Vehicle Sales Authority
of British Columbia

Hearing File No. 14-12-002
Investigation File No. 13-12-115

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

MIKE BUNYAK

Consumer

AND:

DARRYL'S BEST BUYS AUTO SALES LTD.
(Dealer #11019)

Motor Dealer

AND:

DARRIN JOSEPH COTNAM
(Salesperson #119247)

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearings:	February 11, May 28, and July 16, 2015 (written statement of Darrin Cotnam only), at Surrey, British Columbia

Appearances for:

Darryl's Best Buys Auto Sales Ltd.	Darryl Wardrop, Dealer Principal & Owner Karen Wardrop, Owner
Darrin Joseph Cotnam	In person on February 11, 2015, and written statement of July 16, 2015
Mike Bunyak	In person
Vehicle Sales Authority	Daryl Dunn, Manager of Compliance and Investigations Jas Virk, Compliance Officer

Introduction

[1] On December 12, 2013, Mike Bunyak purchased a 2004 Ford F150 Lariat (the "Ford") from Darryl's Best Buys Auto Sales Ltd. (the "Dealer"). Mr. Bunyak dealt with Darrin Joseph Cotnam during the initial sale.

[2] As part of the sale, Mr. Bunyak says he was told the Ford would receive a transmission flush which should address a hard shifting concern with the Ford found during a pre-purchase inspection by All Make Auto Repair Ltd. Mr. Bunyak believes the transmission flush was never completed, but he paid $140.00 for this service.

[3] Not long after purchase, Mr. Bunyak stated the Ford's check engine light came on and there is an allegation that the Ford's tires were unsafe. Mr. Bunyak did some further reviews about the Ford's history and determined the Ford was formerly a lease vehicle which was not declared to him. Mr. Bunyak also alleges the odometer reading noted on the purchase agreement was incorrect. In addition, Mr. Bunyak complains that he was promised two sets of keys and key fobs and never received them. Finally, Mr. Bunyak complains he never received a full tank of gas at the time of sale as represented by Darrin Cotnam.

[4] This hearing was called to review the following allegations against the Dealer and Darrin Joseph Cotnam as set out in the Hearing Notice:

(a) The Dealer failed to properly declare the Ford was an ex-lease vehicle,
(b) The Dealer sold the vehicle with unsafe tires,
(c) The Dealer charged Mr. Bunyak $140 for a transmission flush which was never completed,
(d) The Dealer failed to provide the extra key and two key fobs it had represented came with the Ford,
(e) The Dealer sold the Ford with a transmission leak from the "main seal,"
(f) The Dealer failed to provide a full tank of gas as represented by Darrin Cotnam, and
(g) The Dealer declared on the purchase agreement the incorrect odometer reading.

Preliminary Matter – Hearing Process

[5] At the conclusion of the February 11, 2015 hearing, the VSA had provided its investigation findings and Mr. Bunyak had provided his evidence. Mr. Bunyak had tendered some documents during that hearing that the Dealer and Mr. Cotnam had not yet seen. As it was close to the end of the day, I adjourned the hearing to another date to be set by the parties. While adjourned, Mr. Cotnam was involved in a serious motor vehicle accident which delayed setting a new hearing date. Finally, a date of May 28, 2015, was set. However, on that date it was found Mr. Cotnam was still not able to attend the hearing. As all the parties, but Mr. Cotnam, were present on May 28, I decided to continue with the hearing with the following additional process to allow Mr. Cotnam to fully participate, at his choosing:

(a) Mr. Cotnam was to be provided transcripts of both hearing dates,
(b) Mr. Cotnam was already in possession of the evidence presented at the February 11 hearing. If he wished copies of any evidence presented at the May 28 hearing that evidence would be provided to him.
(c) Mr. Cotnam was given time to review the transcripts and the evidence. If he desired to question any of the witnesses or provide submissions orally, another hearing would be reconvened.

[6] The above process was followed. On July 16, 2015, Mr. Cotnam provided a written statement, witnessed by Darryl Dunn, Manager of Compliance and Investigations at the VSA. In that statement, Mr. Cotnam says:

(a) He had reviewed the transcripts provided to him,
(b) That he had no further evidence to add at this time,
(c) That he did not wish to cross examine any of the witnesses that have appeared in this matter, and
(d) That he saw no need to reconvene the hearing on his behalf.

[7] I am satisfied that Mr. Cotnam has had an opportunity to fully participate in this hearing and an opportunity to be heard in order to address the allegations regarding his conduct.

[8] I would note that Mr. Virk provided evidence at the February 11, 2015 hearing that the Ford had been an ex-lease vehicle. He said there was an ICBC document showing its registered ownership as between a lessee and a lessor. The hearing was recessed to allow Mr. Virk to produce this document to the Dealer and Mr. Cotnam, and was entered into evidence as Exhibit 5. I am satisfied that the adjournment of the hearing to May 28, 2015, provided the Dealer and Mr. Cotnam ample opportunity to review that document and provide evidence, and ask questions related to that document. The Dealer did provide evidence on Exhibit 5 and the issue of the ex-lease declaration: *Transcript of Proceedings*, dated May 29, 2015 [the hearing was Thursday May 28], pages 24-39.

Comments on these reasons

[9] I have provided very detailed reasons in this case, especially as to the applicable law, as it is apparent that consumers often believe any misrepresentation by a motor dealer allows them to cancel a contract. The facts of each case must be carefully considered to determine what remedy, if any, is available to a consumer. This case also required a detailed assessment of the facts as the evidence provided was often contradictory. Finally, it was apparent that the dealer in this case was mistaken about the law applicable to it, especially regarding vehicle leases and the

reverse onus provision of the *Business Practices and Consumer Protection Act* S.B.C. 2004, c. 2 ("BPCPA").

Position of the Parties

(a) Mr. Bunyak

[10] Mr. Bunyak's concerns are noted in his written complaint and highlighted by the above allegations. Mr. Bunyak emphasized that he purchased the Ford as a way to get back into driving and to try and regain some independence. As part of his position, he said he was in a serious motor vehicle accident and was having a hard time getting back into driving. When he made his complaint about the Dealer, he said he was willing to keep the Ford if the Dealer addressed his concerns and reimbursed him for repairs made to the Ford for which he felt the Dealer was responsible. However, because the Dealer failed to disclose the past lease history of the Ford, and how the Dealer has acted in trying to resolve this issue, Mr. Bunyak does not feel he can trust the Dealer and simply wants to undo this transaction, and get his money back, and the money he has spent on repairs.

(b) The Dealer

[11] The Dealer's position can be summarized as follows:

(a) The Dealer provided evidence (much of it hearsay) that car dealers often register vehicles with ICBC as a lease, but they are not really a lease. The Dealer says that if a car dealer is self-financing a purchase, the purchaser pays the dealer monthly and to ensure the dealer can retrieve the vehicle in case of default, the dealer and consumer agree to register the vehicle as a lease. This way the dealer continues to be the owner of the vehicle on the registration until it is fully paid. The Dealer also noted that AutoPlan agents almost always check the ex-lease box on the ICBC Transfer/Tax Form APV9T and also said the car dealer from whom they purchased the Ford (Delta Auto Marine) declares all their vehicles as ex-lease even if they are not an ex-lease. The Dealer also said it was up to the VSA to prove that the ex-lease declaration made to the Dealer and as noted on the ICBC records were both accurate and true.

(b) The Dealer stressed that Mr. Bunyak really only wanted to return the Ford after his wife insisted he return the Ford. In cross examination, Mr. Bunyak did admit that his wife did not want him to purchase a truck. The Dealer also noted Mr. Bunyak is recovering from a motor vehicle accident and continues to be apprehensive to drive. The Dealer says these are the

real reasons Mr. Bunyak wants to get out of this deal, and not the missed ex-lease declaration.

(c) As for the various mechanical issues and other complaints of Mr. Bunyak, the Dealer highlighted their offers to pay for certain repairs and the tank of gas.

The Law

(a) Ex-lease declaration

[12] Section 23(c) of the *Motor Dealer Act Regulation* requires a motor dealer to declare, to the best of their information and belief, whether a vehicle is an ex-lease vehicle. Section 23 of the Regulation has been interpreted by several court decisions as placing a positive duty on a motor dealer to exercise due diligence to make proper enquiries to ascertain the truth of the facts that must be disclosed. That duty is not met if:

(a) The dealer simply relies on the representations of a prior owner: *Clark v. Abbotsford Imports (1983) Ltd.*, [1992] B.C.J. No. 471 (BC Supreme Court) and *Robillard v. Comox Valley Ford Sales (1964) Ltd.*, [1995] B.C.J. No. 436 (BC Court of Appeal).

