

MOTOR VEHICLE SALES AUTHORITY OF BRITISH COLUMBIA
(Previously known as the Motor Dealer Council of B.C.)

**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**

RE:

EMILIA KUZMOVA

COMPLAINANT

AND:

EAGLE RIDGE PONTIAC BUICK GMC LTD.
Dealer Registration No. 8214

DEALER

DECISION OF THE REGISTRAR OF MOTOR DEALERS

1. On April 16, 2008, a hearing was held pursuant to Sections 5 and 6 of the *Motor Dealer Act* R.S.B.C. 1996 c. 316 (the “MDA”) and Sections 154, 155 and 164 of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the “BPCPA”) regarding an alleged deceptive act or practice committed by Eagle Ridge Pontiac Buick GMC Ltd. Dealer No. 8214 (“Eagle Ridge”) on March 12, 2007, in its sale of a vehicle to Emilia Kuzmova (“Kuzmova”). In specific, the Notice of Hearing (Exhibit 2) makes the following allegation:

Evidence gathered has disclosed that Eagle Ridge Pontiac Buick GMC:

1. On or about March 12, 2007 you failed to comply with section 4(3)(a)(i) of the Business Practices and Consumer Protection Act – a representation by a supplier that goods or services have performance characteristics, accessories, components, uses or benefits that they do not have specifically that a 2007 Pontiac G5 Coupe, VIN: 1G2AJ15F877131266 sold to Emilia Kuzmova was equipped with factory air conditioning when it was not.

2. The Notice of Hearing was delivered by hand to Eagle Ridge along with the Affidavit of Bill Jost sworn March 3, 2008, (the “Affidavit”). The Affidavit contains a summary of Mr. Jost’s investigation and Kuzmova’s position and was entered as Exhibit 1. Attached to the Affidavit are various Exhibits relied on at the Hearing. It is clear that Eagle Ridge had reviewed those materials as its representative came prepared with questions put to Mr. Jost regarding the Affidavit and the attached Exhibits. Eagle Ridge also brought documents to the hearing which were entered as Exhibits.

3. Present at the hearing for Eagle Ridge were: (i) Adam Isfeld who represented Eagle Ridge and spoke on its behalf; (ii) Jeff Hokanson – sales manager; (iii) Dan Thistlethwaite – salesperson; and (iv) Robert Strain – sales manager.
4. Present at the hearing for the Motor Vehicle Sales Authority of B.C. (the “VSA”) were Denis Savidan, Manager of Compliance and Investigations, and Bill Jost, Compliance Officer (Investigator).
5. Ms. Emilia Kuzmova was also present at the hearing and provided evidence.

The Facts

6. I have reviewed the Affidavit and its exhibits and the exhibits tendered by Eagle Ridge. I have also considered the given testimony. While I may not refer to all the evidence presented at the hearing, I have reviewed, considered and given all the evidence its due weight. The facts are really not in dispute.

7. On March 12, 2007, Kuzmova purchased a 2007 Pontiac G5 Coupe VIN: 1G2AJ15F877131266 (the “Vehicle”) from Eagle Ridge which included a corresponding financing agreement: Exhibit I. Kuzmova stated she required the vehicle have: (i) air conditioning; (ii) a trailer hitch; and (iii) have trunk space, not a hatchback. The Vehicle’s console has an air conditioning button which when pressed lights up indicating the air conditioning is on: see Exhibit J attached to the Affidavit. In her written complaint Kuzmova stated that Dan Thistlethwaite, showed her how to turn the air conditioning on and off: Exhibit A to the Affidavit. It seems reasonable that Kuzmova would ask for verification that the vehicle was equipped with air conditioning and I accept this evidence.

