



Neutral Citation: 2018-BCRMD-003

**IN THE MATTER OF THE *MOTOR DEALER ACT* R.S.B.C. 1996, C. 316 AND THE
BUSINESS PRACTICES AND CONSUMER PROTECTION ACT S.B.C. 2004, C. 2**

PATRICK BOLGER

Complainant

And

VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Complainant

And

**CARKRAFT TRADING LTD. DBA BURNSIDE AUTO
(Dealer Registration #30302)**

Respondent Dealer

And

**IAN FRASER
(Salesperson Licence #105470)**

Respondent Salesperson

**DECISION OF THE
REGISTRAR OF MOTOR DEALERS**

Date and place of hearing: February 15, 2018 at Surrey, British
Columbia

Appearances for:

Patrick Bolger	In person
Vehicle Sales Authority of British Columbia	Norm Felix, Manager of Compliance and Investigations
Carkraft Trading Ltd. dba Burnside Auto	No one
Ian Fraser	In person by telephone

Introduction

[1] This hearing involves an allegation that Carkraft Trading Ltd. dba Burnside Auto, dealer registration # 30302 ("Burnside") and Ian Fraser, salesperson licence

105470 did make a written representation on a Scotiabank credit agreement that they would on behalf of Mr. Bolger, undertake to pay-out a lien on a 2011 Hyundai Santa Fe (the "Hyundai") that Mr. Bolger traded-in towards the purchase of a 2016 Hyundai Santa Fe, and did not pay that lien. It is alleged that this constitutes a deceptive act or practice contrary to sub-section 5(1) of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA") and that this deceptive act or practice has caused Mr. Bolger to suffer a loss in the amount of the unpaid lien.

Burnside's non-attendance

[2] At the commencement of the hearing, I heard evidence that Burnside had been served the hearing notice in this matter. I also heard evidence that the principal of Burnside, Ian Kraft, advised the Authority he was not going to attend the hearing. Given this evidence, I found that Burnside had been properly served the notice of hearing to attend, and did not do so. In accordance with section 6(e) of the *Motor Dealer Act*, R.S.B.C. 1996, c. 316 ("MDA"), I elected to continue with the hearing in Burnside's absence.

Jurisdiction over Burnside

[3] Under subsection 4(3) of the MDA, a motor dealer registration is valid for one year. At the time of the hearing, Burnside's motor dealer registration had lapsed and Burnside was therefore no longer a registered motor dealer. However, at the time the complaint was received by the Vehicle Sales Authority of British Columbia (the "Authority") and its investigation commenced, Burnside was a registered motor dealer. Ian Kraft, the principal for Burnside, was interviewed during the investigation.

[4] Once a complaint is received by the Authority and an investigation for compliance with the legislation is instigated, the Authority retains jurisdiction to complete their investigation; and I retain jurisdiction as Registrar to review the complaint and investigation findings. To allow a registrant or licensee to lapse their licence to avoid liability to the Authority, to a consumer, and to the public, would be contrary to the purpose of the MDA and the BPCPA. It would also undermine the public's confidence in the ability of the Registrar to regulate this industry:

[50] It would be untenable to find that a complaint can be referred to the professional conduct committee for a formal investigation of a member in good standing, leading to a finding that there should be a Formal Complaint but that the Formal Complaint can be frustrated by the voluntary actions of the dentist to terminate his membership in the College by failing to pay his fees or by moving out of the jurisdiction.

[51] To permit Dr. Abouabdallah to oust an ongoing investigation by causing his membership in the College to lapse while continuing to practice as a dentist in another Canadian

jurisdiction would clearly undermine the public's confidence in the ability of the College to self-regulate.

Abouabdallah v College of Dental Surgeons of Saskatchewan, 2011 SKCA 99 (CanLII), (Sask. Court of Appeal), leave to appeal to the Supreme Court of Canada refused 2012 CanLII 18864 (SCC).

[5] As Burnside was a registered motor dealer at the time the Authority received Mr. Bolger's complaint and commenced its investigation, I find the Authority and I as Registrar, retain jurisdiction over Burnside in relation to Mr. Bolger's complaint.