(b) The dealer simply relies on a notation on an invoice or on a broker who has sold them the vehicle: *Motley v. Regency Plymouth Chrysler Inc.*, 2002 BCSC 1885 (BC Supreme Court) and *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894.

(c) The dealer solely relies on vehicle history reports, as they are not 100% accurate because not everything gets reported, including to ICBC: *Fraser v. Richmond Imports Ltd. dba Richmond Honda et al* 2001 BCPC 211 (Small Claims Court) at paragraph 54.

(d) The dealer makes no reasonable enquiries of its own prior to making the declaration: *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court).

[13] The disclosures that a dealer must make under section 23 of the *Motor Dealer Act Regulation* are statutorily compelled representations about motor vehicles. Therefore, the manner in which those disclosures are to be made are

subject to the deceptive act or practice (misrepresentation) provisions of the *Business Practices and Consumer Protection Act.*

[14] The disclosures that a dealer is compelled to make under section 23 of the *Motor Dealer Act Regulation*, including ex-lease, are deemed to be material facts for consumers to know before they purchase a motor vehicle.

(b) Tires: safety of a motor vehicle prior to sale – duty on motor dealers

[15] A motor dealer may not display for sale, offer for sale, sell (includes a lease) or transfer over to another person (including a test drive), a motor vehicle that is intended for use on the roadways, that is not compliant with the minimum safety requirements of the *Motor Vehicle Act* and all its regulations. A motor dealer selling a new vehicle may not modify that vehicle in a way that makes it non-compliant with the *Motor Vehicle Safety Act* (Canada) and its regulations.

- *Motor Vehicle Act* sections 219, 222 and 223
- *Motor Vehicle Act Regulation section 8.01*

[16] A motor dealer must declare to a consumer purchasing a used motor vehicle that the motor vehicle meets the requirements of the *Motor Vehicle Act*: section 21(2)(e) of the *Motor Dealer Act Regulation*.

[17] If a motor dealer wishes to sell a motor vehicle that is not compliant with the *Motor Vehicle Act* and its regulations, then the dealer must:

(a) Place a declaration on the motor vehicle itself that the motor vehicle is "not suitable for transportation": section 27(b) of the *Motor Dealer Act Regulation.*

(b) Indicate on every advertisement about the motor vehicle that it is "not suitable for transportation and is sold for parts only or purposes other than transportation": section 22 of the *Motor Dealer Act Regulation*.

(c) Indicate on the contract, the purchase agreement and even on the ICBC Transfer/Tax Form APV9T that the motor vehicle is "not suitable for transportation and is sold for parts only or purposes other than transportation": section 22 of the *Motor Dealer Act Regulation*.

[18] If a dealer says nothing to a consumer, then the consumer may accept that the motor vehicle meets the requirements of the *Motor Vehicle Act*. A consumer does not have to specifically ask.

[19] A motor vehicle that does not meet the requirements of the *Motor Vehicle Act* may not be driven on the BC highways, including a test drive: section 219 of the *Motor Vehicle Act*. This is a material fact which must be disclosed and a failure to disclose this fact may entitle the purchaser to cancel the contract: *Cummings v. 565204 B.C. Ltd. dba Daewoo Richmond* 2009 BCSC 1009 (BC Supreme Court), and see *Balderston v. Cheng et al*. 2006 BCPC 64 (B.C. Small Claims Court) at paragraph 13.

[20] There is an allegation that the tires on the Ford were unsafe. The term "unsafe" can be subjective. What must be determined is if the tires did not meet the requirements of the *Motor Vehicle Act* at the time of sale: see *Naples v. River City Auto Sales Ltd. et al* (Registrar decision, February 18, 2013, File 12-022).

(c) Misrepresentations under the BPCPA

[21] A motor dealer and a salesperson are to refrain from making misrepresentations which are deceptive acts or practices under the *Business Practices and Consumer Protection Act*. A deceptive act or practice can occur innocently, negligently or deliberately.

> *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court) at paragraphs 28 – 30
>
> *Cummings v. 565204 B.C. Ltd. dba Daewoo Richmond,* 2009 BCSC 1009 (BC Supreme Court) at paragraphs 20 – 22
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> *Mikulas v. Milo European Cars Specialist Ltd.* 1993 CanLII 183 (BC Supreme Court), affirmed by 1995 CanLII 2431 (BC Court of Appeal)
>
> *Rushak v. Henneken Auto Sales and Service Ltd.*, 1991 CanLII 178 (BC Court of Appeal)

[22] If it is alleged that a deceptive act or practice has been committed by a motor dealer or a salesperson, the onus is on them to prove they did not commit the deceptive act or practice: section 5(2) of the BPCPA and see *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia* 2014 BCSC 894 (B.C. Supreme Court) and *Cummings v. 565204 B.C. LTD dba Daewoo Richmond* 2009 BCSC 1009 (BC Supreme Court). As stated by Mr. Justice Blok in the *Crown Auto Body and Auto Sales Ltd*. decision:

> [26] In judicially reviewing both the Original Decision and the Reconsideration Decision it is important to bear in mind that the *BPCPA* is consumer protection legislation that places a reverse onus of proof on a supplier of goods in a consumer transaction:
>
> 5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
>
> (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.
>
> [Emphasis added]
>
> [27] Accordingly, once there was evidence indicating the odometer reading on the Prius was misstated and the car was sold to a consumer in an unroadworthy state, the onus was then on the petitioners [dealer & salesperson] to show that they had not committed a deceptive act or practice in the transaction.

[23] I should also note that if a motor dealer makes representations about a vehicle and fails to state a material fact about the vehicle, that failure may be a deceptive act or practice: *Applewood v Ratte & Registrar* (April 13, 2010, S.C.B.C. Action #S094126, Vancouver Registry) (BC Supreme Court).

[24] If a motor dealer or salesperson has been found to have committed a deceptive act or practice, an administrative penalty of up to $50,000 can be levied on a company or up to $5,000 can be levied on an individual: section 165 of the BPCPA.

[25] If a motor dealer has committed a deceptive act or practice, it is a ground to suspend or cancel their registration: section 8.1(4)(b) of the *Motor Dealer Act*. The same seriousness applies to a salesperson.

[26] I emphasize that a deceptive act or practice (misrepresentation) can be committed innocently. That is, a supplier (motor dealer or salesperson) may act in a due diligent manner to ensure the representations they are making are accurate and true, but still get it wrong. In this case, a consumer may still be entitled to a remedy under the BPCPA, because that Act has been breached and because the consumer has made a decision to enter into a contract based on incorrect information: *Rushken v. Henneken* (BC Court of Appeal) and *Crown Auto Body and Auto Sales Ltd. V. Motor Vehicle Sales Authority of British Columbia* 2014 BCSC 894 (BC Supreme Court) at paragraph 28. What may change for the supplier (motor dealer or salesperson) who has committed an innocent misrepresentation (deceptive act or practice) contrary to the Act, is whether regulatory action will be taken against them for having breached the Act (ex. administrative penalties).

[27] In their submissions, the Dealer noted their purchase agreement speaks of the declarations being true "to the best of its knowledge and belief." This phrase is legal terminology meaning that they have acted in a due diligent manner (not in a negligent or reckless manner) to ascertain the truth of the information contained in the declarations on the purchase agreement. If the dealer has in fact acted with due diligence, but still made a misrepresentation, the consumer may still be entitled to a remedy under the BPCPA, but the dealer may not be subject to regulatory action for breaching the BPCPA. The rights of a consumer to a remedy under the BPCPA are not subject to the ability to bring regulatory action against the supplier (motor dealer or salesperson).

(d) A claim of misrepresentation (deceptive act or practice) under the BPCPA

[28] If it can be shown that a supplier (motor dealer or salesperson) committed a deceptive act or practice (made a misrepresentation), then there has been a breach of the BPCPA for which the Registrar may take regulatory action to address. A consumer need not have suffered damages for a deceptive act or practice to have occurred: *Robson v. Chrysler Canada & Oshanek v. General Motors* 2001 BCSC 40 (BC Supreme Court).

[29] Apart from there being a misrepresentation made innocently, negligently or deliberately; the following considerations are to be satisfied before a consumer is entitled to a remedy:

- The consumer reasonably relied on the misrepresentation (or failure of the dealer to state a material fact) in entering into the consumer transaction, and

- The consumer has suffered some loss or damage due to their reliance on the misrepresentation.

