



Vehicle Sales Authority
of British Columbia

Investigation File No. 19-10-067
Hearing File No. 19-12-001

Neutral Citation: 2019-BCRMD-030

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

RE:

DIAN GREENE

Consumer Complainant

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA

Complainant

And

AFFORDABLE AUTO SALES AND SERVICES INC.

(Motor Dealer Registration # 40114)

Respondent Dealer

And

MOHAMMED NADIR GHANI ZADEH

(Salesperson Licence # 201376)

Respondent Dealer Principal

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and location of Decision: March 13, 2020 at Langley, British Columbia

By way of written submissions

I. Introduction

[1] This hearing was to review a complaint brought by Dian Greene, involving a consumer transaction where she traded in her 2003 GMC truck towards the purchase of a 2006 Nissan Frontier (the "Frontier") from Affordable Auto Sales and Services Inc. ("Affordable Auto") on July 29, 2019 (collectively the "Transaction"). Dian Greene dealt with salesperson Mohammed Nadir Ghani Zadeh ("Mr. Zadeh") throughout the Transaction. Mr. Zadeh is also the owner and dealer principal of Affordable Auto.

[2] The core allegations as noted in the Hearing Notice of December 2, 2019 can be summarized as follows:

In the course of the Transaction, Affordable Auto and Mr. Zadeh did:

- i. Misrepresent to Dian Greene that Affordable Auto would pay for certain repairs to the Frontier as a condition of the purchase and did not,
- ii. Misrepresent the Frontier as having minor prior damage to the rear bumper when the Frontier had been written-off as salvage and rebuilt,
- iii. Misrepresent the Frontier by failing to state a material fact in that the Frontier was a former salvage vehicle subsequently rebuilt,
- iv. Misrepresent the Frontier by failing to disclose damage over \$2,000, contrary to section 23(b)(ii) of the *Motor Dealer Act Regulation*, B.C. Reg. 447/78 (the "MDA-R"),
- v. Failed to provide Dian Greene with an itemized list of repairs and any additional costs, if any, on the purchase agreement as required by section 21(2)(d) of the MDA-R,
- vi. Failed to disclose to Dian Greene that the Frontier had been brought into British Columbia for the purpose of resale from another jurisdiction contrary to section 23(d) of the MDA-R,
- vii. Failed to advertise the Frontier as "not suitable for transportation" as required by section 27(b) of the MDA-R, and

that the above conduct constitutes deceptive acts or practices and/or unconscionable acts or practices contrary to sections 5(1) and 9(1), respectively, of the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 (the "BPCPA"), and are also contraventions of sub-sections 33(2)(a) and (e) of the MDA-R (Code of Conduct).

[3] This hearing proceeded by way of written submissions. During the investigation, Affordable Auto and Mr. Zadeh were given a copy of Dian Greene's written complaint with supporting documents and afforded an opportunity to comment and provide evidence. There is a short email where they did. Further,

Affordable Auto and Mr. Zadeh were given written notice of this hearing, a copy of the Investigation Report with its attached exhibits and given time to provide any written submissions and additional evidence. The Hearing Notice also advised Affordable Auto and Mr. Zadeh of how to request an oral hearing if they wished. The time for them to provide submissions has passed with no submissions being received.

II. Position of the Parties

[4] Ms. Greene says that Affordable Auto and Mr. Zadeh for Affordable Auto, were deceitful during the transaction. She wants the Transaction to be unwound and to return the Frontier. In her communications with the Investigator, she expressed the opinion that Affordable Auto should not be allowed to remain in the industry. An opinion she notes was shared by a few others she has spoken with.

[5] In their communications with the VSA Investigator, Affordable Auto and Mr. Zadeh are willing to have the Frontier inspected and repairs made. They are unwilling to take back the Frontier and unwind the Transaction. Affordable Auto and Mr. Zadeh have not expressed an opinion on any compliance action although advised of the Authority's view on that point and given an opportunity to be heard.

[6] The Authority agrees with Ms. Greene's position that the Transaction should be unwound. The Authority has made various recommendations regarding compliance action against Affordable Auto and Mr. Zadeh, summarized as follows:

- (a) Cancel the salesperson's licence of Mohammad Nadir Ghani Zadeh with a prohibition period to reapply,
- (b) Issue an administrative penalty on Mr. Zadeh,
- (c) Suspend or cancel Affordable Auto's registration,
- (d) Issue an administrative penalty on Affordable Auto,
- (e) Order Affordable Auto and Mr. Zadeh to pay for the investigation and hearing costs, and
- (f) Order that the consumer receive a full refund taking into consideration the trade-in the consumer provided.

[7] The Authority did not detail why it recommends any or all the above compliance actions. I take it the Authority leaves it to the Registrar to consider the appropriate action, if any.

III. Legal considerations

[8] I have considered the applicable law in detail in past decisions that I will refer to throughout these reasons. Here, I provide an overview of the applicable law:

- (a) A dealer and a salesperson are to refrain from committing deceptive acts or practices and unconscionable acts or practices. This includes by not failing to state material facts,
- (b) The MDA-R prescribes various declarations a motor dealer is required to make to consumers. Being legally prescribed, they are considered material facts for a consumer to know,
- (c) The way that the MDA-R declarations are made must comply with the BPCPA, including by not failing to make them,
- (d) Where there is some evidence to suggest a deceptive act or practice or an unconscionable act or practice occurred, the onus shifts to the supplier (dealer or salesperson here) to prove their conduct was not misleading or unconscionable, and
- (e) The burden of proof is the civil burden - on a balance of probabilities.