8. In June 2007 Ms. Kuzmova went to use her air condition for the first time only to find that it did not work. On June 20, 2007, Kuzmova took the Vehicle into Eagle Ridge’s service department for an oil change and to have them investigate the inoperative air conditioning. The technician’s notes on the service work order (Exhibit G of the Affidavit) states:

Check and Report on a/c not blowing cold- Tech Comments: check A/C, light on control head comes on. No A/C stuff under hood. Check RPO list and found car does not have A/C. Check and found wrong HVAC head installed at factory. ordered proper heater – Warranty Completed by Technician number: 2202

9. Adam Isfeld stated that when a vehicle is received from the factory, Eagle Ridge conducts an inspection of the car and checks it against the RPO list to ensure it has the equipment that it is supposed to. Mr. Isfeld properly admitted that Eagle Ridge clearly missed the fact that the Vehicle did not have air conditioning even though the HVAC head and interior console indicates that it does. Mr. Isfeld also stated that this is the third such vehicle they received from the factory with this problem and that they resolved the other two problems with the consumers.

10. After Kuzmova was informed of the air conditioning problem, she contacted Dan Thistlethwaite who referred her to Rob Walker, sales manager, who in turn referred her to Jeff Hokanson, the sales manger dealing with Kuzmova during the purchase of the Vehicle. Over the past months, Eagle Ridge has proposed to Kuzmova options to rectify this situation. Kuzmova filed her complaint with the VSA on August 1, 2007.

11. It is clear from the evidence that Ms. Kuzmova requested her vehicle have air conditioning and the dealer was to provide her with a vehicle with air conditioning on the agreed to financing terms. That was the deal the two parties bargained for. I now turn to the options presented to Kuzmova to resolve this problem.

Option 1

12. Ms. Kuzmova suggested that she return the Vehicle for a 2007 Pontiac Wave Sedan which had air conditioning. According to her statement, Eagle Ridge said this could not be done as the value of the Vehicle was too low now “because I drove the car out of the parking lot.” Eagle Ridge instead offered her an older Pontiac (2005 or 2006) with A/C. However, she states that “payments would almost be the same or a little bit higher because interest rate on used vehicle is higher. Simply, after all that pain I should get used car with higher payments?”: Exhibit A attached to the Affidavit. These facts were not challenged by Eagle Ridge.

Option 2

13. Eagle Ridge offered to install air conditioning once the parts became available: see paragraphs 12-13 of the Affidavit, Exhibit K of the Affidavit and Exhibit 7. Adam Isfeld has stated that this option would appear to now be a virtual impossibility. Mr. Isfeld states that they have inquired with GM almost every two weeks to ascertain if parts would be coming available. He also stated Eagle Ridge has inquired with Anglo-Canadian, who Eagle Ridge stated was an industry leader in the sale and service of automotive air conditioning, and tendered an April 15, 2008, email from Anglo-Canadian which was entered as Exhibit 6. In that email, Anglo-Canadian states that all their suppliers indicate there is no A/C kit available for the Vehicle and they “are not optimistic about a kit being available in the near future.” I note that Exhibits 6 and 7 were offered into evidence by Eagle Ridge.

Option 3

14. Adam Isfeld noted that the air conditioning option for this vehicle had a manufacturer’s suggested retail price of \$1150.00: Exhibit 5. Eagle Ridge offered \$1,800.00 cash to compensate Kuzmova for the missing air conditioning: Exhibit 7.

Option 4

15. On April 14, 2008 Adam Isfeld met with Kuzmova to provide her with two scenarios to finance a new 2008 Pontiac G5 Coupe with air conditioning over 60 or 72 months. Exhibit 7 details those two options, and is signed by Adam Isfeld and Kuzmova and dated April 14, 2008. I note there is no interest rate shown on the document, but that a documentation fee of \$295.00 is charged under both scenarios. It is common knowledge within the industry that a dealer documentation fee is an amount set by the dealer to cover its administrative costs and the amount varies from dealer to dealer. Noted on the bottom of this document are the following three options:

- Option 1: Trade in car with air con (As Above)
- Option 2: \$1800 CASH to customer.
- Option 3: Wait for parts.

Option 5

16. At the hearing, Adam Isfeld indicated a possible further option which was a cash purchase of the 2008 Pontiac G5 Coupe utilizing a GM cash credit and the trade in of the Vehicle. This option would see Kuzmova having to pay \$2920.00 plus taxes and she would then be in a brand new car with air conditioning and a trailer hitch.