[30] The reason there must be reliance by a consumer on the misrepresentation of a dealer or salesperson is because the legislation does not protect consumers who make their own mistakes in their own purchasing decisions. As noted by the B.C. Supreme Court:

> This Court exists for many purposes and one of these purposes is the protection of unsophisticated and defenceless persons against the exactions of conscienceless persons who seek to take advantage of them. The legislation provides one method of exercising that benevolent authority. <u>But</u>

> the Courts are not empowered to relieve a man of the burden of a contract he has made under no pressure and with his eyes open, merely because his contract is an act of folly.
>
> *Bain v. The Empire Life Insurance Company*, 2004 BCSC 1577 (BC Supreme Court) at paragraph 88 citing *Miller v. Lavoie* (1966), 60 D.L.R. (2d) 495 (B.C. Supreme Court).

[31] It is, therefore, important to identify when a consumer's decisions are influenced by the misconduct of a supplier (motor dealer or salespersons), and when they are not so influenced, to determine if a consumer is entitled to a remedy.

i. Deceptive act or practice (misrepresentation)

[32] A deceptive act or practice (misrepresentation) is one that has the capability or tendency to mislead a consumer into an error of judgement: section 4(1) of the BPCPA and see *Rushak v. Henneken* (BC Court of Appeal).

[33] In considering whether a misrepresentation has the capability or tendency to mislead a consumer into an error of judgement, an adjudicator keeps in mind that:

(a) The standard is the credulous consumer and not the reasonable consumer. That is, a consumer who is willing to believe the things told to them without question and base their decision on what is told to them: *Rushak v. Henneken* (BC Court of Appeal) and *Richard v. Time Inc.* 2012 SCC 8, [2012] 1 SCR 265 (Supreme Court of Canada), and

(b) Consumers are entitled to believe and rely on the representations made to them by motor dealers and their salespersons: *Vavra v. Victoria Ford Alliance Ltd. et al*. 2003 BCSC 1297 (BC Supreme Court).

[34] The BPCPA specifically does two things different than the common law when it comes to proving a misrepresentation (deceptive act or practice).

[35] First, once some evidence is advanced by the consumer showing a misrepresentation (deceptive act or practice) occurred, the BPCPA places the "onus" on the supplier (motor dealer) to prove that the misrepresentation (deceptive act or practice) did not occur: section 5(2) of the BPCPA and *Crown Auto Body and Auto Sales Ltd.* (BC Supreme Court) at paragraphs 26-27. This is a shift of the legal burden onto the supplier on this element of the claim: *Northland Properties Corp. v. British Columbia* 2010 BCCA 177 (BC Court of Appeal). This makes sense from a

policy perspective. A supplier is in the dominant position of knowledge vis-à-vis the consumer regarding the products or services it provides. The supplier knows where they obtained the product and a better understanding of a used product's history. For new products, the supplier has the relationship with the manufacturer and can obtain more detailed information on the product more easily than a consumer. Because suppliers interact with their products on a daily basis, they become aware of their products' attributes and their failings and certainly more so than a consumer. From an evidentiary point of view, a supplier is in the better position to show that a representation it made was true and not misleading; than a consumer is to prove it was untrue and misleading. Reverse onus provisions within civil cases are not uncommon and have not been found contrary to constitutional principles: *British Columbia v. Imperial Tobacco Canada Ltd.* [2005] 2 SCR 473 (Supreme Court of Canada) and *R. v. Wholesale Travel Group Inc.* [1991] 3 SCR 154 (Supreme Court of Canada).

[36] Second, the BPCPA deems certain conduct to be deceptive acts or practices (misrepresentations). If it can be shown that the conduct complained of is one found in sub-section 4(3) of the BPCPA, the consumer (or the regulator if, for example, the regulator is reviewing advertising) is not required to prove that the complained of conduct "has the capability or tendency to mislead" a consumer. That is deemed to be the fact.

ii. Reasonable Reliance

[37] Another factor that must be considered is whether the consumer relied on the misrepresentation when deciding to enter into the consumer transaction and whether that reliance was reasonable in the circumstances. A consumer is generally allowed to rely on the representations of a motor dealer and their salespersons: *Vavra v. Victoria Ford Alliance* (BC Supreme Court).

[38] For instance, in *Crowston v. Platinum Auto Corporation et al* (Registrar decision, April 26, 2012, Hearing File 12-002), the dealer was found to have committed a deceptive act or practice (misrepresentation) contrary to the BPCPA because it did not declare damage over $2,000 as required by section 23 of the *Motor Dealer Act Regulation*. The dealer was assessed administrative penalties for its breach and conditions placed on its licence, and the salesperson's licence was suspended for a period of time. Even so, the specific evidence of that case showed that the consumer did not rely on the missed declaration in making his purchasing decision, nor was he concerned about the past history of the vehicle. While there was a misrepresentation by failing to declare a material fact, it could not be shown that the consumer in any way did or would have relied on that missed declaration in making his purchasing decision. The consumer was not entitled to claim damages.

iii. Damage or loss due to the misrepresentation

[39] Another factor to be considered is whether the deceptive act or practice (misrepresentation) was the cause of the damage or loss suffered by the consumer. The BPCPA does not reverse the legal burden on this point, so *"ordinary principles of litigation put the burden of proof on the party making the assertion*" - in this case the consumer: *WIC Radio Ltd. v. Simpson*, [2008] 2 S.C.R. 420, 2008 SCC 40 at paragraph 30 (Supreme Court of Canada).

[40] In *Crowston*, the consumer claimed some $7,000 in damages related to the misrepresentation. He "felt" this was the lost value of the vehicle due to that misrepresentation. There was no evidence of that being the case and was denied these damages.

[41] In *Lamontagne v. Bill Howich Chrysler Ltd.* (Registrar decision, August 12, 2008, File 08-70064), the consumer claimed $12,568.00 due to a failure to declare damage over $2,000. That amount comprised the cost of the repairs to the vehicle that ICBC had paid and the interest charges for the financing of the vehicle. While the dealer was found to have committed a deceptive act or practice and received an administrative penalty, the consumer could not show the loss or damage they claimed was related to the misrepresentation. They were denied these damages.

[42] In *Southern v. Victoria Hyundai et al*., (Registrar, June 23, 2009, File 08-70472), the consumer claimed damages for the dealer failing to declare the vehicle as an ex-rental. In that case, I found the consumer did not and would not have reasonably relied on the ex-rental declaration, and also did not show he suffered any damages as a result of that failure. The consumer was not entitled to a remedy.

(e) Assessing Witness Credibility

[43] I keep in mind the guidance of the courts when assessing the credibility of witness testimony: *Bradshaw v. Stenner*, 2010 BCSC 1398 (BC Supreme Court) at paragraphs 186 – 187, affirmed 2012 BCCA 296 (BC Court of Appeal), leave to appeal to the Supreme Court of Canada dismissed 2013 CanLII 11302 (SCC).

Discussion

(a) The Dealer failed to properly declare the Ford was an ex-lease vehicle

(i) Misrepresentation

[44] The purchase agreement for the Ford specifically says the vehicle was not an ex-lease vehicle. This is contradicted on the ICBC Transfer/Tax Form ("APV9T") transferring the Ford from the Dealer to Mr. Bunyak, where the Dealer has declared the Ford as an ex-lease vehicle. The two documents read together create an ambiguity as to whether the Ford was or was not an ex-lease, which is legislatively deemed to be a material fact. Representing a material fact in an ambiguous way is deemed to be a deceptive act or practice: section 4(3)(b)(vi) of the BPCPA.

[45] The ICBC Transfer/Tax Form transferring the vehicle from Delta Auto Marine to Darryl's Best Buys also has the ex-lease declaration checked off. Therefore, the Ford was declared to the Dealer as an ex-lease vehicle before it was sold to Mr. Bunyak. Exhibit 5 at the hearing is the ICBC registration covering November 15, 2011 to November 12, 2012, showing the Ford registered with a lessor and lessee. There is ample evidence that the Ford was an ex-lease vehicle and that information (the declaration on the ICBC Transfer/Tax Form) was in the hands of the Dealer.

