Hearing File No. 16-06-001
Investigation File No. 16-01-138

Neutral Citation: 2016-BCRMD-011

RE: THE *MOTOR DEALER ACT* R.S.B.C. 1996 C. 316 and the *BUSINESS PRACTICES AND CONSUMER PROTECTION ACT* S.B.C. 2004 C. 2

BETWEEN:

TANYA MCRAE

Complainant

AND:

PINNACLE CAR SALES & LEASING LTD. *DBA* PINNACLE MOTORS (Dealer #30793)

Motor Dealer

AND:

CARMINE RISI (Salesperson #111396)

Salesperson

AND:

JOHN BOND (Salesperson #116940/Lapsed)

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing:	July 22, 2016, at Surrey, British Columbia
Appearances for:	
The Complainant	In person
Pinnacle Motors	Carmine Risi
Carmine Risi	In person
John Bond	In person
Vehicle Sales Authority	Daryl Dunn, Manager of Compliance and Investigations
	Chris Coleman, Compliance Officer

Introduction

[1] This hearing was to review allegations that Pinnacle Car Sales and Leasing Ltd. *dba* Pinnacle Motors ("Pinnacle"), Carmine Risi and John Bond (collectively "the Respondents") breached the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the "BPCPA") by representing to Tanya McRae that they would sell her 2009 Chevrolet Tahoe (the "Tahoe") and pay off the lien, but instead they failed to pay off the lien in a timely manner and required Ms. McRae to enter into an

agreement to pay Pinnacle $3,400 for a shortfall in the selling price of the Tahoe in order to discharge the lien, when there was no such shortfall. Ms. McRae had been making monthly payments to Pinnacle.

[2] After hearing from Ms. McRae and John Bond, a former employee at Pinnacle who was a part of this transaction, Mr. Risi agreed to refund Ms. McRae all payments that she had made and to cancel the agreement. I made that a condition of the registration of Pinnacle. I also provided Mr. Risi an opportunity to discuss what regulatory action should be taken to ensure future compliance by him and by Pinnacle.

[3] I heard from four witnesses: VSA Compliance Officer Chris Coleman; Carmine Risi, the owner of Pinnacle and a licensed salesperson who gave evidence on his behalf and on behalf of Pinnacle; Tanya McRae, the complainant; and John Bond who was the salesperson on this deal. Placed in evidence was an affidavit with attached exhibits from Chris Coleman; and bank statements and phone records provided by Ms. McRae.

The Law

[4] I have detailed in past decisions the applicable law under the BPCPA. I summarize that law here:

(a) A motor dealer is a "supplier" under the BPCPA when conducting a consumer transaction: section 1 of the BPCPA,

(b) A supplier must refrain from committing a deceptive act or practice (making misrepresentations) during a consumer transaction: section 5(1) of the BPCPA,

(c) A deceptive act or practice is one that tends to lead a consumer into making an error of judgement during a consumer transaction: section 4(1) of the BPCPA,

(d) Certain conduct is deemed to be a deceptive act or practice. The allegations in this case suggests Pinnacle represented to Ms. McRae that she had obligations under the consumer transaction which she did not (a debt owing to Pinnacle), which is deemed a deceptive act or practice: section 4(3)(b)(iv),

(e) A deceptive act or practice may occur before, during or after a consumer transaction: section 4(2) of the BPCPA, and

(f) If there is some evidence that a deceptive act or practice occurred, the burden shifts to the supplier to prove that there was no deceptive act or practice: section 5(2) of the BPCPA.

Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers, 2014 BCSC 903, affirming *Harris v. Windmill Auto Sales & Detailing Ltd.*, (April 10, 2013, Registrar, Hearing File No. 12-030)

Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia, 2014 BCSC 894, affirming *Knapp v. Crown Auto Body and Auto Sales Ltd.* (September 21, 2009, Registrar, File 08-70578).

Bunyak v. Darryl's Best Buys Auto Sales Ltd. et al. (October 5, 2015, Registrar, File 14-12-002)

[5] In considering witness testimony, I keep in mind the proper assessment of witness testimony.

Bradshaw v. Stenner, 2010 BCSC 1398 (BC Supreme Court) at paragraphs 185 – 187; affirmed by 2012 BCCA 296 (BC Court of Appeal); leave to appeal to the Supreme Court of Canada refused *Kimberley Shane Stenner v. Lori Noreen Bradshaw et al.*, 2013 CanLII 11302 (SCC)

Crest Realty Westside Ltd. v. W & W Parker Enterprises Ltd., 2014 BCSC 1328 (BC Supreme Court) paras. 43-44, affirmed 2015 BCCA 447 (BC Court of Appeal)

Discussion

[6] The critical issue is when Pinnacle sold the Tahoe on behalf of Ms. McRae did Pinnacle receive sufficient funds to discharge the lien against the Tahoe, or was there a shortfall necessitating Ms. McRae to make up the difference in order to discharge the lien?