The Law

(a) The BPCPA - deceptive acts or practices

[6] A motor dealer and a salesperson are suppliers under the BPCPA, when selling a motor vehicle to a consumer. In such a consumer transaction, the suppliers are to refrain from committing deceptive acts or practices as defined in the BPCPA: subsection 5(1) of the BPCPA. If it is alleged that a supplier committed a deceptive act or practice in respect of a consumer transaction, the onus is on the supplier to prove they did not do so: section 5(2) of the BPCPA.

[7] A deceptive act or practice is, essentially, a written or oral misrepresentation by a supplier or conduct by a supplier that has the tendency or capability of deceiving: subsections 4(1) of the BPCPA. A deceptive act or practice can occur before, during, or after a consumer transaction: subsection 4(2) of the BPCPA. The BPCPA also deems certain conduct to be deceptive acts or practices: subsection 4(3).

[8] A deceptive act or practice may occur innocently, negligently, or be deliberate. In any such case, a consumer is entitled to a remedy if they are harmed by the deceptive act or practice, because the consumer is entitled to rely on the representations of a motor dealer and salesperson: *Vavra v. Victoria Ford Alliance Ltd.*, 2003 BCSC 1297 (BC Supreme Court). Whether a deceptive act or practice is innocent, negligent, or deliberate affects the type of enforcement action taken by the Registrar. In the case of an innocent misrepresentation, no administrative penalties are issued: section 10 of the *Business Practices and Consumer Protection Act Regulation*, B.C. Reg. 294/2004.

[9] If the Registrar finds that a motor dealer or a salesperson has committed a deceptive act or practice, contrary to the BPCPA, the Registrar can issue a compliance order on various terms including paying a consumer restitution or unwinding a consumer transaction: section 155 of the BPCPA, and see *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court).

[10] To deter non-compliance with the BPCPA, the Registrar may levy administrative penalties against a motor dealer or salesperson, who has breached

that Act: section 164 of the BPCPA. The B.C. Legislature has also directed the Registrar to take such breaches of the BPCPA seriously. The B.C. Legislature has deemed it to be just grounds to cancel a motor dealer's registration for committing one deceptive act or practice contrary to the BPCPA: section 8.1(4)(b) of the *Motor Dealer Act*.

(b) Joint ventures

[11] Ian Fraser operated a motor dealership, since closed, called Everyday Motor Center, which was the trade name of 1028461 B.C. Ltd. ("Everyday"). Mr. Fraser operated Everyday at the same location as Burnside; and Burnside had a business relationship with Everyday. On the facts of this transaction, noted more fully below, Burnside and Everyday were conducting a joint venture of the Bolger transaction.

[12] A joint venture arises, when two or more persons agree (orally or in writing) to (a) contribute money, property, effort, knowledge, or other asset to a common undertaking, (b) in relation to a joint interest in the subject property, (c) with mutual control or management of the venture, and (d) with an expectation of profit and the right to participate in the profits.

- *Blue Line Hockey Acquisition Co., Inc. v. Orca Bay Hockey Limited Partnership*, 2008 BCSC 27, (CanLII), (BC Supreme Court), affirmed by 2009 BCCA 34 (CanLII), and leave to appeal to the Supreme Court of Canada refused by *Blue Line Hockey Acquisition Co., Inc. v. Aquilini*, 2009 CanLII 38635 (SCC).
- See also, *Linnebank v. 0786763 B.C. Ltd.*, 2016 BCSC 2220 (CanLII) (BC Supreme Court).

Discussion

[13] During the hearing, Mr. Fraser admitted to orchestrating the Bolger consumer transaction and the way that it unfolded. Mr. Fraser also admitted to the other facts discussed below.

The Everyday and Burnside business arrangement

[14] There was a business arrangement between Everyday and Burnside.