[46] The Dealer's evidence on this point is that it was probably not a real lease, but a financing arrangement. However, that evidence is simply an assertion on the part of the Dealer. They did not provide any direct evidence supporting this assertion. They also did not provide evidence that they took due diligent steps to ascertain whether or not the Ford was a lease vehicle – having been put on notice that the Ford was. They said the CarProof report does not indicate it as an ex-lease vehicle. That report does not indicate it checks for lease status for Canadian vehicles. The Dealer's evidence was basically, you cannot tell if a lease declaration is a real lease declaration or not and cannot find that out. The Dealer also said Delta Auto Marine always declares ex-lease, but did not have someone from Delta Auto Marine provide that evidence. The Dealer also said the same about Maxxam AutoPlan agents who make these declarations on behalf of dealers, again with no direct evidence.

[47] Even if I were to accept the lease was arranged as described by the Dealer, such an arrangement is generally called a security lease in British Columbia: *DaimlerChrysler Services Canada Inc. v. Cameron* 2007 BCCA 144 (BC Court of Appeal) and see also *Mercedes Benz Financial v. Wagner* 2010 BCSC 1090 (BC

Supreme Court). A security lease secures the payment of an obligation meaning the ultimate purchase of goods generally based on a payment plan. A true lease, very generally speaking, secures payments for the use of a good and usually with an option to purchase. A security lease is treated the same as a finance agreement for the purpose of the *Personal Property Security Act* and gives a consumer different and arguably more rights under that Act than they receive under a true lease: *DaimlerChrysler Services Canada Inc. v. Cameron* 2007 BCCA 144 (BC Court of Appeal).

[48] For instance, under a finance agreement or security lease, a creditor (dealer in this case) may not seize a vehicle from a consumer if the consumer has paid 2/3 of the purchase price. They may only sue the consumer for the amount of the default and possibly related costs: section 58(3) of the *Personal Property Security Act* and see *DaimlerChrysler Services Canada Inc. v. Cameron* (BC Court of Appeal). Under a true lease, the creditor can generally seize the property and sue a debtor who is in default for contractual damages: see *DaimlerChrysler Services Canada Inc. v. Cameron* (BC Court of Appeal).

[49] A dealer who fashions a financing arrangement and calls it a lease without specifying it as a security lease versus a true lease, may be misleading (ambiguity) a consumer about their rights and obligations under the contract, which is deemed to be a deceptive act or practice: section 4(3)(b)(iv) and (vi) of the BPCPA. The two types of transactions are not the same: *Schryvers v. Richport Ford Sales Ltd.* 1993 CarswellBC 2068 (BC Supreme Court).

[50] There is evidence that the Ford is an ex-lease vehicle. The Dealer declared the Ford was not an ex-lease vehicle on the purchase agreement and declared it was an ex-lease vehicle on the APV9T Transfer/Tax Form, creating an ambiguity of a material fact. The Dealer has not shown its representations' regarding the ex-lease declaration was not a deceptive act or practice. The Dealer has breached section 5(1) of the BPCPA.

(ii) did the consumer in anyway rely on the misrepresentation regarding the ex-lease declaration

[51] On the evidence, I am not satisfied that Mr. Bunyak was misled by the lack of an ex-lease declaration on the purchase agreement.

[52] First, I note that Mr. Bunyak signed the ICBC Transfer/Tax Form APV9T transferring the Ford into his name. That form clearly indicates the Ford as an ex-lease vehicle.

[53] Second, Mr. Bunyak's evidence is that after All Make inspected the Ford, he went to the bank to pick up a bank draft for the purchase of the vehicle and then attended the dealer's lot to complete the paperwork: *Transcript of Proceedings*, February 11, 2015 at pages 54-56 and 58-59. Mr. Bunyak had decided to purchase the Ford before seeing any declarations on the purchase agreement or the ICBC Transfer/Tax Form, including ex-lease.

[54] Third, Mr. Bunyak's evidence is not consistent on this point. During his direct evidence presented at the hearing, Mr. Bunyak explained how it was important for him to know about rebuilt vehicles and ex-lease vehicles. Mr. Bunyak elaborated that he had been "burned" once before regarding a rebuilt. He said he specifically checks the declaration boxes to see if the ex-lease and rebuilt boxes have been ticked off. I would note, there is no box for rebuilt on the purchase agreement. Mr. Bunyak continues that he specifically asked about ex-lease and was told "no" consistent with what was on the purchase agreement: *Transcript of Proceedings*, February 11, 2015, pages 62-63. This statement is inconsistent with his written statement.

[55] In Mr. Bunyak's written statement, he states he "wasted a few trips" trying to get a key cut for the Ford and then called Mr. Cotnam about his inability to get a key cut. This was after the sale had occurred and Mr. Bunyak had taken possession of the Ford. His statement then says Mr. Cotnam mentioned a package was coming from Budget for the Ford which may have the extra keys. Mr. Bunyak then says "the reference to Budget is why I first began to wonder about the rental or lease dealer declaration on Daryl's Best Buys Purchase Agreement Form that was checked not used for lease or rental." Mr. Bunyak's written statement indicates he did not become concerned about an ex-lease declaration until after he had purchased the Ford, and after he had spent money on some items such as tires. This view is supported by a review of the whole of Mr. Bunyak's written statement.

[56] Nowhere in Mr. Bunyak's initial written statement does he explain that prior to the sale, he advised the Dealer how important ex-lease declarations were to him or does it say that he specifically asked the Dealer if the Ford was an ex-lease. Further, if ex-lease was as important to Mr. Bunyak as he testified, and he looks to see if the box is checked, again as he testified, why did he not also look at the APV9T Transfer/Tax Form for the checked box indicating ex-lease? It would make common sense for him to look at that form if, as he says, it was that important to him and considering he signed that form. If he had looked at the declarations on the APV9T Transfer/Tax Form, he would have been put on notice and asked questions of the Dealer. I find this conduct of Mr. Bunyak's is also inconsistent with his oral evidence.

[57] Based on the above evidence, I do not find that Mr. Bunyak was in fact concerned about the ex-lease status of the Ford, and that the ex-lease declaration would not have formed a part of his decision making process: see *Crowston* (Registrar's decision) and *Motley v. Regency Plymouth Chrysler Inc.*, 2002 BCSC 1885 (BC Supreme Court) where Mr. Justice Parrett noted:

> [13] I am satisfied on the evidence before the court and, in particular, that found in Exhibit 3 that declaration number 3 is, in fact, untrue. It is clear that the vehicle in question was in fact a lease vehicle for a period of time. This in and of itself demonstrates the completely inadequate nature of the brokers bare invoice as constituting a reasonable base from which to make the declarations in question.

And later,

> [24] In the present case, what is wholly lacking is any evidence of detrimental reliance…

[58] I find on the evidence that Mr. Bunyak was not led into an error of judgement by this particular misrepresentation made by Mr. Cotnam on behalf of the Dealer.

(iii) Remedy

[59] Even though I have found Mr. Bunyak did not rely on the Dealer's misrepresentations on ex-lease in entering into this agreement, I will discuss the availability of a remedy.

[60] The fact that the dealer has misrepresented the ex-lease status of the vehicle, does not mean that the contract will automatically be set aside.

[61] A misrepresentation of ex-lease (a material fact) that was reasonably relied on, would <u>generally</u> give rise to a claim for damages and not to rescind the contract where the goods have been accepted and used by the purchaser: *Windmill Auto v. MVSA* (BC Supreme Court) and *Vavra v. Victoria Ford Alliance* (BC Supreme Court). Whether the contract could be set aside for a missed ex-lease declaration would depend on the facts of the case and there would have to be unique facts indicating the only remedy available would be to set aside the contract: *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court), affirming *Harris v. Windmill Auto Sales & Detailing Ltd. et al* (Registrar's decision, August 20, 2013, File 12-030). Those types of unique facts are not present on the evidence before me.

[62] Also, absent at least some evidence of what damages Mr. Bunyak may have suffered, I could not make an order for damages even had Mr. Bunyak relied on the misrepresentation. Again, Justice Parrett dismissed the consumers claim in *Motley v. Regency Plymouth Chrysler Inc.*, 2002 BCSC 1885, stating:

> [24] In the present case, what is wholly lacking is any evidence of detrimental reliance. There is no evidence of damage resulting from this transaction. The significance of this aspect of the case can be found in the fact that in his closing submissions Mr. Charles urged this court to award his client exemplary and punitive damages, but was wholly unable to articulate a basis, on the evidence, for concluding that there were actual damages flowing from the defendant's failure to reveal the fact that the motor vehicle was previously leased.