The Law

17. The alleged deceptive act or practice is set out under section 4(3)(a)(i) of the BPCPA which states:

4 (1) In this Division:

"deceptive act or practice" means, in relation to a consumer transaction,

(a) an oral, written, visual, descriptive or other representation by a supplier, or

(b) any conduct by a supplier

that has the capability, tendency or effect of deceiving or misleading a consumer or guarantor;

"representation" includes any term or form of a contract, notice or other document used or relied on by a supplier in connection with a consumer transaction.

(2) A deceptive act or practice by a supplier may occur before, during or after the consumer transaction.

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

(a) a representation by a supplier that goods or services

(i) have sponsorship, approval, performance characteristics, accessories, ingredients, quantities, components, uses or benefits that they do not have,

18. Supplier is defined under s. 1 of the BPCPA and it is clear that Eagle Ridge falls under the definition of supplier.

19. The decision of the B.C. Court of Appeal in *Rushak v. Henneken* (1991), 59 B.C.L.R. (2d) 250, 1991 CanLII 178 (C.A.) reviewed deceptive acts or practices under the *Trade Practice Act*, which has since been replaced by the BPCPA. In *Rushak*, the Court considered whether the conduct of the Motor Dealer Henneken was a deceptive act and determined it was. From *Henneken* the following principles emerge:

- (1) a deceptive act or practice need not be intentional, may be inadvertent and may arise even if the supplier has an honest belief in the accuracy of the information it relays;
- (2) a deceptive act is one "that tends to lead a person astray into making an error of judgment";

- (3) the Act must be construed so as to protect not only alert potential customers, but also those who are not alert, are unsuspecting and are credulous; and
- (4) the Act imposes a high standard of candour on a supplier of goods.

20. In *The Consumers' Association of Canada et al. v. Coca-Cola Bottling Company et al* 2006 BCSC 863, additional reasons 2006 BCSC 1233 (B.C. Supreme Court), affirmed by 2007 BCCA 356 (B.C. Court of Appeal), Russell J. treated the deceptive act provisions of the *Trade Practices Act* and the BPCPA as the same and applied *Rushak* to her consideration of a deceptive act or practice under the BPCPA. Madam Justice Russell cautioned at paragraphs 86-87:

[86] In oral submissions, plaintiffs' counsel argued that "capability" is all that is required for a successful claim under the Act. While I agree that the statutes impose a "high standard of candour" on suppliers (*Rushak v. Henneken* 1991 CanLII 178 (BC C.A.), (1991), 84 D.L.R. (4th) 87, 59 B.C.L.R. (2d) 250 (C.A.) at para. 17), it defies common sense to suppose suppliers will always be found liable for any consumer misapprehension. In my view, such a literal interpretation of the provision would permit a deceptive act or practice claim to arise from nearly any representation, given the potential for imperfect understanding whatever words are used.

[87] The cases provided by the plaintiffs themselves, as well as those provided by the defendants, establish that a deceptive act or practice "is one that tends to lead [a] person astray into making an error of judgment": *British Columbia (Director of Trade Practices) v. Household Finance Corp.*, [1976] 3 W.W.R. 731 at 736, 29 C.P.R. (2d) 232 (B.C.S.C.); aff'd, [1977] 3 W.W.R. 390, 33 C.P.R. (2d) 284 (B.C.C.A.). Here, there is no evidence that any consumer has been or may have been led into making an error of judgment because of any representation regarding the CRF. [underlining added]

21. The prohibition from committing a deceptive act or practice is found under s. 5 of the BPCPA. It also identifies who bears the burden of proof:

5 (1) A supplier must not commit or engage in a deceptive act or practice in respect of a consumer transaction.

(2) If it is alleged that a supplier committed or engaged in a deceptive act or practice, the burden of proof that the deceptive act or practice was not committed or engaged in is on the supplier.

22. Sub-section 5(2) is a reverse onus provision, which means that the onus is on Eagle Ridge to show that the alleged deceptive act or practice did not occur.

Analysis

23. In this particular case, Kuzmova specifically asked for a car with air conditioning and the Vehicle appeared to have air conditioning and was demonstrated and represented as having air conditioning. The vehicle does not and Eagle Ridge has appropriately conceded they missed this fact. In considering section 4(3)(a)(i) and the common law, I find that representation led Kuzmova to make an error in judgment. She bought a vehicle without air conditioning. The question in this case is what to do to resolve this problem.