[7] The documentary evidence presented and the evidence of John Bond makes it clear that when the Tahoe was sold, there were sufficient funds to discharge the lien. I do not accept the evidence of Mr. Risi. Mr. Risi provided three different explanations during the course of the investigation and at the hearing as to why the lien was not discharged in a timely manner. Also, Mr. Risi was avoiding answering questions during the hearing. For example, Mr. Risi was asked to look at an APV9T Transfer/Tax Form and asked who Andrew was at the dealership who signed that form on behalf of the dealership. Mr. Risi responded he was not sure and would

have to check. When Mr. Bond was asked the same question he readily identified Andrew Dowling as the person signing the APV9T and was the sales manager on duty at the time. I find it very difficult to believe that Mr. Risi, the owner of Pinnacle, would not know one of his sales managers.

[8] This matter came about when Ms. McRae and John Bond discussed selling Ms. McRae's Tahoe in the USA. Mr. Bond told Ms. McRae, they would sell the Tahoe and assured her there would be sufficient funds to discharge the lien on the Tahoe. Mr. Bond stated he would then be able to sell Ms. McRae another vehicle. Instead of selling the vehicle in the USA there was an opportunity to sell the Tahoe locally. A deal was completed. The purchase agreement for the sale shows the selling price of the Tahoe was $29,995. Pinnacle accepted payment for the Tahoe by taking in two vehicles on trade and credited the buyer $7,495 for those trades with the remainder being paid by cash or cash equivalent. The lien to be discharged was $28,481.20 (page 37 of the Affidavit Exhibits).

[9] John Bond noted that Mr. Risi was a part of the sale of the Tahoe. Mr. Bond noted that initially Andrew Dowling appraised the Toyota Celica trade-in at $2,000 actual cash value. Mr. Bond then spoke with Mr. Risi who agreed with Mr. Bond that the Celica had an actual cash value of $3,000. The second trade-in was valued at $6,000 actual cash value. The actual cash value for the two trade-ins totaled $9,000. The crediting of $7,495 to the buyer of the Tahoe is normal as dealers offer a "wholesale" price as dealers make money reselling trade-ins. Mr. Bond also gave evidence that using "dealer math" Pinnacle got $31,500 from the sale of the Tahoe when taking the two trade-ins into account ($22,500 (subtotal on the purchase agreement)) + $9,000 actual cash value for the trade-ins). Mr. Risi was offered to question Mr. Bond on this evidence and Mr. Risi did not do so. Mr. Bond's evidence above was not successfully challenged.

[10] Mr. Risi's written response to Ms. McRae's complaint (page 34 of the Affidavit exhibits) noted that Pinnacle had to sell the Tahoe for $25,000. A review of the purchase agreement and the evidence of Mr. Bond do not support Mr. Risi's written statement. During testimony Mr. Risi said he was delayed in paying out the lien because he could not get a hold of Ms. McRae over the phone. Ms. McRae provided her phone records which showed she was trying to call Pinnacle but Pinnacle called only a few times. Finally, Mr. Risi said he was delayed in paying the lien because he did not receive payment for the Tahoe from the bank. Mr. Risi inferred that when Pinnacle sold the Tahoe it was financed. It was pointed out to Mr. Risi that the purchase agreement specifies that the sale of the Tahoe was not financed. There is a big zero on the three lines that state "Amount Financed, Total Finance Charge and Total Deferred Balance".

[11] Mr. Bond's evidence was that Mr. Risi told him to call Ms. McRae and tell her she owed Pinnacle $3,400 and get her to pay. Mr. Bond stated a deal is a deal and he promised Ms. McRae that her lien would be discharged. Mr. Bond refused to call Ms. McRae which Mr. Bond says ultimately led to him no longer being employed at Pinnacle. Ms. McRae's evidence does not implicate Mr. Bond in arranging for her to sign an agreement to pay Pinnacle the $3,400. The evidence is that representation was made by Mr. Risi, owner of Pinnacle (Transcript of Proceedings, page 18).