(b) The Dealer sold the vehicle with unsafe tires,

[63] The evidence from Mr. Bunyak on this point is that his brother, who assisted Mr. Bunyak to test drive and look over the Ford, thought the tires were not very good: see Mr. Bunyak's initial written complaint statement. In oral testimony, Mr. Bunyak indicated he does not recall the word unsafe being used to describe the tires: *Transcript of Proceedings*, February 11, 2015 at page 51. Mr. Bunyak stated that the technician at All Make who inspected the Ford prior to sale, indicated the tires were of low value and should be replaced. Mr. Bunyak's evidence also shows this was an issue raised with the Dealer prior to his purchase of the Ford. According to Mr. Bunyak, the Dealer agreed the tires were of low value and offered to get some tires installed and quoted Mr. Bunyak some prices. Mr. Bunyak said he declined and would find new tires himself: *Transcript of Proceedings*, February 11, 2015 at page 50-52. There is no evidence that the Dealer misrepresented the condition of the tires.

[64] Tires do not meet the minimum requirements of the *Motor Vehicle Act* or its regulations when, for example:

(a) There is a cord break; cuts in excess of 2.5 cm and deep enough to show the ply cords; less than 1.5 mm of tread depth; 2 adjacent tread depth indicators contact the road; or sidewall lumps and bulges due to partial failure of the tire's structure,

(b) The vehicle has a mix of bias ply and radial tires, and

(c) When a tire does not meet CSA standards.
- Sections 7.16 and 7.161 *Motor Vehicle Act Regulation*

[65] No such or similar evidence was placed before me regarding the Ford's tires.

[66] Finally, Compliance Officer Virk interviewed Mr. Atwal who was the technician who inspected the Ford at All Make before it was sold to Mr. Bunyak. Mr. Virk advises that Mr. Atwal's view was that the tires were not below the "safe mark": *Transcript of Proceeding*, February 11, 2015 pages 17-18. Mr. Atwal's evidence was the tires and oil leak and oil would soon need to be dealt with. Mr. Atwal never said in direct evidence that the tires were unsafe: *Transcript of Proceeding*, February 11, 2015 page 31.

[67] I therefore cannot find on the evidence, there was a misrepresentation about the Ford's tires to Mr. Bunyak at the time of sale. In fact, Mr. Bunyak was aware the tires needed replacing soon and purchased the Ford knowing that fact, and undertook to replace them at his own cost. There is no evidence the tires were not compliant with the *Motor Vehicle Act* at the time of the sale. This allegation has not been made out.

(c) The Dealer charged Mr. Bunyak $140 for a transmission flush which was never completed

[68] In his written statement, Mr. Bunyak said:

- The technician at All Make noted the Ford had a slip when shifting. Mr. Bunyak and his brother who had test drove the vehicle previously had not noticed this on either of their test drives,

- The technician at All Make suggested a transmission flush as a possible remedy; otherwise, more work to the transmission would be needed,

- Mr. Cotnam advised he would take care of the transmission flush. Mr. Bunyak finalized the deal, paid for the Ford and left the Ford with the dealer and picked it up the next day.

- Mr. Bunyak said Mr. Cotnam advised that the flush was completed, and it worked.

- Mr. Bunyak's written statement goes on to say Mr. Cotnam asked $155 for the transmission flush or $140 cash which was a surprise to Mr. Bunyak as he thought the dealer was taking care of this. Mr. Bunyak tried to pay by debit, but the machine would not take the payment, so he paid cash. Mr. Bunyak was not given a receipt nor did he ask for one.

- Mr. Bunyak's statement then says his brother took the Ford for a long ride, and the transmission slip appeared again. Mr. Bunyak believes the transmission flush was not done, or if it was done, it did not repair the transmission.

  Consumer Complaint Form, attached to Exhibit 4 at the Hearing being the Affidavit of Jas Virk.

[69] In his oral testimony, Mr. Bunyak says:

- He and his brother noticed the transmission slipping on the second test drive before it was looked at by the technician at All Make.

- That when the technician pointed out the transmission slippage, Mr. Bunyak said "Yeah, I -- I -- I noticed that," and they had a discussion.

  Transcript of Proceedings, February 11, 2015, page 52.

Mr. Bunyak's oral testimony on this point is inconsistent with his initial written complaint.

[70] Based on Mr. Bunyak's questioning, and some oral testimony he provided while questioning the technician from All Make, Mr. Bunyak indicated it may have been Mr. Cotnam who recommended the transmission oil flush as a remedy: *Transcript of Proceedings*, February 11, 2015, pages 36-38. This is inconsistent with his written complaint statement.

[71] I also note that part of Mr. Bunyak's oral evidence came after the technician from All Make gave direct evidence that he never did, nor would he have recommended a flush as a remedy to the shifting problem he noted. Mr. Bunyak's oral evidence changed from his written statement after he heard the technician's evidence.

[72] In direct oral evidence, Mr. Bunyak said Darrin Cotnam said the transmission flush was done, and Mr. Bunyak asked how much it was. Why would Mr. Bunyak ask how much the transmission flush was if, as he says in his written statement, he expected the Dealer was providing this service for free? This is another inconsistency between Mr. Bunyak's written statement and oral testimony.

[73] Mr. Bunyak testified that Mr. Cotnam asked him to pay $150, and he tried three times to pay by debit. When debit did not work, Mr. Bunyak then said Mr. Cotnam asked if he had any cash in his wallet, and Mr. Bunyak said he had $140 to

which Mr. Cotnam says, 'OK, we'll do $140 cash deal and won't pay the taxes': *Transcript of Proceedings*, February 11, 2015, pages 56-57. Again, this oral testimony is somewhat inconsistent with Mr. Bunyak's written statement. Mr. Bunyak did not testify he thought the dealer was taking care of the cost of the transmission flush, as he did in his written statement. Also, Mr. Bunyak says in his written statement it was Mr. Cotnam who made an offer to Mr. Bunyak to pay $155 or $140 cash - right away. There was nothing in the written statement that Mr. Cotnam asked how much Mr. Bunyak had in his wallet. This latter statement in the oral testimony came across as embellishing on the facts.

[74] I note no evidence was placed before me that the transmission flush was not completed. Therefore, even had money exchanged hands for the flush, there is no proof of "theft" by charging for a service that was not completed. Mr. Bunyak is making an assertion that because the transmission flush did not fix the problem, it had not been done. A mere assertion is not enough to trigger the reverse onus provision of the BPCPA; otherwise, any statement made by a motor dealer could be viewed as misleading requiring proof otherwise: *The Consumers' Association of Canada v. Coca-Cola Bottling Company et al*, 2006 BCSC 863 (BC Supreme Court) at paragraph 86; affirmed by 2007 BCCA 356 (Court of Appeal) and leave to appeal to the Supreme Court of Canada refused 2007 CanLII 66731 (SCC). As Mr. Justice Blok of the BC Supreme Court noted:

> [26] In judicially reviewing both the Original Decision and the Reconsideration Decision it is important to bear in mind that the *BPCPA* is consumer protection legislation that places a reverse onus of proof on a supplier of goods in a consumer transaction:
>
> > 5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.
> >
> > (2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.
> >
> > [Emphasis added]
>
> [27] Accordingly, once there was evidence indicating the odometer reading on the Prius was misstated and the car was sold to a consumer in an unroadworthy state, the onus was then on the petitioners [dealer and salesperson] to show that they had not committed a deceptive act or practice in the transaction.
>
> *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court).

[75] On the evidence presented, Mr. Bunyak was aware the Ford had a possible transmission problem prior to purchasing the Ford. His written statement makes this clear as does his oral testimony. Mr. Bunyak also said in the written statement that the technician suggested a transmission flush as a possible remedy but that other work may need to be done. What is less than clear is that the dealer represented that a transmission flush would remedy the issue. Mr. Bunyak's oral testimony and written statement are contradictory on this point and changed once he heard the evidence from the technician at All Make, saying a flush would not fix this type of problem. Mr. Bunyak's evidence on this point is too inconsistent and changed during questioning of the All Make technician that I find his testimony to be unreliable on this point. I find there to be insufficient reliable evidence to trigger the reverse onus provision regarding the transmission flush. I am satisfied the evidence is insufficient to say the dealer made the representation that the flush would remedy the transmission problem. There is no evidence of "theft."

[76] I highlight some other aspects of Mr. Bunyak's evidence that gives concern about its credibility. "*Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides*": *Bradshaw v. Stenner* (BC Supreme Court) at para. 186. Credibility and "reliability" of evidence are often used interchangeably such that credibility also includes a person's ability to accurately recall evidence, the loss of accuracy due to the passage of time, or because a witness can be persuaded to change their evidence.

