

IN THE MATTER OF A DISCIPLINE HEARING

**Held pursuant to By-Law No. 1 of the
Ontario Motor Vehicle Industry**

DISCIPLINE DECISION

ONTARIO MOTOR VEHICLE INDUSTRY COUNCIL

-and-

ROCKWAY PONTIAC BUICK

Date of Hearing: December 13th, 2006

Panel: Mr. Jeff Prossler (Chair)
Mr. Bruce Wilson
Mr. Larry Pringle

Findings: Breach of Section 2.4.1, Standards of Business Practice

Fine: \$7,500.00

Date of Decision: February 6th, 2007

REASONS FOR DECISION

1. This hearing, held on December 13th, 2006, related to a Notice of Complaint dated April 3rd, 2006 (the "Complaint"). The Complaint alleges that the Respondent, Rockway Pontiac Buick (the "Dealer") breached Section 2.4.1 of the *Standards of Business Practice* (the "Standards").
2. The allegations against the Dealer generally related to the sale of eighteen (18) former daily rental vehicles on which the Dealer failed to disclose on the bills of sale that the vehicles were former daily rentals. Such disclosure is required by Section 2.4.1 of the Standards.
3. The Dealer acknowledged receipt of and the following were marked as Exhibits at the hearing:
 - (a) Exhibit 1: Complaint, dated April 3rd, 2006;
 - (b) Exhibit 2: OMVIC Book of Documents;
 - (c) Exhibit 3: Discipline Decision, *In Re. Terrace Ford Lincoln Sales Inc.*, dated March 23rd, 2006; and
 - (d) Exhibit 4: Discipline Decision, *In Re. Donnelly Kia*, dated March 23rd, 2006.
4. Ms. Aviva Harari represented OMVIC. Mr. Tom Fornier, an officer of the Dealer, represented the Dealer and elected not to have legal counsel present.
5. Ms. Harari provided an opening statement and reviewed the terms of Section 2.4.1 of the Standards. Section 2.4.1 provides as follows:

2.4.1 Wholesale and retail contracts state on the front of the contract any of the following statements if they accurately describe the part regular use of the motor vehicle:

 - (a) "Daily rental" if the motor vehicle was a rental vehicle and has never been owned by a consumer;

....
6. On July 15th, 2002, an OMVIC inspection revealed that the Dealer had sold former daily rental vehicles without disclosing their former usage to the consumer on the Bills of Sale. As a result, OMVIC provided written notice to the Dealer, confirming its failure to comply with Section 2.4.1 of the Standards. The Inspection Findings dated July 15th, 2002 were entered as evidence at Tab 2 of Exhibit 2.
7. A second inspection was conducted by OMVIC of the Dealer's premises on November 16th, 2005. OMVIC found that fifteen (15) more vehicles had been sold since the first inspection without the requisite disclosure of the former daily rental nature of the vehicles, contrary to Section 2.4.1 of the Standards. OMVIC provided the Dealer with a

- copy of the Standards in addition to a written direction highlighting its obligation to disclose former daily rental status. Mr. Fornier, on behalf of the Dealer, acknowledged, in writing, receipt of the Standards. The Inspection Findings dated November 16th, 2005, were entered as evidence at Tab 3 of Exhibit 2.
8. Oral testimony under oath was provided by Mr. Carey Smith on behalf of OMVIC.
 9. Mr. Smith is an OMVIC inspector who provided evidence respecting the history of the Standards and in particular, the importance of compliance with Section 2.4.1. Mr. Smith's evidence explained that the purpose of the disclosure requirements embodied in Section 2.4.1 exist because the characterization of a vehicle as a former "daily rental" is a material fact that could significantly affect a consumer's decision to purchase a vehicle, in addition to the vehicle's price or value.
 10. Mr. Smith gave evidence that the Dealer failed to disclose, in writing, on Bills of Sales to consumers that the vehicles were former daily rentals. The eighteen (18) Bills of Sales were tendered as evidence at Tabs 4 through 22 of Exhibit 2.
 11. The Dealer did not cross-examine Mr. Smith on his testimony.
 12. Mr. Tom Fornier then gave evidence on behalf of the Dealer and admitted that it had contravened the Standards. Mr. Fornier also explained to the Panel that the Dealer had run a reputable motor vehicle dealership for many years and that it had never been subject to disciplinary proceedings prior to these incidents. In fact, Mr. Fornier expressed disappointment with the Dealer's sales managers and gave evidence that the Dealer had, since the inspection in 2005, taken steps to ensure the daily rental history of its vehicles was properly tracked. The Dealer's electronic system now displays the daily rental history of all vehicles so that consumers will be made aware of its former usage prior to purchasing a vehicle.
 13. Ms. Harari cross-examined Mr. Fornier with respect to the measures taken by the Dealer. Specifically, Ms. Harari asked why the Dealer continued to sell former daily rentals without the requisite disclosure to consumers even after the first inspection and warning by OMVIC in July 2002. Mr. Fornier advised that the Dealer had experienced staffing difficulties and that a number of his sales personnel were of the view that they did not have time to check and double check whether the appropriate disclosure was made, in all cases, regarding former daily rental status.
 14. Mr. Fornier did not bring any witnesses to the hearing nor did he tender any documentary evidence.