[12] Ms. McRae says she was asked to come in and sign an agreement that she owed Pinnacle $3,400 and she made arrangements to pay that by way of pre-authorized payments of $500 a month. Ms. McRae's testimony is supported by a copy of the agreement at page 35 of the Affidavit exhibits, and her bank statements showing payments to Pinnacle.

[13] I find on a balance of probabilities that Pinnacle and Carmine Risi committed a deceptive act or practice by stating to Ms. McRae that she owed Pinnacle $3,400 because Pinnacle had paid the lien of $28,481.20 and there was a shortfall in the sale proceeds for the Tahoe. Ms. McRae acted on that misrepresentation to her financial detriment. I find that Mr. Bond did not participate in this deceptive act or practice.

[14] There were two other issues raised during the course of the hearing. First, was that Pinnacle was selling a vehicle on consignment contrary to the condition on its registration prohibiting consignment sales. Second, was that Ms. McRae signed certain documents in blank and that her name appears to be signed on other documents which are not her signature. In reviewing the Notice of Hearing, I do not see these noted as allegations against the Respondents. It would be unfair for me to make any decision on them at this time without the Respondents having received some notice. I do not take these two issues into consideration in my decision here.

Compliance

[15] Pinnacle has made restitution to Ms. McRae and cancelled the automatic bank debits. The focus is now to obtain compliance and attempt to ensure, with some reasonable surety, the future compliance of Pinnacle and of Mr. Risi.

[16] Pinnacle and Mr. Risi are the subjects of two undertakings that included allegations of failing to pay liens in a timely manner. They undertook to ensure vehicles sold to consumers would be transferred free and clear of any liens and they undertook to pay any liens immediately after the transaction occurs. In both those two undertakings Pinnacle and Mr. Risi undertook to pay investigation costs of the Registrar, and administrative penalties of $500 and $2,000 respectively.

[17] Mr. Bond spoke in support of Pinnacle regarding any compliance action to be taken. Mr. Bond noted at the hearing that Pinnacle is now in a business relationship with Pioneer Chrysler and uses their dealer portal when it comes to financing vehicles. Mr. Bond stated Pioneer Chrysler will require liens to be paid off in a timely manner. Mr. Bond noted that money always seemed to be tight at Pinnacle. Mr. Bond commented that requiring Pinnacle to pay any administrative penalty could be detrimental to Pinnacle.

[18] I take all these factors into consideration in fashioning a compliance order, administrative penalties and conditions on registration of Pinnacle and on the licence of Mr. Risi.

(a) Compliance Order under the BPCPA

[19] I make the following compliance order that Pinnacle and Mr. Risi are to:

(a) Abide by the *Business Practices and Consumer Protection Act*, the *Motor Dealer Act* and their regulations,

(b) Not offer a motor vehicle for sale unless that motor vehicle is free and clear of liens,

(c) Prior to selling the motor vehicle, Pinnacle must conduct a lien search on each vehicle offered for sale and must provide a copy of a recent lien search to each consumer prior to them agreeing to purchase a motor vehicle,

(d) The conditions in the Pinnacle Undertakings signed by the Registrar on June 16, 2014, and September 15, 2015, remain in full effect.

(e) Reimburse the Registrar $1,249.32 for investigation and hearing costs.

Any words used in the above compliance order that are defined in the *Business Practices and Consumer Protection Act* or the *Motor Dealer Act* have the meaning noted in those acts. Pursuant to section 155(6) of the *Business Practices and Consumer Protection Act*, Pinnacle and Mr. Risi are jointly and severally liable to comply with the compliance order.

[20] The requirement noted in paragraph 19(b) takes the existing conditions in the two Undertakings a step further. Now, Pinnacle cannot even display a vehicle for sale without first ensuring it is lien free.

(b) Conditions on Registration of Pinnacle and the Licence of Risi

[21] Pinnacle continues to have problems paying off liens. In order to protect the public I would add as a condition of Pinnacle's motor dealer registration that they are not to offer vehicles for sale to the public that have liens. All vehicles offered for sale must be lien free prior to being displayed, advertised and offered for sale. This condition is similar to paragraph 19(b) - the compliance order. This condition can be reviewed in one year's time to assess Pinnacle's compliance.

[22] During the course of the hearing, I canvassed with Mr. Risi his need to retake the Salesperson Certification Course. It appeared that Mr. Risi does not fully understand all the legal requirements placed upon him as a dealer and as a salesperson. Mr. Risi indicated he was amenable to retaking the Salesperson Certification Course. A condition is placed on Mr. Risi's salesperson licence to retake and successfully complete the Salesperson Certification Course at his own cost within 90 days of the date this decision is issued.