[77] In the case of Mr. Bunyak, he says he is recovering from a head injury and apprehensive to drive. During the hearing, his questioning of witnesses and his providing evidence was not always clear and sometimes fragmented and guarded. When asked if had driven the Ford, he responded by saying "What do you mean drive?" *Transcript of Proceedings* May 29, 2015, at page 7-8. When asked how long it was after he purchased the Ford that he decided to return it, he said two days. It was only after further questioning that he recalled it occurred about 8 days after purchase and on the same day when his brother was with him, and there was almost a fight at the dealership. He said, "I forgot about that": *Transcript of Proceedings* May 29, 2015, at page 7-8. Yet, at the February 11, 2015, hearing, Mr. Bunyak specifically mentioned his brother was at that hearing to testify about the altercation that occurred at the dealership: *Transcript of Proceedings* February 11, 2015, page 114. His brother did not provide evidence.

[78] I cannot leave this point without noting that on December 6, 2013, there is an invoice that shows Darryl's Best Buys paying Mekong Auto to do an oil change and "install Lucas to engine and transmission." Associated with that invoice is an invoice from Decker's Auto Parts (#947444) to Darryl's Best Buys for the Lucas oil

stabilizer, Lucas Trans Fix, oil and oil filter dated December 6, 2013. The name Mekong is circled on the Decker's invoice. This indicates that Darryl's Best Buys supplied the parts, and Mekong did the service work only. The technician for All Make testified that Lucas is added to a transmission to help it shift better and reduce any leaks. It is a temporary fix. This is evidence suggestive that Darryl's Best Buys was aware of a possible transmission problem with the Ford prior to it being sold and tried to hide that fact. However, as already noted, Mr. Bunyak was aware of the transmission slip, and that a flush may not fix the slip, before he purchased the Ford.

(d) The Dealer failed to provide the extra key and two key fobs it had represented came with the Ford

[79] Mr. Bunyak's written statement indicates he noted only one set of keys and alarm (key fob) after he purchased the Ford but just before he was going to take it home. Mr. Bunyak says he spoke to Darrin Cotnam who indicated he would look for the second set in the package they were to receive from Budget regarding the Ford. Mr. Bunyak stated that Mr. Cotnam promised a second set of keys if they did not arrive in the package. Mr. Bunyak's oral statement appeared consistent with his written statement, until Mr. Bunyak confirmed under cross-examination that Mr. Cotnam never guaranteed or provided a specific promise that a second key would be in the package: *Transcript of Proceedings* May 29, 2015, pages 9, and 11-13. Mr. Bunyak said the keys are not really a big deal, but would be nice.

[80] Based on this evidence, I cannot say there was a specific misrepresentation by the dealer that Mr. Bunyak would be given an extra remote and set of keys. I cannot find there was a misrepresentation under the BPCPA on this point.

(e) The Dealer sold the Ford with a transmission leak from the "main seal"

[81] The allegation of a transmission main seal leak was not explored in any meaningful away at the oral hearing. I note that Mr. Bunyak's written complaint does not mention this as an issue. This allegation appears to have manifested from the All Make Inspection Invoice 32162 dated December 12, 2013, where there is a notation of a transmission leak from the "main seal."

[82] As already discussed, the inspection by All Make and its findings occurred with Mr. Bunyak present, and the inspection findings reported to him prior to him purchasing the Ford. If he purchased the Ford with a transmission main seal leak, he had knowledge of that fact when agreeing to purchase the Ford, and there is no evidence to suggest he was misled by the dealer on this point. I also note that

there is nothing in the *Light Vehicle Inspection Manual* (which is a Schedule attached to the *Vehicle Inspection Regulation* 256/2010), about a leaking transmission main seal. I cannot say that a leaking "main seal" is not compliant with the *Motor Vehicle Act*. This allegation has not been made out.

(f) The Dealer failed to provide a full tank of gas as represented by Darrin Cotnam

[83] Mr. Bunyak states he was told he would have a full tank of gas at the time of purchase by Mr. Cotnam. He claims he did not receive the full tank of gas. Mr. Cotnam provided no evidence at the hearing or in written submissions that this representation had not occurred, and the Dealer did not really contest this fact other than to suggest that the tank of gas was a "maybe" promise: *Transcript of Proceedings*, May 29, 2015, at page 24.

[84] Mr. Bunyak said he paid about $110 to fill the Ford's tank after he picked it up as it was almost on "E": *Transcript of Proceedings*, February 11, 2015, at page 97. It was generally agreed that a tank of gas for a Ford F150 would be about $100: *Transcript of Proceedings*, February 11, 2015, at page 103.

[85] There is sufficient evidence to say the dealer misrepresented the provision of a tank of gas for the Ford, contrary to the BPCPA. Mr. Bunyak's evidence on this point was clear and did not waiver or change. The Dealer's view was that this was another "maybe" promise like the keys. The "maybe" for the keys makes some sense as the Dealer was waiting for a "package" from a previous owner to see if keys and a remote were in the package. The Dealer had no control of whether the keys were, or were not sent in the package. Whether the Dealer could or could not provide a tank of gas was not contingent on someone else. Either the Dealer would or would not fill up the tank. It is hard to see how a promise for a tank of gas, which was in the control of the Dealer, would be a maybe promise. I find a tank of gas was represented as part of the deal and was not provided by the Dealer. The dealer has not shown this representation was not a deceptive act or practice. This is a misrepresentation that meets the definition of a deceptive act or practice under the BPCPA.

(g) The Dealer declared on the purchase agreement the incorrect odometer reading.

[86] Mr. Bunyak's complaint form indicates the dealer represented the wrong odometer reading on the purchase agreement and the APV9T Transfer/Tax Form – indicating 267,811. Mr. Bunyak's complaint form also notes he did not realize this

discrepancy until he started filling out the VSA complaint form. In that complaint form, he says the mileage as of December 30, 2013, (18 days after purchase) was 270,321 km. His complaint form indicates that this is evidence of the discrepancy - of 2510 km. At the hearing, Mr. Bunyak also noted the mileage recorded on a Minit-Tune invoice dated December 18, 2013, shows mileage of 270,318 km. Mr. Bunyak's oral evidence indicates he did not compare the mileage on the purchase agreement and the APV9T with the odometer on the Ford.

[87] When the Dealer purchased the Ford from Delta Auto Marine on November 20, 2013, the mileage on the APV9T was declared as 269,115 km (1304 km greater than declared on the purchase agreement to Mr. Bunyak). During the hearing, the Dealer indicated Mr. Cotnam's writing is poor and the 7 in 267,811 may in fact be a 9. The Dealer also noted there was a different mileage noted on the All Make invoice of 279,000 km (an even number) on December 12 when the Minit-Tune invoice of December 18 shows 270,318.

[88] What Mr. Bunyak is alleging is the dealer recorded on the paperwork kilometers travelled of about 1304 km less. Mr. Bunyak's oral evidence and his written complaint also clearly indicate this was not a consideration for him in purchasing the Ford. He did not rely on any representation of the mileage as written on the purchase agreement and on the APV9T in deciding to purchase the Ford. Having taken the Ford for two test drives, he would have had an opportunity to have sighted the odometer of the Ford.

[89] The discrepancy in mileage can be as simple as Mr. Cotnam writing a "7" instead of a "9." I do not agree with the Dealer that Mr. Cotnam's writing is poor and that the 7 could be a 9. The APV9T is very clearly a 7 for 267,811 km. The case law supports that a representation of the odometer reading is an important or material consideration for any purchaser: *Feng v. Yang* 2012 BCPC 127 (BC Provincial Court) citing *Birchwood Pontiac Buick Ltd v. Hasid* (1997), 35 CCLT (2d) 54 (Man QB); *O'Regan's Lexus Toyota v. Goomar,* [2001] N.S.J. No 532 (Prov Ct.). I find that the Dealer made a misrepresentation on the purchase agreement and the APV9T transfer/tax form for the Ford regarding its odometer reading – a material fact. This satisfies the definition of a deceptive act or practice under the *Business Practices and Consumer Protection Act*.

[90] Mr. Bunyak's evidence is clear: he did not notice these discrepancies until after purchase, and when he was filling out his complaint form. There was no reliance by him on the written representations of mileage in making his purchasing decision. As noted, he agreed to the purchase and went to the bank to get a draft for the purchase price before any paperwork was completed. Without any detrimental reliance on Mr. Bunyak's part regarding the odometer readings, there is

no remedy that I can provide him for this misrepresentation: *Motley* (BC Supreme Court).