[15] One aspect of that business arrangement was that Mr. Fraser would act for Burnside and complete the transaction, including arranging financing for the consumer if necessary, if a consumer was interested in a vehicle that belonged to Burnside. To achieve this, Mr. Fraser was a licensed salesperson associated with Burnside. Mr. Fraser gave evidence that he did not manage the affairs of Burnside, such as paying Burnside's bills, but would bring those bills to Mr. Kraft's attention. Mr. Fraser also noted that Mr. Kraft did not participate in the day-to-day sales of Burnside. In this regard, Ian Fraser was a salesperson for Burnside and oversaw its day-to-day operations at the time of the Bolger transaction.

[16] Another aspect of the Everyday and Burnside business arrangement was Everyday's access to Burnside's dealer portal to obtain financing for consumers, who wished to purchase vehicles from Everyday. Mr. Fraser's evidence was that Everyday did not have its own access to a dealer portal. A dealer portal allows a dealer to apply for credit to multiple lenders and receive approvals electronically. The dealer portal also allows a dealer to print off and process the loan approval documents at the dealership. The system automatically generates the name of the dealer associated with that portal (in this case Burnside) on the loan documents. Mr. Fraser's evidence was that Burnside allowed Everyday to use its dealer portal, when Everyday was brokering financing for a sale of one of its vehicles and Burnside would receive a fee in respect of that sale.

[17] It is evident that Everyday and Burnside shared a physical location and resources to conduct their individual businesses. The sharing of the location and those resources allowed each to profit from the other's skill, assets, or an individual resource, such as the Burnside dealer portal.

[18] I find that when a transaction occurred, whereby Everyday sold a motor vehicle to a consumer and Burnside received a fee for obtaining financing for that sale, Everyday and Burnside were undertaking a joint venture in respect of that sale. This type of arrangement and classing it as a joint venture is consistent with past Registrar decisions: *Fellner v. Pinnacle Car Sales & Leasing Ltd. dba Pinnacle Motors* and *Pioneer Garage Ltd. dba Pioneer Chrysler Jeep* (Registrar, Hearing File 16-05-005, November 7, 2016).

The Bolger transaction

[19] Mr. Fraser agreed that, in the consumer transaction involving Mr. Bolger, Everyday owned and was the seller of the 2016 Santa Fe that Mr. Bolger purchased. Everyday also accepted the 2011 Santa Fe as a trade-in towards the purchase of the 2016 Santa Fe. This arrangement is reflected in the purchase agreement in evidence: Page 9, of the exhibits attached to the Affidavit of compliance officer Chris Coleman, sworn January 10, 2018 (the "Affidavit") and entered as Exhibit 2 at the hearing.

[20] The financing for the purchase of the 2016 Santa Fe was brokered by Burnside, with Mr. Fraser acting for Burnside. The Scotia Dealer Advantage Credit Agreement notes that Burnside is the seller (dealer), and that Burnside (the seller) undertakes to satisfy the lien to Eden Park of \$20,800 respecting the 2011 Santa Fe: page 10 of the Affidavit Exhibits. Burnside would receive a portion of the proceeds of sale from the Bolger transaction in the form of a fee for the use of its dealer portal.

[21] I find that in respect of the Bolger consumer transaction, Everyday and Burnside were in a joint venture to complete that transaction.

[22] Mr. Fraser testified that when Scotiabank advanced the financing to Burnside, Burnside issued a cheque to Everyday to cover the purchase price of the 2016 Santa Fe and to clear the lien held by Eden Park on the 2011 Santa Fe. This evidence is supported by a copy of a canceled cheque from Burnside, payable to Everyday and Burnside bank statements: Exhibit I in the Affidavit, pages 71 to 73 of the exhibits.

[23] Mr. Fraser stated that he deposited the Burnside cheque into his bank account. Mr. Fraser stated that before Everyday could pay Eden Park to clear the lien on the 2011 Santa Fe, the deposited money was applied to other debts held by creditors of Everyday and exhausted the funds. At the hearing, Mr. Fraser apologized to Mr. Bolger for what had happened and its impact on Mr. Bolger. Ian Fraser said he has no funds to satisfy the lien.

Deceptive act or practice?

