

**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:

MIKE BOYD

COMPLAINANT

AND

**A.P.G. CAR SALES & LEASING LTD.
(Dealer Registration No. 11167)**

MOTOR DEALER

REGISTRAR'S DECISION

1. On June 18, 2008, a hearing was conducted before me whereby it was alleged that A.P.G. Car Sales & Leasing Ltd., Motor Dealer Registration 11167 ("APG"), did sell a motor vehicle to Mike Boyd ("Boyd") on or about August 4, 2006, in North Vancouver, British Columbia, that was in fact a stolen motor vehicle with a switched VIN number from a similar year, make and model vehicle - known in the industry as being a "clone."
2. Present at the hearing on behalf of APG was Arash Sharifi. Mike Boyd ("Boyd") did not attend, but his claim was placed before me in the Affidavit of Ross Cote, a Compliance Officer for the Motor Vehicles Sales Authority (the "VSA"), and sworn on May 12, 2008, (the "Affidavit"). Mr. Sharifi was provided a copy of the Affidavit prior to the hearing. While I may not discuss all the evidence presented, I have reviewed all that evidence and given it the appropriate due weight.
3. The hearing was very short as Mr. Sharifi admitted that everything stated in the Affidavit was true. He admitted that he had to compensate Boyd for any losses sustained when the motor vehicle in question was recovered and seized by the police. Mr. Sharifi only disputes the amount of that compensation, believing Boyd is asking too much.

FACTS

4. On June 17, 2006, APG took in trade a 1997 Ford Mustang VIN 1FALP45X2VF208901 (the “1997 Mustang”) from a Chelsey Carew with APG providing Ms. Carew a 1999 Hyundai Accent and \$5,000.00 cash (see pages 11 and 15 of the Affidavit exhibits). APG was informed by Ms. Carew that she was returning to school and needed a more economical vehicle and the cash for school (see page 20 of the Affidavit exhibits). The ICBC Transfer/Tax Form APV9T (page 15 of the Affidavit exhibits) shows that the vehicle was accepted for registration into the name of APG.

5. On August 4, 2006, APG entered into an agreement with Boyd to accept his 2002 VW Jetta as an even trade for the 1997 Mustang. The Agreement (page 21A of the Affidavit exhibits) shows the 1997 Mustang was valued at that time by APG and Boyd at \$11,999.00. The ICBC Transfer/Tax Form APV9T (page 13 of the Affidavit exhibits) shows that the 1997 Mustang was accepted for registration into the name of Boyd.

6. On October 11, 2007, Boyd attended Jim Pattison Toyota Northshore and traded the 1997 Mustang for a 2008 Toyota FJ Cruiser. The purchase agreement (page 4 of the Affidavit exhibits) and the Lease Agreement (page 5 of the Affidavit exhibits) shows Boyd agreed on a price of \$3,969.00 as the trade-in value for the 1997 Mustang. Again, the ICBC Transfer/Tax Form APV9T (page 14 of the Affidavit exhibits) shows that the 1997 Mustang was accepted for registration into the name of Jim Pattison Industries Ltd. dba Jim Pattison Toyota.

7. On October 23, 2007, 12 days after Boyd traded the 1997 Mustang in to Jim Pattison Toyota, it was sold to a Michael Donnelly for \$8,250.00 (page 10 of the Affidavit exhibits). Again, the ICBC Transfer/Tax Form APV9T (page 12 of the Affidavit exhibits) shows that the 1997 Mustang was accepted for registration into the name of Michael Donnelly.

8. After an investigation by Enzo Nadalin of ICBC’s Special Investigation Unit and Constable Ens, a Vancouver Police Officer attached to “IMPACT”, an inter-agency police force focused on the recovery of stolen vehicles, it was determined that the 1997 Mustang was in fact a 1998 Mustang with VIN 1FAFP45XXWF169375 (the “1998 Mustang”) (paragraph 10 of the Affidavit and page 10 of the exhibits attached thereto) stolen from Carter Pontiac sometime in 2005. The VIN of a 1997 Mustang had been substituted to hide the stolen 1998 Mustang – it was “cloned.” The vehicle was seized from Michael Donnelly on or about November 6, 2007.

9. As a result of the seizure, Jim Pattison Toyota unwound its sale to Donnelly and refunded his money. Jim Pattison then also unwound the transaction with Boyd by removing the trade-in value given for the 1997 Mustang. It is due to this fact that Boyd seeks compensation from APG in the amount of \$10,000.00.

10. Apparently, the police will not be “tracing back” the various sales of the 1997 Mustang and conducting further investigations in assistance to APG and recovery of its loss (paragraph 10(e) of the Affidavit and the testimony of Sharifi). Mr. Sharifi also informed me his only recourse now is the civil courts to try and recover his loss and that it is uneconomical to do so.

THE LAW

11. Section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the “BPCPA”) prohibits deceptive acts or practices. Under s. 4(3) of the BPCPA, the BC Legislature has deemed certain conduct to be deceptive acts or practices. While the notice of hearing refers to ss. 4(3)(b)(i) regarding a representation of the status of the supplier, the preferable section is ss. 4(3)(a)(ii), which states:

4(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

(ii) are of a particular standard, quality, grade, style or model if they are not

The 1997 Mustang was in fact a 1998 Mustang, being a different model year and would fall under this heading.