[91] While I have not found any detrimental reliance by Mr. Bunyak, I will comment on the possibility of remedies. An improper declaration regarding mileage is generally viewed as a breach of warranty regarding the quality of the good (the Dealer warrants the true mileage of the vehicle) providing a claim for damages: see the principle as articulated in *Kuczerpa v. Jim Pattison Industries* 2000 BCSC 1327 (BC Supreme Court). Generally speaking, rescission of a contract is reserved for those cases where the person has received in substance something totally different than contracted for, where unconscionability under the BPCPA is found to have occurred or where an award of damages will not provide an appropriate remedy under the particular circumstances of the case: *Windmill Auto v. Vehicle Sales Authority* (BC Supreme Court). Of course, there must be evidence that the misrepresentation has caused damages and what those damages are; and there is none in this case.

[92] A good case for consideration is the decision of Adjudicator Cornish in a Small Claims action involving the misrepresentation of an odometer reading:

> [22] Plainly the reference on the Transfer Tax form to "46,000 km" is incorrect and I accept that it misrepresents the true odometer reading. It is clear, however, that the Claimant did not rely on this statement prior to deciding to buy the Vehicle. In fact, his evidence was that he didn't even read this document before signing it. As noted, reliance on the misrepresentation is an essential element of this claim and I find as a fact that there was no reliance on the written statement of the odometer reading on the Transfer Tax form.
>
> …
>
> [29] Finally, to succeed in this Action the Claimant must also prove that he suffered damages as a consequence of his reliance on the Defendant's statement…
>
> [31] In summary, I find that the Claimant has not proven on a balance of probabilities that the Defendant made a misstatement of a material fact which induced him to enter into the contract of purchase and sale for the Vehicle or that he suffered damages as a consequence. Accordingly, the Claim is dismissed.
>
> *Feng v. Yang* 2012 BCPC 127 (BC Provincial Court)

Battery and Check Engine Light

[93] Mr. Bunyak noted in his written complaint that the check engine light came on shortly after purchase. He took it to Minit-Tune who recommended the spark plugs be changed: see page 16 of the Affidavit Exhibits.

[94] Mr. Bunyak's oral evidence suggests the issue was a battery. He speculates that the Dealer was aware of the check engine light issue but did not provide any evidence of that fact. His evidence was that the Ford was parked for some time without being run when the battery went dead. He then replaced it and the check engine light has not gone on. He believes the battery was the issue. The receipt for the battery shows it was purchased on September 24, 2014, some nine months after the Ford was purchased. He believes the Dealer is responsible for this cost. The evidence from Mr. Bunyak does not suggest there was a misrepresentation by the Dealer regarding the battery or the check engine light. As such, there is no jurisdiction for me to deal with that issue.

[95] If Mr. Bunyak believes he is entitled to damages on this point, he needs to have that addressed in another venue such as the courts. It is probably for this reason that the check engine light and battery issue was not one of the allegations in the Notice of Hearing. Even if I had jurisdiction, without this allegation being in the Notice of Hearing, it would be unfair for me to adjudicate the issue as the dealer did not have proper notice. I make no further comment on the battery and check engine light concern raised by Mr. Bunyak.

Compliance Order

[96] I have found the following deceptive acts or practices committed by the Dealer through its employee Darrin Cotnam contrary to the BPCPA:

(a) Darrin Cotnam and the Dealer misrepresented the ex-lease status of the Ford, being a material fact, on the purchase agreement and they created an ambiguity about the ex-lease history of the Ford by making a contradictory declaration on the APV9T Transfer/Tax Form.

(b) Darrin Cotnam and the Dealer represented that the Ford would have a full tank of gas if purchased by Mr. Bunyak when that was not the case. The proven loss to Mr. Bunyak was $110.

(c) Darrin Cotnam and the Dealer misrepresented the mileage of the Ford on the purchase agreement and the APV9T Transfer/Tax Form. There is no

evidence that Mr. Bunyak relied on this misrepresentation in deciding to purchase the Ford or that he has suffered any damages as a result.

[97] I also have concerns of the Dealer's conduct regarding the slipping transmission. There is sufficient evidence to show that the Dealer was aware of the Ford's slipping transmission and took steps to hide that fact.

[98] In order to protect the public interest, ensure the Dealer's future compliance and remedy the breaches of the BPCPA noted above, I make the following compliance order:

(a) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are to abide by the *Business Practices and Consumer Protection Act*,

(b) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are to refrain from making misrepresentations to consumers during a consumer transaction,

(c) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are to disclose all material facts to consumers, and not try and hide materials facts,

(d) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are joint and severally to pay to Mike Bunyak the sum of $110 for the tank of gas for the Ford, and

(e) Darryl's Best Buys Auto Sales Ltd. is to ensure it has two years of complete business records regarding the sale of motor vehicles at its business premises as required by section 11 of the *Motor Dealer Act* and section 20 of the *Motor Dealer Act Regulation*, and to produce those records to the Registrar or his delegate when directed and within the time directed,

(f) Darrin Joseph Cotnam is to retake and successfully complete the Salesperson Certification Course at his own cost within 90 days of this compliance order being issued, or before any renewal of his salesperson licence, and

(g) Darryl's Best Buys Auto Sales Ltd. and Darrin Joseph Cotnam are joint and severally liable to pay the VSA's investigation and hearing costs in the amount of $3167.68. I have reduced the full amount of $4,252.35 by 30% to reflect that some of Mr. Bunyak's claims were unproven.

Administrative Penalty

[99] In this particular case, I find the breaches of the BPCPA warrant an administrative penalty in order to deter future similar conduct and as a means to ensure future compliance. In considering the correct administrative penalty, I must consider the factors in section 164(2) of the BPCPA and the whole of the case. Administrative penalties may be imposed to obtain compliance and deter future non-compliance, but not to penalize: *Walker v. British Columbia (Securities Commission)* 2011 BCCA 415 at para. 68 (Court of Appeal) and *Harris v. Windmill* (Registrar Decision, April 10, 2013) paras. 54-57, affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers* 2014 BCSC 903 (BC Supreme Court).

[100] I will first review each of the section 164 factors in turn for each of the three noted breaches.

(a) previous enforcement actions for contraventions of a similar nature by the person;

(i) Ex-lease Declaration

[101] There are no substantiated past contraventions for misrepresenting the ex-lease status of a vehicle by the Dealer or Darrin Cotnam.

(ii) Tank of Gas

[102] There are no past substantiated contraventions for misrepresenting a term of a consumer transaction such as including a tank of gas, or something similar by the Dealer or Darrin Cotnam.

(iii) Odometer

[103] There are no past substantiated contraventions for misrepresenting the odometer of a motor vehicle or a similar statement about the past history of a motor vehicle by the Dealer or Darrin Cotnam.

(b) the gravity and magnitude of the contravention;

(i) Ex-lease Declaration

[104] Declaring whether a vehicle is an ex-lease vehicle or not is deemed to be a material fact and a material consideration for a consumer to purchase a motor vehicle. A misrepresentation regarding ex-lease may impact consumers financially. This is not a trivial matter.

(ii) Tank of Gas

[105] Failure to provide a tank of gas as represented does not rise to the level of failing to declare ex-lease. The cost to a consumer is not generally large, so this is on the lower end of the "gravity and magnitude" scale.

(iii) Odometer

[106] Properly declaring the odometer reading of a vehicle is a material fact. This is a major indicator of the vehicle's historical use and operational life, and potential future life span. Odometer readings affect the value placed on a used motor vehicle.

(c) the extent of the harm to others resulting from the contravention;

(i) Ex-lease Declaration

[107] Based on the evidence, this breach was confined to this one transaction although the dealer suggested it often declared ex-lease in this way in the past.

(ii) Tank of Gas

[108] Based on the evidence, this breach was confined to this one transaction.

(iii) Odometer

[109] Based on the evidence, this breach was confined to this one transaction.

(d) whether the contravention was repeated or continuous;

(i) Ex-lease Declaration

[110] No clear evidence was presented that this type of infraction was repeated or continuous by the dealer or Mr. Cotnam. As noted above, the dealer intimated that this is how they used to declare ex-lease.

(ii) Tank of Gas

[111] Again, there is no evidence that failing to provide a tank of gas as promised was a repeated or continuous infraction.