[24] By way of the Scotiabank loan agreement, Burnside made a written representation in respect of this consumer transaction, *i.e.* that it would pay Patrick Bolger's debt to Eden Park associated with the 2011 Santa Fe. It failed to do so and instead gave the money to Everyday. This meets the general definition of a deceptive act or practice under subsection 4(1) of the BPCPA and is prohibited conduct by subsection 5(1) of the BPCPA. If I consider for a moment that Burnside asked Everyday to act on Burnside's behalf to pay Eden Park the debt of Mr. Bolger, which is implied by the evidence, Burnside remains responsible to Mr. Bolger. Burnside cannot pass-off to its agent, Everyday, the responsibilities and the liability that Burnside owes to Mr. Bolger.

[25] I find Burnside to be liable for the loss suffered by Mr. Bolger. This is especially the case, as Mr. Fraser was wearing two hats in this consumer transaction. Mr. Fraser was acting for the selling dealer, Everyday, and for the dealer brokering the financing, Burnside.

[26] Mr. Fraser was (and still is) a licensed salesperson at the time of the Bolger transaction and orchestrated that consumer transaction. Mr. Fraser is also directly liable for the deceptive acts or practices in this case and any resulting loss to Mr. Bolger.

[27] Mr. Bolger's loss is the unpaid lien amount. The money to pay that lien was incorporated into the loan on the 2016 Santa Fe, to which Mr. Bolger is liable. Mr. Bolger is paying that loan. At the hearing, the last known amount owing to clear the lien on the 2011 Santa Fe was \$20,800, as noted on the purchase agreement and the Scotiabank Dealer Advantage Credit Agreement dated March 28, 2017. This is almost a year ago. After the hearing and before my decision was rendered, Norm Felix from the Authority sent a letter to the parties and myself that the amount owing to Eden Park was \$22,126.04 with a \$0 per diem rate and was good until February 28, 2018. Mr. Felix's letter attached an email from Eden Park to Mr. Bolger dated February 21, 2018, stipulating those terms. All parties were asked to comment by February 28, 2018, about this late addition of evidence, and no party

did. I find nothing prejudicial or unfair in the late admission of this evidence as it only more clearly specifies the loss of Mr. Bolger.

[28] I am satisfied on the evidence that Mr. Bolger has suffered a loss of \$22,126.04 being the amount necessary to clear the lien on the 2011 Santa Fe, because of the deceptive act or practice of Burnside and Mr. Fraser.

Compliance order

[29] The Hearing Notice brought these allegations as against Burnside and Ian Fraser. Therefore, I can only make an order in relation to them, and not against Everyday. In awarding damages for Mr. Bolger's loss, I am mindful that his loss is the debt owed to Eden Park. Therefore, the damage award and compliance order should recognize this debt.

[30] The following Compliance Order is made:

Having found that Carkraft Trading Ltd. dba Burnside Auto and Ian Fraser committed a deceptive act or practice in respect of a consumer transaction, contrary to subsection 5(1) of the *Business Practices and Consumer Protection Act*, SBC 2004, c. 2, by representing to Patrick Bolger that they would pay off a debt Patrick Bolger owed to Eden Park, being a loan with a registered lien on a 2011 Santa Fe, and that Carkraft Trading Ltd. dba Burnside Auto and Ian Fraser did not pay off said loan, after having received the funds to do so, the following Compliance Order is made:

- (a) Carkraft Trading Ltd. dba Burnside Auto and Ian Fraser are to abide by 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 and the regulations under those Acts;
- (b) Carkraft Trading Ltd. dba Burnside Auto and Ian Fraser are to pay the sum of \$22,126.04 jointly to Patrick Bolger and Eden Park; and
- (c) Carkraft Trading Ltd. dba Burnside Auto and Ian Fraser are to pay the investigation and hearing costs of the Authority in an amount as yet to be assessed.

Where two or more persons are named in a compliance order, they are jointly and severally liable to abide by that compliance order and to pay any amounts ordered paid: subsection 155(6) of the BPCPA.