IV. Discussion - Findings of Fact

[9] The following facts are not contested and are derived from the consumer complaint, the Authority's communications with Affordable Auto during the investigation, the results of the Authority's investigation and the documents attached to the Investigation Report.

[10] The Transaction involved a consumer and was a consumer transaction as those terms are defined in the BPCPA and the MDA. Affordable Auto and Mr. Zadeh are suppliers as defined in the BPCPA as well as being a motor dealer and salesperson, respectively, as defined in the MDA.

[11] On the evidence before me, I accept that Mr. Zadeh represented the Frontier as having a minor accident involving the rear bumper. Ms. Greene's evidence on this point was not challenged and is consistent with the dealer not declaring damage over \$2,000 on the purchase agreement: Exhibit 10 of the Investigation Report. This evidence is also corroborated by the evidence of the consumer who purchased the Frontier from Affordable Auto before Ms. Greene. That consumer,

who returned the Frontier to Affordable Auto, advised the VSA Investigator that Affordable Auto did not state the Frontier was a rebuilt vehicle when they purchased the Frontier: Exhibit 12, pages 114 to 115 of the Investigation Report.

[12] I note the statement from Mr. Zadeh on his own behalf and that of Affordable Auto is that the declaration of damage over \$2,000 was made on the ICBC Transfer/Tax Form; and it is. However, the statutory duty is to advise the consumer on the purchase agreement so the consumer can review prior to agreeing to purchase the vehicle. Declaring the damage after the purchase is complete, avoids the very purpose of the statutory duty as stated by the B.C. Court of Appeal in *Brook v. Wheaton Pacific Pontiac Buick GMC Ltd.* 2000 BCCA 332 (CanLII):

[34] Examining the words of the Regulation [*Motor Dealer Act Regulation*] in the context of its whole, and bearing in mind the ordinary meaning of the words "damage" and "repairs", I do not disagree with the reasoning of the trial judge that the purpose of the Regulation is to provide a prospective purchaser with information about damage to a vehicle so that the purchaser may make inquiries as to the effect of the damage on the value of the motor vehicle. It might be more precise, however, to say that the purpose is to alert the purchaser to the possibility of hidden existing damage which would affect the value of the vehicle.

Applied in

- *Harris v. Windmill Auto Sales & Detailing Ltd.* (April 10, 2013, File 12-030, Registrar) and affirmed by *Windmill Auto Sales & Detailing Ltd. v. Registrar of Motor Dealers*, 2014 BCSC 903 (BC Supreme Court)
- *Knapp v. Crown Auto Body and Auto Sales Inc. et al.* (September 21, 2009, File 08-70578, Registrar) and affirmed by *Crown Auto Body and Auto Sales Ltd. v. Motor Vehicle Sales Authority of British Columbia*, 2014 BCSC 894 (BC Supreme Court)

[13] There is ample documentary evidence to show that Affordable Auto purchased the Frontier as a salvage vehicle¹ and was subsequently rebuilt by Affordable Auto while Affordable Auto was the owner, and then sold by Affordable Auto. The evidence is as follows:

- (a) Affordable Auto purchasing the Frontier from Impact Auto Auctions Ltd. in Alberta. Impact Auto Auction sells damaged vehicles written off by insurers: Bill of Sale Exhibit 9, page 91 of the Investigation Report.
- (b) Mr. Zadeh made a statutory declaration to the Insurance Corporation of British Columbia ("ICBC") of having purchased the Frontier from Impact

¹ Damaged and written-off by an insurer

Auto Auction without all the necessary paperwork as to prior ownership, so that the Frontier could be registered in B.C. to the new owner, being Affordable Auto: Exhibit 9, pages 88 to 90 of the Investigation Report. I note that on the ICBC Vehicle Registration in the name of Affordable Auto on page 88 of the Investigation Report, the vehicle status for the Frontier is "Rebuilt".

- (c) The usual documentation and inspection reports for a vehicle that has been rebuilt from salvage are in evidence:
- (i) B.C. Ministry of Transportation and Infrastructure Private Vehicle Inspection Report #1234677, noting reason for inspection as "Rebuilt from Salvage", with Affordable Auto named as the owner of the Frontier: Exhibit 9, page 95 of the Investigation Report,
 - (ii) B.C. Ministry of Transportation and Infrastructure Body Integrity Inspection Report, naming Affordable Auto as the owner and the rebuilder of the Frontier: Exhibit 9, page 94 of the Investigation Report, and
 - (iii) B.C. Ministry of Transportation and Infrastructure Structural Integrity Declaration Report, attaching a wheel alignment report and naming Affordable Auto as the owner and the rebuilder of the Frontier: Exhibit 9, pages 97 and 98 of the Investigation Report.