(iii) Odometer

[112] There is no evidence that failing to properly declare the odometer reading on the purchase agreement was a repeated or continuous infraction.

(e) whether the contravention was deliberate;

(i) Ex-lease Declaration

[113] I find the manner in which ex-lease was declared in this transaction was deliberate. The dealer, through Mr. Cotnam, did declare the vehicle as an ex-lease vehicle on the APV9T Transfer/Tax Form, but declared the vehicle as not an ex-lease vehicle on the purchase agreement. I cannot find this was an innocent or negligent error, as the dealer (Mr. Cotnam) had clear knowledge of the ex-lease status of the vehicle and declared that on the APV9T which would have been completed around the same time as the purchase agreement. The Dealer's position during the hearing was that it could not tell if the lease declaration was actually true and took no steps to confirm its belief. The Dealer simultaneously declaring the Ford as an ex-lease and not an ex-lease without regard of the truth of those representations amounts to reckless conduct which in civil cases is considered deliberate conduct: *Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond*, 2009 BCSC 1335 (BC Supreme Court).

(ii) Tank of Gas

[114] I have no evidence to suggest the failure to provide a tank of gas as represented was deliberate. I also find this is not an innocent misrepresentation, which means the dealer did all it could and merely got it wrong. I find the Dealer was negligent in ensuring there was a full tank of gas in the Ford as it had represented.

(iii) Odometer

[115] There is insufficient evidence to suggest the misrepresented odometer reading on the purchase agreement and APV9T was deliberate. As I noted earlier, the difference in mileage could be as simple as substituting a 9 for a 7. The Dealer would clearly have access to the actual mileage of the Ford as noted on its odometer, so I cannot find this was an innocent misrepresentation. I find the dealer was negligent in recording the correct mileage on the documents.

(f) any economic benefit derived by the person from the contravention;

(i) Ex-lease Declaration

[116] The economic benefit for failing to declare ex-lease was not quantified at the hearing. It would certainly be something less than the sale price of $8,299 (price of Ford of $8,000 plus $299 documentation fee). For Mr. Cotnam, it would be his commission on this sale.

(ii) Tank of Gas

[117] Representing the Ford would be delivered with a full tank of gas and not doing so saved the Dealer about $110. For Mr. Cotnam, the benefit for him would be his commission on this sale.

(iii) Odometer

[118] The economic benefit for improperly declaring the odometer reading was not quantified at the hearing. It would certainly be something less than the Ford's sale price of $8,299. For Mr. Cotnam, it would be his commission on this sale.

(g) The person's efforts to correct the contravention.

(i) Ex-lease Declaration
(ii) Tank of Gas
(iii) Odometer

[119] The above three breaches can be discussed concurrently on this factor. The evidence shows the Dealer did try to resolve this matter and made offers to Mr. Bunyak: Exhibit 3, emails between the Dealer and Mr. Bunyak. In this case, it appears Mr. Bunyak's position that the transaction be completely reversed and he reimbursed for certain expenses stood in the way of a resolution to his complaint. The evidence indicates the Dealer was willing to provide some sort of compensation, but was not willing to unwind the transaction. I note my decision is that Mr. Bunyak is entitled to some compensation, but not to unwind the transaction.

[120] I would also note that the Dealer's last offer to settle came with a threat to sue Mr. Bunyak for any hearing costs the Dealer incurred at this hearing if he did not accept their final offer: Exhibit 3 at the hearing.

(h) similar cases decided by the Registrar

[121] In the case of *Lamontagne v. Bill Howich Chrysler*, (Registrar's decision, August 12, 2008, File #08-70064) the consumer claimed for damages of over $12,000 for the dealer's failure to declare damage over $2,000. The dealer was found to have committed a deceptive act or practice but the consumer's actual loss was determined to be $313.52. The dealer received an administrative penalty of $1,000. In that case the Dealer's failure to disclose the damage of the vehicle was found to be negligent. No salesperson was identified as being liable in the *Lamontagne* case.

[122] In *Crowston v. Platinum Auto Sales* (Registrar's decision, April 26, 2012, Hearing File 12-002), the consumer claimed the dealer failed to declare damage over $2,000. The Registrar's decision noted the consumer did not rely on the dealer's disclosure, or failure to disclose, in making his decision to purchase the vehicle in question. There was also no evidence of a loss suffered by the consumer. While the dealer was found to have committed a deceptive act or practice, the consumer was denied a remedy. The dealer was found to have deliberately misrepresented the vehicle's damage and received an administrative penalty of $5,000. The distinguishing fact between this case and that of Platinum is that Platinum was the subject of eight prior contraventions, including failing to declare prior damage. The salesperson's licence was suspended and a condition was placed on his licence to retake the salesperson certification course at his cost.

[123] In *Re: Northland Chrysler Jeep Dodge and Fredrick Brent Marshall* (Registrar, August 13, 2015, 13-08-001) the dealer was found to have produced misleading advertising and made misrepresentations to consumers about the price of motor vehicles. Acting Registrar Baker decided that in terms of liability, the salesperson (dealer principal) was to be treated the same as the dealer where he had personally approved the advertising, but the amount of the penalty was 10% of that of the dealer's as reflected in the BPCPA itself. In that case the salesperson received a $600 penalty for failing to price a vehicle as advertised in a flyer and the dealer $6,000; and $600 for improperly describing one vehicle and the dealer $6,000. There were other breaches. In that case, Acting Registrar Baker considered the overall conduct of the dealer and the salesperson, and noted they deliberately acted to deceive consumers in four different ways, and also issued a general penalty of $20,000 on the dealer and $2,000 on the salesperson (dealer principal). There had been past breaches by the dealer that weighed into the amount of the administrative penalties.

[124] Based on the BPCPA factors, taking into consideration the various past precedents, the $110 the Dealer and Mr. Cotnam are to pay Mr. Bunyak, the fact this is the first time the Dealer and Mr. Cotnam have been found to be in breach of the BPCPA, and the goal of deterring future similar infractions; I find the following administrative penalties are warranted:

	Darryl's Best Buys Auto Sales Ltd.	Darrin Cotnam
Deliberately misrepresenting the ex-lease status of the Ford – a material fact	$2,500	$250
Negligently misrepresenting the consumer transaction included a full tank of gas for the Ford	$250	$25
Negligently misrepresenting the odometer reading on the purchase agreement and APV9T Transfer/Tax form – a material fact	$1000	$100
Total of Administrative Penalties	**$3,750**	**$375**

Comment on Karen Wardrop

[125] Karen Wardrop also represented the Dealer at this hearing. From her representation, it appears Ms. Wardrop's involvement at the Dealer is fairly substantial, and she may be interacting with consumers during the sale or lease of motor vehicles. If this is the case, Ms. Wardrop must be a licensed salesperson, but currently has no license. If Karen Wardrop "*in any way participates in the soliciting, negotiating or arranging for the sale* [includes a lease] *of a motor vehicle to a person*", she must be licensed as a salesperson: section 1 of the *Motor Dealer Act*, definition of "salesperson" and the *Salesperson Licensing Regulation*, B.C. Reg. 241/2004. As noted by Madame Justice Sharma of the BC Supreme Court:

> [40] …The wording of the statute [*Motor Dealer Act*] is very clear that one cannot engage in activity under the definition of salesperson unless licensed.
>
> *Fryer v. Motor Vehicle Sales Authority of British Columbia* 2015 BCSC 279

A dealer who allows a salesperson to work as such while unlicensed can be subject to a suspension or cancellation of their motor dealer registration: *Re: SG Power Products Ltd.* (Registrar, September 15, 2008, File 08-70569).

Right to request a reconsideration or a judicial review

[126] The administrative penalties and the compliance order may be reconsidered in accordance with the *Business Practices and Consumer Protection Act*, Part 12. A request for reconsideration must be submitted in writing within 30 days of receiving

the compliance order and notice of administrative penalty. A request for reconsideration may be submitted to the VSA to the attention of Daryl Dunn, Manager of Compliance and Investigations. A request must be accompanied with the grounds for the reconsideration and any new and previously undiscoverable evidence that is substantial and material to the determinations, as required by sections 181 – 182 of the BPCPA.

[127] A person may also petition the BC Supreme Court to review this decision pursuant to the *Judicial Review Procedure Act* within 60 days of receiving this decision: section 7.1 of the *Motor Dealer Act* and section 57 of the *Administrative Tribunals Act*.

Date: October 5, 2015

"Original Signed"

Ian Christman, J.D.
Registrar of Motor Dealers