24. As soon as it was determined that the Vehicle did not have air conditioning, as the parties had bargained for, it was for Eagle Ridge to honour its part of the bargain and provide Kuzmova with a vehicle as agreed under the same financing terms, including interest rate, monthly payments and the term of the financing.

25. Options one, four and five would have placed Kuzmova in a different vehicle than bargained for completely changing the subject of the agreement and did so on different terms. Kuzmova rejected these options as they either placed her in an older used car for the same or higher monthly payments or extended her indebtedness another two years for the new car. Kuzmova was well within her rights to refuse these new agreements and to demand Eagle Ridge honour its original agreement.

26. Option three amounts to compensation for Eagle Ridge's inability to perform its part of the agreement. If Kuzmova had accepted the \$1800.00 compensation, she would have accepted the Vehicle without air conditioning which she did not want to do. It was well within Kuzmova's rights to refuse the compensation and demand that Eagle Ridge honour its original agreement.

27. Option two attempted to honour the original agreement. Up until April 14, 2008, two days before the hearing, Eagle Ridge held this out as a viable option "Wait for parts": Exhibit 7. Eagle Ridge stated at the hearing that it had inquired with GM almost every two weeks to see if parts were becoming available. Eagle Ridge also said they were inquiring with Anglo-Canadian, but the only documentary evidence is that they inquired once on April 15, 2008, the day before the hearing: Exhibit 6. This is some 13 months after they sold the vehicle and some 10 months after the missing air conditioner was brought to its attention. There is no evidence showing that Kuzmova was informed of the lack of availability of the air conditioning parts. In Exhibit 7 "Wait for parts" is unqualified.

28. Eagle Ridge says they could not resolve Kuzmova's problem because they could not obtain the same financing terms as in the original agreement. Adam Isfled said the deal could not just be unwound because "programs" were not available to do so. I note that Eagle Ridge could have itself covered any discrepancy in payments to compensate for higher interest rates, higher monthly payments or a longer term. This it never offered to do. It was Eagle Ridge's obligation to honour its agreement, not to expect or wait for a program offered by a third party to assist Eagle Ridge to honour its agreement, or to require Kuzmova to agree to something different than the original agreement.

29. At the hearing Ms. Kuzmova said she wants the deal unwound, to return the car, get her money back and have nothing more to do with Eagle Ridge. Eagle Ridge suggested that the deal cannot simply be unwound as the car is now used, has a depreciated value and Kuzmova would have driven the car for a year for free. Adam Isfled said that courts will deduct the depreciated value if a deal is unwound to reflect the use the consumer had of the car.

30. Whether or not there should be a deduction for the depreciated value of the Vehicle is to be determined by an examination of the unique facts of each case with a view of doing what is just amongst the parties.

31. Kuzmova stated she continued to drive the vehicle as Eagle Ridge led her to believe air conditioning parts would be available and installed for free. The evidence is clear that Eagle Ridge held this out as an option even two days before the hearing: Exhibit 7. The problem as I see it is that Eagle Ridge never qualified that offer to Kuzmova by informing her that those parts may never become available: see Exhibit 7. If Eagle Ridge had informed Kuzmova that after

talking to GM and Anglo-Canadian that there is a possibility that parts may not come available and both then agreed on a wait and see strategy, then I would agree with Eagle Ridge that Kuzmova should pay a reasonable amount of the depreciated value. There is no evidence that Eagle Ridge properly informed Kuzmova about this option. This created a knowledge imbalance between the parties, with Eagle Ridge in the more superior position. A failure to properly qualify a representation, even though there was an honest belief in that representation by the dealer, was found to be a deceptive act in *Rushak*.