(c) Administrative Penalty under the BPCPA

[23] During the hearing I gave Mr. Risi an opportunity to speak about the prospect of an administrative penalty being issued. He stated that it was not Pinnacle's intention to withhold payment of the lien payout. It was at this time he said Pinnacle was waiting for payment from the bank on the Tahoe, which I have noted was not the case. Mr. Risi noted that the lien was eventually paid and that Pinnacle was refunding Ms. McRae the money she had paid and canceling the agreement requiring her to pay $3,400. Mr. Risi apologized and said he probably should have better researched the terms of the deal to sell the Tahoe for Ms. McRae and that he had relied on others when he and Pinnacle took the position that they did in regards to Ms. McRae's complaint. I would note that during the hearing Mr. Risi clearly inferred several times that the deal to sell the Tahoe and pay off the entire lien was done by John Bond and not with Mr. Risi's approval. Mr. Bond was an employee of Pinnacle and I would note that Mr. Risi was an active participant in the sale of the Tahoe having provided the valuation on the Toyota Celica that was used as a trade-in towards the purchase of the Tahoe: (Transcript of Proceedings, page 57).

[24] In order to deter future non-compliance I may consider the necessary deterrence needed on Pinnacle specifically and on the industry generally in setting an administrative penalty. I am also required to consider the factors set out in section 164(2) of the BPCPA and consider the entire transaction.

Re Cartaway Resources Corp. 2004 SCC 26, [2004] 1 S.C.R. 672 (Supreme Court of Canada), at paragraphs 38 - 39

Walker v. British Columbia (Securities Commission) 2011 BCCA 415 (Court of Appeal), at paragraph 68

Harris v. Windmill Auto Sales & Detailing Ltd., (April 10, 2013, Registrar, Hearing File No. 12-030) paragraphs 54 – 57, affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (Supreme Court)

[25] I would also note that a separate administrative penalty may be levied for breaching an undertaking: section 164(1)(f) of the BPCPA. However, I note that was not advanced in the hearing notice and I therefore will only address this breach of the BPCPA.

(i) Section 164(2)(a) factor – previous similar enforcement actions

[26] As noted, Pinnacle has entered into two undertakings involving breaches of the BPCPA of a similar nature – failure to pay out liens. Pinnacle was well aware of its duty to pay out liens in a timely fashion. Administrative penalties of $500 and $2,000 were issued in those cases. It appears those administrative penalties did not act as a sufficient deterrent on Pinnacle and Mr. Risi.

(ii) Section 164(2)(b) factor – gravity and magnitude of the contravention

[27] The gravity of the contravention is serious. Pinnacle misrepresented to Ms. McRae that she owed Pinnacle money to cover a shortfall in the sale of the Tahoe. This was clearly note the case. This type of conduct reflects badly on this dealership and on the industry itself.

(iii) Section 164(2)(c) factor – the extent of the harm to others due to the contravention

[28] The evidence presented to me is that this deceptive act (misrepresentation) was confined to the transaction with Ms. McRae.

(iv) Section 164(2)(d) factor – the contravention was repeated or continuous

[29] While there was only one misrepresentation to Ms. McRae, Mr. Risi and Pinnacle continued to represent that there was a shortfall in the lien payout as noted in their written response to Ms. McRae's complaint: page 34 of the Affidavit exhibits.

(v) Section 164(2)(e) factor – whether the contravention was deliberate

[30] Mr. Risi says he should have looked more closely at the Tahoe deal before he and Pinnacle took the position that they did. Mr. Risi is claiming that Pinnacle and he were negligent. The evidence from Mr. Bond is clear that Mr. Risi was a part of the deal to sell the Tahoe. Mr. Bond was also clear that he was told by Mr. Risi to call Ms. McRae and get her to pay a further $3,400 and that Mr. Bond refused and explained why he refused to do so. I am satisfied that Mr. Risi was not satisfied with the amount of money Pinnacle ultimately made on this deal and that he came up with the story that the Tahoe sold for less than the lien payout amount and Ms. McRae had to make up the difference. I find the conduct of Mr. Risi, and therefore of Pinnacle, was deliberate.

(vi) Section 164(2)(f) factor – any economic benefit received from the contravention

[31] The evidence shows the following:

Purchase Price of the Tahoe	$29,995
Credit given for the two trade-in vehicles	-$7,495
Actual cash value for the two trade-in vehicles	$9,000
Lien paid out	-$28,481.20
Total dealer revenue on the sale of the Tahoe	$3,018.80
Additional payments required from Ms. McRae	$3,400.00
Total expected dealer revenue	$6,418.80

Pinnacle would have received a total of $6,418 in revenue from this deal if its deceptive act had come to complete fruition. Ms. McRae would have suffered a loss of $3,400.