[14] I also find that having purchased the Frontier as salvage and having rebuilt it, Affordable Auto would know the approximate value of the damage to the Frontier. The estimated value of the damage was declared as \$11,239.00 in 2017 in Edmonton, Alberta as noted on the CarFax Canada vehicle history report: Exhibit 8, pages 77 to 80. Mr. Zadeh for himself and Affordable Auto noted that these estimates are usually overstated. Even if they are, it is difficult to see how one can go from a damage estimate of over \$11,000 to one below \$2,000. A dealer must not factor in their cost of repair including any "free" labour they provide when rebuilding a vehicle, when considering making the statutory declaration. Doing so would defeat the very purpose of the statutory duty to declare damage on used vehicles, which is to place consumers on notice of prior damage so they can make any necessary inquiries and make an informed decision to purchase the vehicle: *Brook v. Wheaton Pacific Pontiac Buick GMC Ltd.*, supra.

[15] I would also note that the above evidence establishes that the Frontier had previously been in a jurisdiction other than British Columbia and was purchased for

the purpose of resale in British Columbia. Mr. Zadeh and Affordable Auto were aware of these facts.

[16] I accept on the evidence that as part of the negotiations between Ms. Greene and Affordable Auto for the sale of the Frontier, Affordable Auto would be responsible for certain repairs and did not make all those repairs. This comes from the complaint form, the evidence supplied by Ms. Greene (written statements), the lack of denial by Affordable Auto, and Affordable Auto's email offering to repair the Frontier to resolve Ms. Greene's complaint.

[17] Finally, I note there is no evidence establishing that the Frontier did not meet the requirements of the *Motor Vehicle Act* at the time of sale. There are certainly issues with the Frontier, but I have no report or evidence from someone authorized to say that the Frontier was not compliant with the *Motor Vehicle Act*, at the time of sale. This allegation must be summarily dismissed.

V. Discussion - Breaches of the Legislation

[18] Applying the law to my above noted findings of fact, I find Affordable Auto and Mr. Zadeh breached the below noted legislation.

(a) Motor Dealer Act Regulation

[19] Affordable Auto and Mr. Zadeh, as the responsible salesperson, failed to declare damage over \$2,000 on the purchase agreement as required by section 23(b)(ii) of the *Motor Dealer Act Regulation*. The evidence is clear that both Affordable Auto and Mr. Zadeh knew the Frontier had damage over \$2,000 and did not make that declaration on the purchase agreement. The fact that a declaration is on the Transfer/Tax Form (APV9T) does not meet the requirement of the legislation, nor the legislative purpose of making that declaration to the consumer before purchase so they can make an informed decision to purchase: *Brook v. Wheaton Pacific Pontiac Buick GMC Ltd.*, supra.

[20] Affordable Auto and Mr. Zadeh, as the responsible salesperson, failed to declare on the purchase agreement that the Frontier was purchased in Alberta and brought into British Columbia for the purpose of resale contrary to section 22(3)(d) of the MDA-R. This legislative duty to declare exists so consumers have a better idea of a vehicle's history. This is important for various reasons. For instance, knowing the vehicle came from a jurisdiction where premature rusting of vehicles can occur allows the consumer to make appropriate inquiries and an informed decision: *Rushak v. Henneken*, 1991 CanLII 178 (BC Court of Appeal).

[21] A review of the purchase agreement for the Transaction makes it clear that there is no itemized list of repairs which Affordable Auto agreed to make to the Frontier. Failing to itemize those repairs on the purchase agreement, with any associated costs, is a breach of section 21(2)(d) of the MDA-R. The policy reason for this provision is obvious. Itemizing repairs and any costs are important terms of a contract of purchase and sale for a motor vehicle. They form part of the transactions' consideration and the vehicles' valuation.

(b) Business Practices and Consumer Protection Act – deceptive act or practice

[22] I find that Affordable Auto, through its employee and the dealer principal Mr. Zadeh, committed deceptive acts or practices contrary to section 5(1) of the BPCPA as follows.

(i) Misrepresenting the degree of damage to the Frontier

[23] Affordable Auto and Mr. Zadeh knew the Frontier had significant damage, estimated at over \$11,000, and certainly enough damage that an insurer wrote the Frontier off and it was sold for salvage. Mr. Zadeh and Affordable Auto attempted to minimize the damage declaration by saying it was on the rear bumper. This is an ambiguous and misleading statement that has the capability to mislead a consumer and meets the general definition of a deceptive act or practice and is also deemed to be a deceptive act or practice: section 4(1) and 4(3)(b)(vi) of the BPCPA. This misleading conduct was clearly deliberate given their knowledge of the prior damage.

(ii) Failing to state a material fact – rebuilt status of the Frontier

[24] Affordable Auto and its employee and dealer principal Mr. Zadeh knew the Frontier was a salvage vehicle that was rebuilt. They did not advise Ms. Greene of this fact. The fact that a motor vehicle was once a salvage vehicle subsequently rebuilt is a material fact for the consumer to be made aware of. A rebuilt vehicle comes with higher risks of mechanical failures such that a manufacturer will usually void any remaining factory warranty and after-market warranty providers will not sell a mechanical warranty policy on a rebuilt vehicle: see *2258756 Ontario Ltd. dba Auto/One Leasing LP et. al.* (February 4, 2014, File 13-11-001, Registrar) at paragraph 33. Experience has further shown that vehicles can be rebuilt to sub-standard conditions but still pass inspections because the sub-standard repairs can be hidden: see *Knapp v. Crown Auto Body and Auto Sales Inc. supra.*

[25] These past Registrar's cases have ruled that a vehicle having been rebuilt from salvage is a material fact for a consumer to be made aware. By failing to state this material fact, Affordable Auto and its employee and dealer principal Mr. Zadeh have committed a deceptive act or practice: section 4(1) and 4(3)(b)(vi) of the BPCPA. Having purchased the Frontier as salvage and rebuilt it, this fact was known to Affordable Auto and Mr. Zadeh and I am satisfied that this was deliberate conduct on their part.