FINDINGS OF THE PANEL

15. Inspections of the Dealer were carried out by OMVIC on two (2) separate occasions. At the first inspection in July 2002, it was discovered that vehicles had been sold to consumers without disclosure as to their former daily rental status. OMVIC issued a written warning and cited the Standards as the basis for the warning.
16. At the second inspection in November 2005, it was discovered that the Dealer had sold fifteen (15) more vehicles to consumers without disclosing their former daily rental status.
17. Since the November 2005 inspection, the Dealer sold another three (3) vehicles and failed to disclose in writing on the bills of sale that the vehicles were former daily rentals.
18. On the basis of the evidence presented, uncontradicted and in fact, conceded by the Dealer, the Dealer blatantly ignored OMVIC's written warnings in July 2002 and November 2005. Even after the warning, the Dealer sold vehicles without disclosure of former daily rental and took no steps whatsoever to advise consumers that they had purchased former daily rentals.

PENALTY

19. Ms. Harari requested a fine in the amount of \$400.00 per vehicle sold without the appropriate disclosure, following the first OMVIC inspection, or fifteen (15) vehicles. Ms. Harari requested the amount of \$800.00 per vehicle sold by the Dealer without the appropriate disclosure, following the second inspection, or three (3) vehicles. Accordingly, OMVIC requested a total fine of \$8,400.00.
20. In determining the appropriate penalty for breaches of the Standards, this Panel has considered the following:
 - (a) the Dealer continued to sell vehicles without disclosing on the Bills of Sale that the vehicles were former daily rentals even after OMVIC's two (2) written warnings;
 - (b) following the inspections, the Dealer did not make any attempts at all to contact the consumers who had been sold the vehicles without the appropriate disclosure;
 - (c) the Dealer failed to take timely and appropriate steps with its employees to ensure that these individuals were sure to comply with the Standards in the future;
 - (d) this Panel's decisions in *Re Terrace Ford Lincoln* (Exhibit 3) and *Re. Donnelly Kia* (Exhibit 4);
 - (e) the Dealer made no submissions with respect to an appropriate penalty; and
 - (e) Counsel for OMVIC submitted that an appropriate fine in these circumstances would be in the range of \$8,400.00.

21. The Dealer is ordered to pay \$7,500.00 within ninety (90) days of the date of this decision.
22. The fine is based on \$300.00 per vehicle for vehicles sold without proper disclosure following the first inspection in July 2002 and \$1,000.00 per vehicle for vehicles following the second inspection in November 2005. While a fine of \$800.00 per vehicle following the second inspection might be appropriate in some cases, in this case, the Panel has set the fine at \$1,000.00 per vehicle following the second inspection due to the failure of the Dealer to take any steps whatsoever to contact customers after the sales and advise them of their vehicles' former daily rental status. The purpose of the Panel's fine is to deprive the Dealer of some of its profits on the vehicles at issue and is intended to act as a general deterrent to breaching the Standards.
23. No order of costs has been made against the Dealer because, at the present time, the source of the Panel's jurisdiction to make a costs awards, section 17 of the *Statutory Powers Procedure Act*, R.S.O. 1990, Chap. S. 22, has been amended and only permits costs awards to be made in cases where a party's conduct has been unreasonable, frivolous or vexatious. The Panel is of the view that the Dealer's conduct was neither frivolous nor vexatious in the circumstances.
24. Further, this decision shall be communicated to the industry and to the public.

Mr. Jeff Prossler (Chair)

Mr. Bruce Wilson

Mr. Larry Pringle