ms. Tomra as to the year of the Dodge Grand Caravan they purchased. They were clear in their evidence that they always understood it to be a 2012 vehicle.

[152]. I do have a concern about the fact that the vehicle was listed for sale in the June flyer when it was sold prior the commencement of the effective period of the June flyer. I will return to this point in relation to my conclusions below on the general conduct of Northland and Mr. Marshall.

2006 Honda Civic

[153]. On June 15, 2013 the 2006 Civic was on the lot at the Mega Sale with a sticker price of $14,888. The sticker price is inconsistent with the June flyer where the Civic was advertised at $9,988.

[154]. Northland and Mr. Marshall stated that the advertised price was wrong as it did not reflect additional work done on the vehicle. I accept that work was done on the Civic after the prices for the June flyer were set and this work increased the dealer cost of the vehicle. If Northland was not prepared to sell the Civic at the originally advertised price, it ought to have corrected the June flyer price to reflect what it says was the correct price. Northland did not correct the price in the June flyer, and so on the facts of this case was obligated to sell the Civic at the advertised price, inclusive of administrative fee.

[155]. Mr. Marshall also took the position in evidence that he was not bound by s. 27 of the Motor Deal Regulation, which requires the price to be affixed to the vehicle, because of s. 28 of the Regulation which relieves dealers of the obligation to price vehicles in a storage area. This position was not advanced in final argument. Suffice it to say that I am not persuaded that the Civic was in a storage area at the Mega Sale. The Civic was available for sale, and was shown to consumers with a sticker price of $14,888.

[156]. As such, I find that to affix a price to the Civic which was $4,900 over the advertised flyer price is a deceptive act within the meaning of the *BPCPA*. The Millers were misled into paying a higher price for the Civic than they would have if the flyer price had been affixed. In addition, Northland engaged in a deceptive act in failing to provide the Civic at a price which included the administrative fee which was advertised to be included in the price on the June flyer.

[157]. The MVSA alleges that the Civic was described in a misleading way on the June flyer because the image shown was of a four door sedan, while the actual vehicle for sale was a two door coupe. Mr. Marshall agreed that the image of the four door sedan was capable of misleading a consumer. As such, I find that the image of the four door sedan when the actual vehicle for sale was a two door coupe was a deceptive act within the meaning of the *BPCPA*.

[158]. I also find that the Millers were not actually misled by the image on the June flyer, as they at all times realized they were engaged in the purchase of a two door coupe.

[159]. The MVSA alleges that Northland engaged in an unconscionable or deceptive act in selling the Civic for $14,089, as opposed to the June flyer price of $9,988, while representing to the Millers that the vehicle was available at a lower price as it was a "family deal". The MVSA also asserts that Northland paid $5,000 for the car, and spent only approximately $3,000 in additional work done to the vehicle.

[160]. The MVSA relies on s. 8(3) of the *BPCPA* which provides that I must consider whether the total price grossly exceeded the total price at which similar vehicles would be sold, and whether the terms or conditions upon which the consumer entered into the transaction were so harsh or adverse to the consumer as to be inequitable.

[161]. Northland and Mr. Marshall submit that the dealer total projected cost for the vehicle was $10,400, and that market value was $14,888. I accept that the total dealer cost for the Civic was $10,400.

[162]. No evidence was submitted by Northland or Mr. Marshall to support the market value of $14,888. No comparable pricing was offered. No Black Book values were offered.

[163]. The difference between the price paid and the dealer cost on the Civic is $3,689. The difference between the price paid and the June flyer price is $4,101. Is that significant enough to render this transaction unconscionable, particularly in light of the representation that the Millers were getting a family deal?

[164]. In applying s. 8 of the *BPCPA* I refer to the common law on unconscionable transactions: *Loychuk* at para 53 and 54:

> [53] When the *BPCPA* was enacted there was a well-developed body of judicial authority setting out the high standard to be met before a contract could be set aside on the basis of unconscionability. The degree to which a contract can be said to be unfair has always been a factor in that determination. However, it has never been the only factor and I cannot read s. 8(3)(e) as having defined "unconscionable" to mean "inequitable". Had the Legislature intended such a result then it could easily have done so.
>
> [54] In my view, whether one is considering unconscionability at common law or under the *BPCPA*, the essential elements are the same.

[165]. In *Morrison v. Coast Finance Ltd*. (1965), 55 DLR (2d) 710 the BC Court of Appeal described the key elements in establishing an unconscionable bargain:

> …On such a claim the material ingredients are proof of inequality in the position of the parties arising out of the ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger. On proof of these circumstances, it creates a presumption of fraud which the stronger must repel by proving that the bargain was fair, just and reasonable.