(iii) Failing to state a material fact – Declaring damage over \$2,000

[26] The legislation compels a dealer to declare on the purchase agreement that a used motor vehicle has sustained damages over \$2,000: section 23(b)(ii) of the MDA-R. I note the heading in the legislation for section 23 of the MDA-R is entitled "Material Facts". The Lieutenant-Governor-in-Council² has determined that the disclosures required under that section are material to a consumer's buying considerations that must be disclosed. They are without question legally deemed to be material facts. Affordable Auto and Mr. Zadeh failed to declare damage over \$2,000 in the manner legally required, which is deemed to be a deceptive act or practice: section 4(3)(b)(vi) of the BPCPA.

[27] The fact that the declaration was made on the ICBC Transfer/Tax Form does not absolve Affordable Auto and Mr. Zadeh. The declaration was to be made to Ms. Greene on the purchase agreement so it would be brought to her attention. Making the declaration on the form submitted to ICBC to transfer ownership of a vehicle does not necessarily bring the declaration to the attention of the consumer. This is one reason why the Lieutenant-Governor-in-Council specified that the declaration was to be made on the purchase agreement – so it would be seen by the consumer and before they finalized the sale with their signature on the purchase agreement.

[28] Affordable Auto and Mr. Zadeh knew the Frontier had prior damage in excess of \$2,000. Affordable Auto and Mr. Zadeh attempted to minimize the prior damage by representing it was only the rear bumper needing repair. In furtherance of that minimization, I find Affordable Auto and Mr. Zadeh deliberately did not declare the damage over \$2,000 on the purchase agreement so as not to bring that to the attention of Ms. Greene. I further find that the correct declaration that was made on the Transfer Tax Form (APV9T) was calculated to ensure Affordable Auto made the correct declaration on some documentation, but one where the consumer may not notice. I find that this failure to declare damage in excess of \$2,000 was deliberate conduct.

² The legal term for the provincial cabinet who has been empowered by the B.C. Legislature to make regulations under the *Motor Dealer Act*.

(iv) Failing to state a material fact – the Frontier was brought into B.C. for the purpose of resale

[29] Affordable Auto and Mr. Zadeh failed to advise Ms. Greene that the Frontier was brought into British Columbia for the purpose of resale. This is a required declaration under section 23(d) of the MDA-R. As discussed at paragraph 26 this disclosure is legally compelled and legally considered a material fact for a consumer to know. By failing to advise Ms. Greene of this material fact, Affordable Auto and its employee and dealer principal Mr. Zadeh have committed a deceptive act or practice: section 4(1) and 4(3)(b)(vi) of the BPCPA. Affordable Auto and Mr. Zadeh clearly knew this was the case and did not make the declaration. I find this conduct to have been deliberate.

(v) Misrepresenting that Affordable Auto and Mr. Zadeh would be responsible for certain repairs to the Frontier

[30] I have found that Affordable Auto and Mr. Zadeh made promises to make certain repairs to the Frontier at the time of purchase. The evidence shows they made some but not all of them. I have also found that Affordable Auto and Mr. Zadeh failed to properly note these repairs as terms and conditions on the purchase agreement as required by section 21(2)(d) of the MDA-R. Such terms and conditions form a part of the contractual rights and obligations of each of the parties. By stating they would be responsible for certain repairs to induce Ms. Greene to purchase the Frontier and having not undertaken all those repairs as part of its contractual obligations, Affordable Auto and Mr. Zadeh have committed a deceptive act or practice as deemed by section 4(3)(b)(iv) of the BPCPA:

(3) Without limiting subsection (1), one or more of the following constitutes a deceptive act or practice:

(b)a representation by a supplier

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

[31] The fact that Affordable Auto and Mr. Zadeh now offer to make some further repairs to the Frontier only after Ms. Greene filed her complaint with the Authority does not absolve them of this finding. Based on the evidence, Affordable Auto and Mr. Zadeh avoided Ms. Greene's inquiries about repairs before Ms. Greene filed her complaint. Had Ms. Greene not filed her complaint, I am satisfied Affordable Auto and Mr. Zadeh would not have completed the agreed to repairs.

(c) Business Practices and Consumer Protection Act – Unconscionable Act or Practice

[32] The Authority submits that the conduct of Affordable Auto and its employee and dealer principal Mr. Zadeh in respect of the Transaction was unconscionable within the meaning of the BPCPA.

[33] In considering whether unconscionability occurred in the Transaction, I am to consider the factors enumerated in section 8(3) of the BPCPA and in consideration of the circumstances surrounding the Transaction that Affordable Auto and its employee and dealer principal Mr. Zadeh knew or ought to have known: section 8(2) of the BPCPA. It is important to remember that an adverse finding on one or more of the factors in section 8(3) of the BPCPA does not mean there has been an unconscionable transaction. One considers those factors in consideration of the whole transaction. Guidance is taken from court decisions applying the legal principles of unconscionability found in contract law.