Conditions on Licence – Ian Fraser

[31] At the time of the hearing, Ian Fraser was a licensed salesperson operating at another dealership. His duties at that dealership were to conduct sales only. Mr. Fraser does not finalize any sale; he does not act as a business manager or in any way assist consumers to obtain financing. Nor does he act in a management

capacity. In his evidence, Mr. Fraser, essentially, testified that he failed at operating and managing a motor dealership. Mr. Fraser also gave evidence of how his mismanagement of Everyday has affected his personal finances.

[32] I believe it is important to add conditions on the salesperson licence of Ian Fraser to protect the public, who may deal with him in the future. I believe Mr. Fraser needs some time to get his finances in order, to reflect on the impact his conduct has had on Mr. Bolger, and to build trust in his ability to act in a more senior role and a role requiring trust within this industry. I also believe it would be beneficial for Ian Fraser to re-educate himself on his legal obligations as a licensee to consumers. On this later point, I take into consideration that Ian Fraser is currently experiencing some financial hardships. In accordance with subsection 4(3) of the *Salesperson Licensing Regulation*, B.C. Reg. 241/2004, the following conditions are added to Ian Fraser's salesperson licence # 105470:

- (a) Ian Fraser may not change employment at a dealership without the prior written authorization of the Authority;
- (b) Ian Fraser may not occupy a management position at any motor dealership, without the prior written authorization of the Authority;
- (c) Ian Fraser may not in any way participate in the arranging of a loan or other credit for a consumer, including a lease;
- (d) Ian Fraser must have all his consumer transactions reviewed by a manager at his dealership prior to the consumer transaction being finalized;
- (e) Ian Fraser it to retake and successfully complete the Salesperson Certification Course at his own cost by May 18, 2018;
- (f) Ian Fraser is to bring to the attention of the current dealership he is employed with and any subsequent dealership he may become employed at, these conditions on his licence; and
- (g) These conditions may be reviewed one year after they have been attached to Ian Fraser's salesperson licence.

[33] The Manager of Licensing of the Vehicle Sales Authority of B.C. is authorized to issue any written authorization required by these conditions, or to remove any of these conditions, after the noted one-year period has expired.

Administrative Penalties

[34] The Authority did not seek an administrative penalty to deter Burnside and Ian Fraser from committing similar conduct in the future. I believe this was appropriate as the evidence to properly consider the factors under subsection 164(2) of the BPCPA as against Burnside and Ian Fraser is sparse. The evidence would not allow me to assess whether section 10 of the *Business Practices and*

Consumer Protection Act Regulation should apply to either Burnside or Ian Fraser. It would therefore be unfair to engage in that analysis.

[35] In the case of Burnside, it is no longer a registered motor dealer. Therefore, issuing an administrative penalty to deter its future conduct is not necessary. This decision will be considered, if Burnside should apply in the future to be a registered motor dealer.

[36] In the case of Ian Fraser, I believe the conditions and restrictions on his licence, along with his liability to repay Patrick Bolger and the Authority's costs will suffice as deterrence.

Reconsideration or Review of this decision

[37] The compliance order made under the authority of the *Business Practices and Consumer Protection Act* may be reconsidered pursuant to sections 180 to 182 of that Act. Such a request for reconsideration must be made in writing within 30 days of receiving the Compliance Order. The request for reconsideration must identify the errors or grounds for reconsideration and must enclose new evidence that supports the reconsideration.

[38] The conditions added to the salesperson licence of Ian Fraser may be reconsidered pursuant to section 26.11 of the *Motor Dealer Act*. Such a request for reconsideration must be made within 30 days of receiving notice of the conditions or these reasons. The request for reconsideration must be in writing and identify the errors or other grounds for requesting the reconsideration. Such a request must enclose new evidence that supports the reconsideration.

[39] The entire decision of the Registrar may be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. Such a petition is to be filed with the B.C. Supreme Court within 60 days of this decision being issued: subsection 7.1(t) of the *Motor Dealer Act*.

Dated: March 7, 2018

Original Signed
Ian Christman, Registrar