[166]. In relation to the allegation of unconscionability in the sale of the 2006 Civic, the total price of the vehicle, including administrative fee, was close to 40% higher than either the dealer cost or the advertised price. However, there is no evidence before me that the Millers were in a position of inequality arising out of ignorance, need or distress. The Millers expressed satisfaction with the Civic, and purchased significant additional features to bring the total financed price of the Civic to $20,693.69. On balance, I do not find that Northland or Mr. Marshall engaged in unconscionable practices pursuant to s. 8 of the *BPCPA*.

[167]. However, I do find that Northland engaged in a deceptive practice in selling the Civic at $4,101 over the June flyer price and in representing to the Millers that they were receiving a "very good deal" and a "family deal" because their daughter worked for Northland. I find that the Millers in fact received no price advantage as a result of their daughter working at Northland and the representation that they were receiving a family deal was a false statement upon which the Millers could reasonably conclude that a price benefit and advantage was being extended to them, contrary to s. 4(3)(c) of the *BPCPA.*

2009 Chevy Impala

[168]. When Mr. Case attended the Northland dealership on June 2, 2013 he recalls the 2009 Chevy Impala having a sticker price of approximately $14,800. On June 2, the June flyer was in effect and the Chevy Impala was advertised for sale at $10,988 on that flyer. I find that the June flyer was in effect whether or not it was delivered to the dealership on June 2, 2013. The obligation is on Northland and Mr. Marshall to ensure that salespeople are aware of all advertised pricing from the moment such advertisements are effective.

[169]. The sticker price on the 2009 Chevy Impala was a misleading representation of the price of the vehicle which on June 2, 2013 was advertised for sale at the much lower price of $10,988. Mr. Case testified that if he had known the vehicle was in fact for sale at the lower price, this would have impacted his offer of price for the vehicle. Mr. Case offered $11,500 for the 2009 Chevy Impala.

[170]. The advertised price in the June flyer of $10,888 included an administrative fee of $589. The sticker price of the vehicle on the lot at the time of purchase did not include the administrative fee. The administrative fee was added on to the price offered by Mr. Case such that the total price of the vehicle before taxes was $12,089, $1,101 over the price advertised in the June flyer.

[171]. Northland and Mr. Marshall attempted to justify the inclusion of the $589 administrative fee by saying that Mr. Case had requested a 52" TV thereby changing the deal as advertised on the flyer and allowing them to add back in the administrative fee. This explanation does not accord with the evidence of Mr. Marshall who said that the June flyer had not been delivered to the dealership on June 2, 2013. No witness testified the June flyer price was discussed in the negotiations. As such I do not accept that the June flyer price and its treatment of the administrative fee was considered by the salesman that day. I do not accept that Mr. Case asked for a TV and I do not accept that a TV was part of the bargain that day.

[172]. I find that the sticker price for the 2009 Chevy Impala on June 2, 2013 was close to $4,000 higher than the price in the June flyer and did not include the administrative fee.

[173]. In the result, I find that Northland engaged in a deceptive act as described in the *BPCPA.*

2012 Dodge Journey

[174]. I accept that Mr. Naaykens concluded the agreement to purchase the 2012 Dodge Journey on May 28, 2013, which is within the effective period of the June flyer. However, I also accept that Mr. Naaykens attended the dealership prior to May 28, 2013 and that the sticker price he saw on the vehicle at the time he first viewed the vehicle was placed prior to the effective period of the June flyer.

[175]. The question in relation to the 2012 Dodge Journey is whether the dealer engaged in a deceptive act if it failed to provide the consumer with the advertised price in effect on the day the agreement was finally negotiated, even if the negotiation arguably commenced in the days prior to the effective period of the advertisement.

[176]. The June flyer was in effect on May 28, 2013 and, as such, I find that Northland did engage in a deceptive act within the meaning of s 4 of the *BPCPA* when it failed to provide Mr. Naaykens with the opportunity to purchase the 2012 Dodge Journey at the June flyer price, inclusive of administrative fee, on May 28, 2013.

2009 Dodge Grand Caravan

[177]. Ms. Payne was offered $2,000 cash back on the purchase of the 2009 Dodge Grand Caravan and was not advised that in accepting this offer she would have to pay a $589 administrative fee.

[178]. I find that there was no forthright negotiation between Ms. Payne and Northland about the administrative fee. Once Ms. Payne agreed to the cash back offer, Northland simply added the administrative fee to the price of the vehicle.