[34] Generally, an unconscionable act is one where the evidence shows that the supplier (Affordable Auto and/or Mr. Zadeh) took advantage of the consumer's inability to protect their interests such that, "the transaction, seen as a whole, is sufficiently divergent from community standards of morality that it should be rescinded": *Bain v. Empire Life Insurance Company* 2004 BCSC 1577 (BC Supreme Court) at paragraph 72, citing *Harry v. Kreutziger* (1978), 1978 CanLII 393 (BC Court of Appeal); see also *Ma v. MIV Therapeutics Inc.* 2004 BCCA 483 (BC Court of Appeal); *Webster v. Pioneer Garage Ltd. dba Fraser Valley Pre-Owned* (April 27, 2018, File 17-07-002, Registrar); and *The Estate of George Mann Sr. v. Ocean Park Ford* (File 07-70255, May 19, 2009, Registrar). I turn now to consider each of the statutory factors.

(i) s. 8(3)(a) - that the supplier subjected the consumer or guarantor to undue pressure to enter into the consumer transaction;

[35] There is no evidence to suggest Ms. Greene was subject to pressure during this transaction. Ms. Greene test drove the Frontier on July 26, 2019. On July 28, 2019, Ms. Greene was emailed pictures of the Frontier. Ms. Greene stated she then went back to the dealership, looked over the Frontier and listed items she could visibly see were wrong that she wanted the dealer to repair: Email of Dian Greene to the VSA Consumer Services dated October 7, 2019, Exhibit 1, page 7 of the Investigation Report. This evidence suggests there was no pressure by Affordable Auto or Mr. Zadeh.

(ii) s.8(3)(b) - that the supplier took advantage of the consumer or guarantor's inability or incapacity to reasonably protect his or her own interest because of the consumer or guarantor's physical or mental infirmity, ignorance, illiteracy, age or inability to understand the character, nature or language of the consumer transaction, or any other matter related to the transaction;

[36] I find that Affordable Auto and Mr. Zadeh did take advantage of Ms. Greene's ignorance of the Frontier's history. They failed to advise Ms. Greene of the Frontier's prior damage and rebuilt status of the Frontier. Facts they were in a unique position to have advised on. This coupled with the various noted misrepresentations made it difficult for Ms. Greene to fully understand what she was buying and to protect her own interests. I specifically note that a consumer is not required to second guess the representations of a dealer or of a salesperson. A consumer should be allowed to trust what they are being told by a dealer or by a salesperson, as stated by the BC Supreme Court:

[36] Mr. McDonald [salesperson] clearly was aware of the plaintiff's concern with towing capacity of any vehicle she might purchase and was looking to him for accurate advice. It was entirely appropriate for the plaintiff to rely upon Mr. McDonald in the circumstances as it was his job to provide information and answer questions regarding the product being sold.

...

[38] It was entirely reasonable for the plaintiff to have relied on Mr. McDonald's assurances after she raised the issue at least three times during their discussions.

- *Vavra v. Victoria Ford Alliance Ltd.*, 2003 BCSC 1297 (BC Supreme Court)

And, by the BC Provincial Court:

[70] Most people who buy a car from a used car dealer rely on his skill or judgment in that they assume that the dealer has been selective in choosing which cars he will acquire and sell. They also rely upon the dealer to disclose relevant information about the vehicles.

[71] It is also reasonable to assume that most purchasers of used cars want to buy a reliable vehicle for use in driving in safety on the roads. Used car dealers know this without a need for a customer to specifically state it as a specific purpose.

- *Sugiyama v Pilsen dba Southgate Auto Sales*, 2006 BCPC 265

(iii) s. 8(3)(c) - that, at the time the consumer transaction was entered into, the total price grossly exceeded the total price at which similar subjects of similar consumer transactions were readily obtainable by similar consumers;

[37] No evidence was provided that the price Ms. Greene paid for the Frontier grossly exceeded that of similar vehicles in similar mechanical condition as represented by Affordable Auto and Mr. Zadeh.

(iv) s. 8(3)(d) - that, at the time the consumer transaction was entered into, there was no reasonable probability of full payment of the total price by the consumer;

[38] No evidence was led that Ms. Greene was unable to pay the total price for the Frontier.

(v) s. 8(3)(e) - that the terms or conditions on, or subject to, which the consumer entered into the consumer transaction were so harsh or adverse to the consumer as to be inequitable;

[39] There was no evidence that the terms or conditions of the Transaction “were so harsh or adverse to the consumer as to be inequitable.” This provision requires a review of the actual terms of an agreement for evidence that the consumer has been taken advantage of. An example would be, a term of the agreement imposing a 29% interest rate on a person whose circumstances would garner a 3% interest rate anywhere else.

(vi) s.8(3)(f) – a prescribed circumstance

[40] The word “prescribed”³ means that a regulation can be made to add additional circumstances to be considered. There is currently no regulation prescribing additional circumstances for me to consider.

(vii) s.8(2) – considering the s. 8(3) factors together with the circumstances of the whole Transaction

[41] It is possible that misrepresentations, deceptive acts or practices, can also amount to unconscionable acts or practices. The two are not mutually exclusive.

³ Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238

Such an interpretation would diminish consumer protection: *Webster v. Pioneer Garage Ltd. dba Fraser Valley Pre-Owned et al* (April 27, 2018, File 17-07-002, Registrar). In *Webster*, the various misrepresentations to the consumer and to the bank coupled with the confusing way the transaction and financing were arranged and documented resulted in a finding of an unconscionable act.

[42] Considering the Transaction as a whole, I find that the Transaction before me satisfies as an unconscionable act or practice contrary to the BPCPA. There is no one single circumstance or event that makes the Transaction unconscionable. It is the amalgamation of the misrepresentations that make it unconscionable. I find those representations were deliberately made to leave Ms. Greene ignorant of the Frontier's history, alleviate any concerns Ms. Greene may have had, and to induce her to purchase the Frontier. The fact that Ms. Greene asked specifically about accidents and reviewed the Frontier asking for repairs to be done on items she visually saw, would have put any dealer and salesperson on notice of Ms. Greene's concern about the Frontier's history and its mechanical fitness. Instead of addressing those concerns, Affordable Auto and Mr. Zadeh embarked on conduct to keep Ms. Greene ignorant of the true facts.

[43] Factored into this is that Affordable Auto and Mr. Zadeh were intimately aware of the pertinent history of the Frontier having purchased it as salvage and rebuilt it. In addition is Affordable Auto's and Mr. Zadeh's veiled promises to make repairs as a condition of purchase coupled with their refusal to take the Frontier back and issue a refund. Finally, there is the evidence of the previous owner also not being advised of the Frontier's rebuilt status.

[44] All this conduct clearly shows Affordable Auto and Mr. Zadeh undertook a deliberate course of conduct to try and sell the Frontier at little cost to itself to an unsuspecting consumer. They did so by undertaking various misrepresentations to leave Ms. Greene ignorant as to the true facts, allay any concerns Ms. Greene may have of the Frontier's condition, and induce her to purchase the Frontier. They took advantage of Ms. Greene's ignorance of the Frontier's history. Affordable Auto and Mr. Zadeh also took advantage of Ms. Greene's right to trust, without further inquiry, what a licensed motor dealer and a licensed salesperson advised her. Taken together, "the transaction, seen as a whole, is sufficiently divergent from community standards of morality that it should be rescinded". I find Affordable Auto and Mr. Zadeh to have committed an unconscionable act or practice in respect of the Transaction contrary to section 9(1) of the BPCPA.

(d) Motor Dealer Act Regulation ss. 33(2)(a) and (e) – Code of Conduct

(i) Section 33(2)(a) – act with honesty and integrity

[45] From my above findings, Affordable Auto and Mr. Zadeh did not act with honesty and integrity based on their deliberate conduct to hide facts from Ms. Greene. Honesty and integrity together require open and transparent communications and even advising consumers that a decision they are about to make may not be in their best interests: *Fryer v. Motor Vehicle Sales Authority of British Columbia*, 2015 BCSC 279 (BC Supreme Court) at paragraph 23. An example of integrity in this case would have been advising Ms. Greene not to purchase the Frontier because of its prior history, based on Ms. Greene’s clearly articulated concerns about vehicle damage history and her request for certain repairs. At a minimum, honesty and integrity would have required Affordable Auto and Mr. Zadeh to provide open disclosure of the Frontier’s history so that Ms. Greene could have made an informed decision.

(ii) Section 33(2)(e) - must not make false or misleading representations with respect to any amount charged in respect of a consumer transaction

[46] This provision is narrower than it seems due to the limiting words “with respect to any amount charged”. Based on the allegations, there was nothing advanced that Affordable Auto or Mr. Zadeh charged something more than what was represented or made a misrepresentation to justify a charge. The aim of this provision is to ensure dealers provide open and honest explanations for any charge related to the consumer transaction. Examples of a breach of this provision would be a dealer making a false representation to justify charging a documentation fee, a finance placement fee, a pro-pack⁴, a northern/winter package charge, or other types of charges.

VI. Joint and Several Liability

[47] In my discussions I have spoken of the liability of Affordable Auto and Mr. Zadeh synonymously. I should explain why.

[48] In law, companies are viewed as separate legal entities from its owners and directing minds to advance business development. Except in certain circumstances, if a business fails, the liabilities of the business end with the business and are not

⁴ Industry lingo for things such as undercoating, paint protection and interior seat protection

transferred to the individuals who own or direct the business. This common law⁵ concept, called the corporate veil, has limitations with the most important being where legislation allows piercing the corporate veil:

[33] For instance, section 5 of the MDA specifically contemplates looking behind the corporate veil. Common law principals also note that a regulator needs to look at the realities surrounding a licensee or an applicant for a licence, if it is going to meet its public mandate of protecting the public from potential future harm. A licensing body is not blinded by the legal doctrine of the corporate veil.

Re: *Best Import Auto Ltd. et al* (November 28, 2017, File 17-08-002, Registrar) varied but not on this point in *Best Import Auto Ltd. v Motor Dealer Council of British Columbia*, 2018 BCSC 834 (BC Supreme Court)

[49] If a company has breached the BPCPA and it can be shown that the owners, officers and directors of the company condoned, acquiesced in or otherwise authorized or directed the breach, they too are equally liable for that breach: sections 164(5) and 189(8) of the BPCPA.