12. Also applicable would be ss. 4(3)(b)(iv):

(b) a representation by a supplier

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

It was clearly inferred that Boyd would obtain clear title to the 1997 Mustang, with the associated property rights that accompany clear title, when in fact he did not gain those rights.

13. In *Rushak v. Henneken Auto Sales and Service Ltd.* (1991), 59 B.C.L.R. (2d) 250 (C.A.), the BC Court of Appeal stated that a deceptive act may be inadvertent and may even occur where the supplier honestly believes the representation he makes. While *Rushak* applied the deceptive

act provisions of the now repealed *Trade Practices Act*, Madam Justice Russell in *The Consumers' Association of Canada et al. v. Coca-Cola Bottling Company et al.* 2006 BCSC 863, additional reasons 2006 BCSC 1233; affirmed by 2007 BCCA 356 (BC Court of Appeal); leave to appeal to the Supreme Court of Canada refused (December 20, 2007, S.C.C. File No. 32248, 2007 CanLII 66731), stated that the deceptive act provisions of the *Trade Practices Act* and the BPCPA are identical and her ladyship applied *Rushak* to the case before her.

14. It is clear that, while inadvertent, APG committed a deceptive act or practice as defined by the BPCPA and interpreted by the above cited court decisions.

15. Having found a deceptive act has occurred, I have jurisdiction to make a compliance order under ss. 155(4)(a) & (b) of the BPCPA to have APG reimburse Boyd for his losses resulting from this consumer transaction.

COMPENSATION AMOUNT

16. I would note that the wording of s. 5(2) of the BPCPA is very clear and restricts the reverse onus placed on APG, to only having to prove that a deceptive act or practice did not occur:

(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.[underlining mine]

17. The reverse onus, therefore, does not apply to proof of damages incurred by a consumer and the normal law on onus applies; meaning that it is for the consumer to substantiate by evidence that it has incurred damages and the amount of those damages.

18. After a review of the Affidavit and its exhibits, there is no evidence to substantiate the \$10,000.00 claimed by Boyd. As stated above, the 1997 Mustang was purchased by Michael Donnelly 12 days after Boyd traded it in. The purchase agreement between Michael Donnelly and Jim Pattison Toyota (page 10 of the Affidavit Exhibits), being an arm's length transaction with neither Boyd nor APG's interests involved, shows the retail value of the vehicle in the market place was \$8,250.00. Further, it must be remembered that Boyd agreed to value the 1997 Mustang for the purpose of his trade-in at \$3,969.00. If the 1997 Mustang was never a cloned vehicle and never seized, Boyd would not have incurred any losses or damages and must be taken

to have accepted \$3,969.00 as a reasonable amount for the 1997 Mustang. In light of these facts, for Boyd to ask for \$10,000.00 as compensation is wholly unrealistic.

19. Boyd's only proven loss is the value of the trade-in he was deprived of because of the vehicle being stolen. There would also be a corresponding "tax benefit" as the trade-in value would be deducted from the purchase price of the 2008 Toyota FJ Cruiser, reducing the GST amount payable. The purchase agreement shows the GST payable was \$2,110.20, being 6% of the purchase price (after the trade-in was deducted). Therefore, Boyd's proven loss is the \$4,207.14 ($\$3,969.00 \times 1.06$) lost trade-in and tax benefit towards the purchase of his 2008 Toyota FJ Cruiser. At the hearing, Mr. Sharifi agreed without argument that APG would be responsible for this amount.

COSTS AND ADMINISTRATIVE PENALTY

20. Under ss. 155(4)(d) of the BPCPA, I may order APG pay the investigation and hearing costs in this matter. I decline to do so as it is clear to me that it was not due to the conduct of APG that this hearing and investigation was necessary. APG admitted it had a responsibility to Boyd; it appropriately admitted to the facts in the Affidavit, but simply contested the amount of the compensation asked by Boyd. My conclusion on the compensation amount is in line with APG's submission on this point. APG only took up about 10 minutes of time at the hearing. There is no evidence to suggest that APG hindered or was uncooperative in the investigation. If Boyd had made a reasonable request, this matter probably would have been dealt with, without the need for an investigation or hearing. Under these circumstances, it would not be just to order APG pay investigation and hearing costs.

21. Under s. 164 of the BPCPA I may order an administrative penalty where there has been a breach of that Act. I decline to do so as in this case it is clear that APG was also a victim of the Mustang being a stolen vehicle. ICBC had several times registered the 1997 Mustang as such. It also appears APG will not be able to collect its own loss. I further believe that APG will have learned to have a better look at the VINs on vehicles it buys, trades and/or sells to see if they appear factory installed. In this case, the VIN plates were glued in place on the dash and the driver's door pillar.

COMPLIANCE ORDER

22. APG is ordered to reimburse Boyd \$4,207.14 within 45 days of this decision.

Dated: July 4, 2008

A large black rectangular redaction box covers the signature of Ian Christman. There are handwritten initials 'C' to the left and 'S' to the right of the box.

Ian Christman, B.A., LL.B