(vii) Section 164(2)(g) factor – the person's efforts to correct the contravention

[32] Pinnacle and Mr. Risi took no steps to correct the contravention. They only agreed to do so at the end of the hearing and once all the evidence was heard.

(viii) Considering the whole of the case

[33] A deliberate misrepresentation of this nature impacts the confidence consumers have of the entire motor dealer industry in B.C. Pinnacle and Mr. Risi were steadfast in their position until all the evidence was heard and it became clear what had transpired. I find this misrepresentation was not an error and Mr. Risi and Pinnacle were not forthcoming in admitting to this misrepresentation, which prolonged the resolution of Ms. McRae's complaint. This type of conduct is not one that is tolerated by the industry. It is one of grave concern and two administrative penalties have not had the necessary deterrent effect on Pinnacle.

(ix) Considering other cases

[34] In determining what would be an appropriate administrative penalty, I have also considered the following Registrar decision which I find is the closest proximate case to this one: *Re: Golden Year Auto Broker & Bo Pan* (April 28, 2015, File 14-11-011, and Registrar).

[35] The case of *Golden Year Auto Broker & Bo Pan* involved misleading advertising and failing to disclose material facts to consumers contrary to the BPCPA. Golden Year Auto Broker & Bo Pan had previously entered into <u>one</u> undertaking to abide by the BPCPA and had failed to do so. The dealership and Bo Pan were also found to have advertised two vehicles for sale that were not compliant with the *Motor Vehicle Act*. The administrative penalty issued in that case was $5,000 for the advertising breaches. Golden Year had relinquished its dealer registration and Bo Pan had relinquished his salesperson licence by the time of the hearing. Even so, they were banned from reapplying for either for five years.

[36] I have also considered the series of decisions in the *Parkwood Auto* matter (August 6, 2010, Registrar, 07-70285, 07-70263, 08-70631, and 08-70997) where four complaints were heard simultaneously for breaches of the BPCPA in four different transactions over a period of a year. In those cases, the administrative penalties levied ranged from none to $10,000 based partially on the dealers repeated breaches of the BPCPA. In addition to the administrative penalty, the dealer's registration was canceled and the salesperson licence of the owner was also cancelled.

(x) Amount of Administrative Penalty

[37] In considering all the above factors, the past precedents and the overall case, I believe an administrative penalty in the amount of $7,500 is warranted to act as a necessary deterrent. A Notice of Administrative Penalty is ordered against Pinnacle in the amount of $7,500.

[38] I have not issued an administrative penalty on Mr. Risi personally as a salesperson. I find that Mr. Risi was acting in his capacity as owner of Pinnacle in this transaction and therefore his actions are those of Pinnacle. The above compliance order against Mr. Risi and the conditions on his licence are necessary to address his personal oversight of the dealership.

Suspension or Cancelation of Pinnacle's Registration

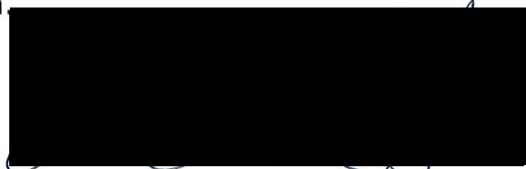
[39] I have considered whether it would be appropriate to cancel or suspend Pinnacle's registration as a motor dealer. I note that this is the third similar transgression in three years. The mitigating factor in not cancelling the registration of Pinnacle was the evidence that Pinnacle recently entered into a business arrangement with Pioneer Chrysler which should address the issue of failing to pay out liens in a timely manner.

Reconsideration and further reviews

[40] The Compliance Order and Notice of Administrative Penalty may be reconsidered in accordance with Part 12, Division 1 of the BPCPA. If there is a request for reconsideration it must be accompanied with the grounds for the reconsideration and the new evidence (as defined by the BPCPA) that are being relied on in requesting the reconsideration. Such a request must be received by the VSA within 30 days of Pinnacle receiving these reasons and the Compliance Order and Notice of Administrative Penalty.

[41] Section 7.1(t) of the Motor Dealer Act combined with section 57 of the Administrative Tribunals Act place a 60 day time limit from the date these reasons are issued to seek a judicial review of this decision.

Dated: **September 26, 2016**



Ian Christman, J.D.
Registrar of Motor Dealers