[50] If a company has breached the MDA and it can be shown that the owners, officers and directors of the company condoned, acquiesced in or otherwise authorized or directed the breach, they too are equally liable for that breach: sections 26.04(5) and 35(5) of the MDA.

[51] In this case Ms. Greene says she dealt with Mr. Zadeh throughout the Transaction and in subsequent discussions after the Transaction. During the Authority's investigation, it dealt with Mr. Zadeh. Mr. Zadeh provided the statutory declaration to ICBC to gain the Frontier's registration in British Columbia. I am satisfied that Mr. Zadeh's conduct as the owner of Affordable Auto and as an individual licensed salesperson condoned, acquiesced in or otherwise authorized or directed the conduct of Affordable Auto. Affordable Auto and Mr. Zadeh's liability to Ms. Greene for the breaches should be joint and several.

VII. Remedy to the Consumer

(a) Cancellation of the Transaction and full refund

[52] Having found an unconscionable act or practice in relation to the Transaction, Ms. Greene has a statutory right to have the Transaction unwound at her election: section 10(2) of the BPCPA. She seeks that remedy.

⁵ Judge made law.

[53] I would note that had I not found an unconscionable act or practice; I would still have found that unwinding the Transaction was the appropriate remedy for Affordable Auto and Mr. Zadeh's deceptive acts or practices for the following reasons.

[54] There were clear misrepresentations made to Ms. Greene. Those misrepresentations were deliberately made to allay her concerns about prior damage and induce Ms. Greene to purchase the Frontier. Ms. Greene specifically asked about accidents and sought repairs to be made and was deliberately misled as to both. Ms. Greene's reliance on the assurances and representations by Affordable Auto and Mr. Zadeh were reasonable in the circumstances. A consumer is entitled to rely on the representations of a motor dealer and salesperson unless so outrageous their unreasonableness would be apparent to anyone. That is not the case here. Ms. Greene has suffered harm in that she has "inherited" a rebuilt motor vehicle which the industry knows has an increased risk of mechanical, electrical or other concerns. Ms. Greene appears to be experiencing some of these concerns.

[55] I would find that a monetary award for damages would, for public policy reasons, be insufficient compensation to Ms. Greene. As in the cases of *Harris v. Windmill Auto Sales* and *Knapp v. Crown Auto Sales*⁶, an award of damages would leave Ms. Greene in the position of assuming an unknown future financial liability with the Frontier, related to the Frontier having been rebuilt. Had Ms. Greene been advised of the rebuilt status of the Frontier, it could then be accepted that she assumed the potential liability of ownership of such a vehicle, and a financial award (damages) for the remainder of the misrepresentations would probably be appropriate. That is not the case, and it would be contrary to the spirit of the consumer protection legislation and public policy to allow the dealer to transfer to Ms. Greene that degree of liability in the manner that Affordable Auto and Mr. Zadeh did. Also, as with *Harris v. Windmill Auto Sales* and *Knapp v. Crown Auto Sales*, I find it would be contrary to public policy to require any deduction from Ms. Greene's ownership of the Frontier as that could have the effect of rewarding Affordable Auto and Mr. Zadeh. That, and because there is no evidence as to what that deduction should be.

(b) Structuring the unwinding of the transaction - quantum

[56] Given Affordable Auto's reluctance to provide a refund and cancel the transaction, I find I should provide some directions as to how that should unfold.

⁶ Also involving a rebuilt vehicle where statutory rescission was granted.

[57] I need to first resolve discrepancies as to the amount paid for the Frontier as the written statement of Ms. Greene is inconsistent with the purchase agreement. According to Ms. Greene's statement, she agreed to a value of \$1,500 for the GMC truck as a trade-in plus paying an additional \$9,250 for the Frontier in installment payments over a few months. Applying simple math, this means Ms. Greene paid \$10,750 plus applicable taxes. However, the purchase agreement only shows \$6,000 being paid and you cannot see if taxes were even applied to that amount.

[58] I accept Ms. Greene's written statement as to the amount paid over what is written on the purchase agreement. First, the purchase agreement specifically documents the GMC truck as a trade-in even though no trade-in value is noted in the right-hand columns. I am satisfied a trade-in was applied in this Transaction. Second, separate hand-written receipts in relation to the 2006 Frontier from Affordable Auto shows the \$9,250 amount payable by Dian Greene with subsequent changes as payments appeared to have been made by Ms. Greene: Exhibit 1, page 11 of the Investigation Report.

[59] Next I turn to the amount of refund Ms. Greene is entitled to.

[60] First, is the cash payment of \$9,250 Ms. Greene made over time. There is no indication that taxes were applied to this amount. In fact, the hand-written receipts suggest otherwise. I accept that the \$9,250 amount was an "all-in" price as that term is sometimes used in this industry. The \$9,250 amount was inclusive of taxes. Ms. Greene is entitled to a refund of this amount.