[179]. While the Paynes made enquiries about a number of missing items, such as headrests, no such items were ultimately provided to the Paynes. The Paynes noticed the wheels were out of alignment and Northland did perform an alignment for them. However, Ms. Payne testified that the alignment was included at no cost. There is no reference to a wheel alignment on any of the purchase and sale documentation. She was not advised that having the wheels aligned would result in an additional charge of $589.

[180]. In failing to include the administrative fee in the advertised price of the 2009 Dodge Grand Caravan, Northland failed to make the vehicle available at the advertised price.

[181]. Therefore, I find that Northland engaged in a deceptive practice in failing to include the administrative fee in the purchase price of the 2009 Dodge Grand Caravan.

2013 Dodge Ram

[182]. Northland and Mr. Marshall contended that the 2013 Dodge Ram was not subject to the *BPCPA* because it was not sold to a consumer, or at all, during the effective period of the July flyer. However, as I have already found, the *BPCPA* does apply to the July flyer and the 2013 Dodge Ram regardless of whether the vehicle was ultimately sold within the effective date of the July flyer.

[183]. The question before me is whether a mistake in the stock ID number alone is capable of misleading a consumer.

[184]. If the intention of Northland was to advertise a Crew Cab, but offer for sale a Regular Cab, I would find the flyer advertising the Crew Cab to be deceptive. The images and words on the July flyer would be capable of misleading a consumer to believe that he or she would be able to purchase a Crew Cab at the advertised price, when in fact the dealer intended to offer for sale a Regular Cab with the stock ID number referenced on the July flyer.

[185]. But I do not accept an error in the stock ID number alone is capable of misleading a consumer, as the stock ID number printed on an advertisement has no particular meaning for a consumer. A stock ID number will only become a feature of a deceptive act when a dealer produces for sale the vehicle with the advertised stock ID number, and such vehicle does not correspond to the vehicle described with words and images on the advertisement.

[186]. Based on the evidence led by Northland, I accept that the intention of Northland was to sell the Crew Cab with the stock ID number 13AV581410 in response to the July flyer advertising the 2013 Ram Crew Cab 4x4, even though a different and incorrect stock ID number was printed on the flyer. I accept that Northland would produce for sale the vehicle described by words and images on the July flyer, and would not produce for sale the Regular Cab with the stock ID number printed on the July flyer, namely stock ID number 13Q1724710.

[187]. In the result, I find that Northland and Mr. Marshall did not engage in deceptive acts or practices in relation to the July flyer.

Pattern of Conduct Generally

[188]. The MVSA alleges that both Northland and Mr. Marshall have engaged in a pattern of conduct which is calculated to deceive and mislead consumers, and which minimizes the consumer protection objectives of the *BPCPA* and the Motor Dealer Act. The MVSA says Northland and Mr. Marshall are recklessly indifferent with respect to their obligations under the legislation, lack familiarity with the legislation, and trivialize the nature and effect of their contraventions.

[189]. Northland and Mr. Marshall strenuously deny these allegations and submit that they are well aware of their obligations under the relevant legislation, and have demonstrated a pattern of compliance and cooperation with the MVSA.

[190]. I find that Mr. Marshall cooperated with the MVSA during the investigation, and provided information when requested. Mr. Marshall provided the kinds of information he had been asked to provide in the past when the MVSA had made enquiries. If further information had been requested of him, I am satisfied that he would have cooperated and provided whatever had been asked of him and Northland.

[191]. I find that Mr. Marshall and Northland are aware of and reasonably familiar with the relevant legislation which governs their operations. However, I also find that Northland and Mr. Marshall have not taken adequate steps to comply with all aspects of the relevant legislation.

[192]. Specific instances of the failure of Mr. Marshall and Northland to comply with the relevant legislation have been addressed above in relation to specific vehicles. In

addition, the general conduct which gives me concern in the operation of this dealership is summarized below.

(a) There is a significant lack of clarity on the part of Northland and its salespeople as to when the flyers come into effect. It seems to me that one obvious solution would be to put a start date of the effective period for the flyer on the flyer itself, in the same way that the end date of the effective period is currently shown on the flyer. In addition, the salespeople need to know at least one day before the effective period of the flyer which vehicles will be advertised on the flyer, and the price and terms upon which the vehicles will be sold. The disconnect between the information on the flyers, and the salespeople's knowledge of such information, gives rise to many of the problems uncovered through the MVSA's investigation.

(b) Further, Northland and Mr. Marshall did not take steps to clearly indicate on the flyers when vehicles were no longer available for sale. Three of the advertised vehicles were sold before the start date of the June flyer. The sale of these three vehicles either was known, or ought to have been known, to Northland and Mr. Marshall and yet they took no steps to ensure the flyer was corrected. It would not be complicated to correct the information on the flyers, and the failure of Mr. Marshall and Northland to do so suggests to me that they do not take seriously their obligation to ensure advertising is accurate.