32. It was Eagle Ridge who chose the wait and see strategy. The evidence also shows that Eagle Ridge failed to make due inquiries and to inform Kuzmova that parts may not become available. This deprived Kuzmova from making an informed decision on Eagle Ridge's wait and see strategy. The extent of the depreciation of the Vehicle is a result of Eagle Ridge's lack of diligence, lack of disclosure about the availability of the air conditioning parts, and their chosen wait and see strategy. Kuzmova acted quickly by filing her complaint within 5 weeks of becoming aware of the air conditioning problem and when Eagle Ridge failed to quickly resolve that problem. In these circumstances, I find it would be unjust for Kuzmova to pay for the depreciation of the Vehicle.

Decision

33. I have found that Eagle Ridge has committed a deceptive act or practice under s. 4(3)(a)(i) of the BPCPA in that Eagle Ridge represented to Kuzmova that the Vehicle had air conditioning when it did not. Section 155 of the BPCPA provides that I may make a Compliance Order in relation to a breach of the BPCPA to remedy that breach. I therefore make the following:

Compliance Order

- (1) Eagle Ridge is to refrain from committing deceptive acts or practices and to abide by the *Business Practices and Consumer Protection Act* S.B.C. 2004 c.2 and its regulations.
- (2) Within 45 days of this decision, Eagle Ridge is to unwind the transaction between itself and Kuzmova regarding the Vehicle ending all of Kuzmova's legal obligations to the Vehicle.
- (3) Eagle Ridge shall refund to Kuzmova all monies, including the down payment, she has paid towards the purchase of the Vehicle. Ms. Kuzmova will be required to transfer ownership of the vehicle back to Eagle Ridge as the case may be. There will be no deduction for depreciation of the Vehicle.
- (4) Eagle Ridge shall reimburse the Motor Vehicle Sales Authority of British Columbia for the investigation and hearing costs related to this matter. An invoice of those costs will be provided to Eagle Ridge.

In accordance with s. 157 of the BPCPA this Compliance Order may be filed in the B.C. Supreme Court and if so filed is an enforceable order of that Court.

Administrative Penalty

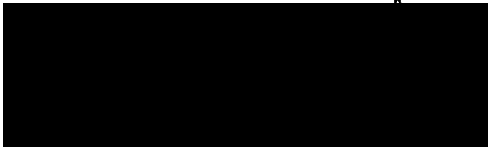
34. Under sections 164 and 165 of the BPCPA I may impose an administrative penalty of up to \$50,000.00 on a dealer who has contravened the BPCPA. I have considered the various factors found in s. 164(2) of the BPCPA, and the specific facts of this case including but not limited to:

- (1) Eagle Ridge was not diligent in ascertaining the viability of obtaining air conditioning parts;
- (2) Eagle Ridge did not inform Kuzmova of its difficulty in locating those parts, its knowledge of the viability of option two, and it continued to hold this out as an option as late as two days before the hearing some 10 months after the problem was discovered;
- (3) Eagle Ridge continued to try and profit even while it was trying to resolve this issue. For example, Eagle Ridge proposed to charge a \$295.00 documentation fee that it need not charge: Exhibit 7; and
- (4) Eagle Ridge took the position that they required a “program” offered by some third party to assist Eagle Ridge to unwind the deal or otherwise rectify this problem. They also looked to Kuzmova to accept something different than the original agreement.

35. In considering all these factors and the totality of the facts of this case, it is my opinion that an administrative penalty of \$3,000.00 is warranted and ordered. This amount represents only about 6% of the maximum amount allowed by the BPCPA. Section 167 of the BPCPA requires the administrative penalty be paid within 30 days of service of notice of this penalty and payment is to be remitted to the office of the VSA at # 150 – 6400 Roberts Street Burnaby, B.C. V5G 4C9. A Notice of Penalty may be filed in the B.C. Provincial or Supreme Court and if so filed is enforceable as an order of the respective court: s. 168(2) of the BPCPA.

36. Pursuant to Sections 155(7), 166(2) and 181 of the BPCPA, a request can be made for this decision to be reconsidered. This can be done by writing the VSA office at #150 - 6400 Roberts Street, Burnaby, B.C. V5G 4C9, attn: Denis Savidan, requesting reconsideration of the decision and outlining the error or mistake that is believed to have been made, and/or, indicating what new and previously unavailable evidence is to be provided.

Dated: May 5, 2008



Ian Christman, B.A. LL.B.