[61] Next to be addressed is the GMC truck Ms. Greene traded-in for the Frontier. The Authority's written material specifically notes this needs to be addressed monetarily. Given the length of time that has passed, it would appear returning the GMC truck to Ms. Greene is no longer an option. Where a vehicle is traded-in, its value can be applied before taxes are paid on the vehicle being acquired thus reducing the purchase price of the vehicle being acquired for tax purposes. Therefore, there is a tax benefit to providing a trade-in such that the value of Ms. Greene's trade-in must be grossed up to capture that tax benefit. The value of her trade-in within the Transaction was \$1,680 ($\$1,500 \times 1.12$ (5% GST and 7% PST)). I find that Ms. Greene is entitled to the value of the GMC truck she has lost as a trade-in, including the tax gross up - \$1,680.

[62] In total, Ms. Greene is entitled to a refund of \$10,930.00 from Affordable Auto and Mr. Zadeh and is so ordered pursuant to section 155(4)(a) of the BPCPA. In accordance with section 155(6) of the BPCPA, this amount is payable jointly and severally by Affordable Auto and Mr. Zadeh. Simultaneous to being compensated, Ms. Greene will have to transfer ownership of the Frontier back to Affordable Auto.

VIII. Compliance

[63] The Authority and Dian Green have provided submissions on the appropriate compliance action against Affordable Auto and Mr. Zadeh. At the outset it should be noted that my role as regulator is not to punish past conduct. That is left for the courts to do applying a different approach – the criminal law process.

[64] As a regulator, I am to consider the various statutory tools at my disposal to obtain the licensees' compliance and provide sufficient assurance of their future compliance consistent with protecting the public interest. If after consideration of:

- (a) all the facts of the breach,
- (b) the licensee's conduct before, during and after the breach,
- (c) the legal rights of both licensees considered against the public interest with the latter being paramount, and
- (d) the various statutory considerations I am required to make,

I believe obtaining future compliance from the licensees is doubtful, my duty is to remove them from the industry to protect the public.

[65] I am also empowered to make these considerations as part of one hearing process, and I do not have to hold two separate hearings: *Best Import* (BC Supreme Court), *supra*. Even so, the facts of each case may require that a fairer decision is arrived at by separating the liability assessment and the compliance selection assessment. In this case, the information I have to assess any compliance action for Affordable Auto and Mr. Zadeh is incomplete. Importantly, I have no information of any prior compliance history, complaint history and Affordable Auto's and Mr. Zadeh's cooperation with the Authority in having their licenses renewed and the results of any past inspections. This type of information is necessary for me to make the statutorily required assessments, ensure I properly consider Affordable Auto and Mr. Zadeh's rights and specific circumstances as licensees, and arrive at a fair decision.

[66] A separate process to determine compliance action will also allow the Authority an opportunity to make submissions and provide evidence as to the investigation costs in this case.

[67] I therefore direct the following process:

- (a) The Authority will have 21 days from the date of this decision to provide submissions and any additional evidence on the issue of compliance action against Affordable Auto and Mr. Zadeh, and regarding costs. A copy of any

submissions and evidence are to be served on Affordable Auto and Mr. Zadeh.

(b) Once served under paragraph (a), Affordable Auto and Mr. Zadeh will have 21 days to provide any submissions and evidence in response. Affordable Auto and Mr. Zadeh are to provide a copy of any submissions and evidence to the Authority.

(c) Once served under paragraph (b), the Authority will have 7 days to provide any rebuttal submissions they wish to provide, serving a copy on Affordable Auto and Mr. Zadeh.

[68] Filing any submissions for the Registrar's consideration may be made to my assistant Preet Jassal at preet@mvsabc.com.

IX. Summary

[69] I have found Affordable Auto and Mr. Zadeh have committed deceptive acts or practices in relation to this Transaction, by misrepresenting the Frontier to Ms. Greene.

[70] I have found Affordable Auto and Mr. Zadeh have committed unconscionable acts or practices in relation to this Transaction, in the manner that they misrepresented the Frontier to Ms. Greene resulting in their taking advantage of Ms. Greene's inability to protect her interests.

[71] Having found an unconscionable act or practice occurred, Ms. Greene is by operation of the law, entitled to rescind the contract for a full refund. I would have found that remedy also appropriate for the deceptive acts or practices I found Affordable Auto and Mr. Zadeh to have committed.

[72] A compliance order will be issued on the following terms:

(a) Dian Greene is awarded \$10,930 payable joint and severally by Affordable Auto Sales and Services Inc & Mohammad Nadir Ghani Zadeh, and

(b) Ms. Greene will have to transfer ownership of the 2006 Nissan Frontier to Affordable Auto Sales and Services Inc. at the time of receiving confirmation of payment of \$10,930.

X. Review of Decision

[73] My compliance order and these associated reasons may be reviewed by requesting a reconsideration pursuant to sections 180 to 182 of the BPCPA. Such a request must be in writing and received within 30 days of the latter of receiving the Compliance Order or these reasons. The request must be accompanied with the new evidence, as defined in those sections of the BPCPA, for me to consider varying or canceling my Compliance Order. Any request for reconsideration may be directed to my assistant Preet Jassal at preet@mvsabc.com.

[74] This decision may also be reviewed by petitioning the B.C. Supreme Court for judicial review pursuant to the *Judicial Review Procedure Act*. Such a petition must be filed within 60 days of the date of this decision: section 7.1(t) of the MDA.

Date: March 13, 2020

“Original is signed”

Ian Christman, J.D.
Registrar of Motor Dealers