The MVSA did not expressly allege a breach of s. 4(3)(a)(v) of the *BPCPA* with respect to these three vehicles, which section deems it deceptive to advertise products which are not available for sale. I find that in failing to correct the June flyer to show the three vehicles were no longer available, Northland and Mr. Marshall were in breach of the *BPCPA*. However, I consider these breaches in the context of the general conduct of Northland and Mr. Marshall, rather then in relation to the specific allegations associated with these three vehicles.

(c) There appears to be a practice at Northland whereby salespeople are not required to clearly identify to consumers that if they negotiate on a price or vehicle which is advertised as being sold inclusive of the administrative fee, that negotiation will trigger the charge of the administrative fee over and above the negotiated purchase price for the vehicle. In other words, consumers are not notified that the cost of entering negotiations is $589. While I have not been asked to decide whether in all instances Northland is entitled to charge consumers $589 to engage in negotiations, I do find that Northland and its salespeople must be transparent in advising consumers of such cost. It is deceptive to engage in negotiations and not notify consumers of the true cost in doing so. I have concerns that Northland is permitting salespeople to routinely engage in such deceptive conduct.

(d) There was evidence before me of consumers being required to pay for additional features which they did not request, such as windshield coatings, tire and rim warranties, etc. The evidence before me was that the process of reviewing the final purchase agreement was rushed and confusing, and a number of the purchasers did not truly appreciate what they had agreed to in signing the purchase agreements. Completing the purchase agreements is the most important part of the purchase of the vehicle. Consumers should not be rushed through this process, and cannot be required to pay for items which

were already on the vehicle at the time the vehicle was viewed, such as a windshield coating. On the evidence before me I have concerns about the conduct of Northland's sales personnel in completing the final purchase agreements with consumers.

[193]. I find that the conduct described above, coupled with the other conclusions I have reached as to deceptive acts and practices in the advertising and sale of certain vehicles, is conduct which is calculated to deceive and mislead consumers.

[194]. As this hearing did not address penalties, I will not address here whether any sanctions under the *Motor Dealer Act* or the *Sales Personnel Licencing Regulation* are appropriate with respect to the general pattern of conduct I have found.

Summary

[195]. I find that Northland and Mr. Marshall engaged in deceptive practices in relation to pricing on the June flyer which pricing was not shown on the vehicles on the lot and/or was not made available to purchasers of the following vehicles:

(a) 2006 Honda Civic,

(b) 2009 Chevy Impala,

(c) 2009 Dodge Grand Caravan, and

(d) 2012 Dodge Journey.

[196]. I find that Northland and Mr. Marshall engaged in a deceptive act in showing an image of a four door sedan on the June flyer in relation to the 2006 Honda Civic when in fact the vehicle for sale was a two door coupe.

[197]. I find that Northland, through its salespeople, engaged in a deceptive act in representing to the purchasers that they would be getting a "really good deal" and a "family deal" on the 2006 Honda Civic, which statement was intended to convey to and was understood by the purchasers as a representation that they would be getting a price advantage, which representation was false.

[198]. I find that Northland and Mr. Marshall did not engage in any unconscionable acts in relation to the advertising and sale of the 2006 Honda Civic.

[199]. I find that the description on the June flyer of pricing being "Wholesale to the Public" was not deceptive in relation to the 2008 Pontiac Montana and the 2007 Jeep Patriot.

[200]. I find that the mistaken stock ID number listed under the 2013 Dodge Ram Crew Cab in the July flyer was not a deceptive act.

[201]. I find that Northland and Mr. Marshall engaged in deceptive practices in relation to the 2013 [sic] Dodge Grand Caravan by describing a 2013 model when the actual vehicle for sale was a 2012 vehicle. I also find that the purchasers of the 2013 [sic] Dodge Grand Caravan were not deceived in fact by the June flyer and always understood they were purchasing a 2012 vehicle.

[202]. I find the following conduct of Northland and Mr. Marshall to be of concern generally:

(a) failure to ensure that all salespeople know the sale pricing advertised in the relevant effective period of the flyers;

(b) failure to correct flyers to clearly identify which vehicles are no longer available at the commencement of the effective period of the flyers;

(c) failure to clearly identify that any negotiations on the purchase of an advertised vehicle will result in the administrative fee being added to the purchase price; and

(d) failure to properly review the purchase agreements with purchasers, and to remove from or not include in such agreements items which have been declined by purchasers.

[203]. The matter will be reconvened to address the appropriate penalties flowing from the findings I have made herein.

Dated: May 23, 2014

Wendy A. Baker, QC
Acting Registrar