

**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:**

**JONATHON THOMPSON**

**COMPLAINANT**

**AND:**

**APPLEWOOD MOTORS INC.**  
**dba APPLEWOOD KIA**  
**Dealer Registration No. 10659**

**DEALER**

**DECISION OF THE REGISTRAR OF MOTOR DEALERS**

1. On June 18, 2008, a hearing was held before me whereby it was alleged that Applewood Motors Inc. dba Applewood Kia with Dealer Registration No. 10659 (“Applewood”) did on or about April 16, 2007, at or near Surrey, British Columbia, commit a deceptive act or practice by selling a 2004 Dodge Ram, VIN 3D7KU28C44G204377 (the “Dodge”) to Jonathon Thompson (“Thompson”) without disclosing to Thompson that the Dodge had a performance enhancement device and had sustained engine damage; contrary to section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the “BPCPA”).

2. As part of the pre-hearing process, a Notice of Hearing was delivered to Applewood which it admitted receiving: Exhibit 1 at the Hearing. Also provided to Applewood prior to the hearing was the Affidavit of Holly Childs, sworn May 26, 2008, (the “Affidavit”). Holly Childs is a Compliance Officer with the Motor Vehicle Sales Authority of B.C. (the “VSA”). Applewood admitted to having received the Affidavit prior to the hearing and the Affidavit was entered as Exhibit 2.

3. Appearing at the hearing on behalf of Applewood was Darren Graham. Thompson did not appear but his claim and written statements are attached as exhibits to the Affidavit. While I may

not comment on all the evidence and testimony at the hearing, I have reviewed and considered all the evidence and testimony and given it the due weight required.

## **THE FACTS**

4. The facts are really not in dispute. On April 16, 2007, Thompson attended at the lot of Applewood and purchased the Dodge. On the purchase agreement (page 3 of the Affidavit exhibits), it shows the dealer declaring the Dodge was previously registered O.O.P. (Out of Province) and the vehicle damage declaration sections states “unknown”, with neither the yes or no box checked. The total price to be paid with taxes was \$52,035.07, which included a lien payout of \$16,000.00 for the trade-in Thompson provided. The purchase was financed and including the cost of financing, the vehicle purchase price was \$64,479.01. The purchase agreement also states that Applewood warrants the balance of the manufacturer’s warranty on the Dodge. Thompson was not informed the vehicle had a damaged engine or that high performance parts had been previously installed on the Dodge.

5. After purchasing the Dodge, Thompson took the vehicle back to his home in Campbell River. He noted an oil loss problem with the Dodge and he took the vehicle back to Applewood for repair. Thompson did not get any satisfactory service from Applewood. In an agreement between the two, Applewood paid Thompson some \$500.00 or so to allow Thompson to perform the repairs himself.

6. Thompson continued to experience an oil loss problem and took the vehicle to Bill Howich Chrysler in Campbell River. That dealership had completed some repairs under warranty to fix several external oil leaks, but the problem continued. Of interest is a reprinted work order dated December 28, 2007, No. 342675, where it was found that the engine crankcase (oil reservoir) had over-excessive pressure and a notation that “possibly broken piston rings.” Over-excessive pressure in the crank case, also known as blow-by in the industry, could place excessive pressure on the external seals of an engine, causing leaks. Oil would also be able to enter the combustion chamber and be burnt. The dealership obtained authorization from Chrysler Canada to “tear down the engine and check for the cause of concern.”

7. The Dodge was subsequently referred to Woodgrove Chrysler for the engine tear down and inspection. There it was determined, again, that there was engine damaged caused by a high performance computer chip having been installed sometime in the past. It is common industry

knowledge that the addition of a performance computer chip changes the “stock” performance of a vehicle and in most, if not all, cases can void a manufacturer’s warranty on the engine. On March 10, 2008, Nick Cringan, District Manager of Chrysler Canada, was informed of the performance chip and restricted the manufacturer’s warranty on the Dodge: Affidavit paragraph 18 and Exhibit P – page 96.

8. During Holly Childs’ investigation, she determined that a Shane Pietrarroia (“Pietrarroia”) had purchased the Dodge from Applewood in December 2006 and had returned it to Applewood for a full refund in March 2007. Holly Childs obtained the dealer file on Pietrarroia and discovered that Applewood was aware that the Dodge had engine damage and had some performance enhancement equipment installed on the engine.

9. After purchasing the Dodge, Pietrarroia had been experiencing oil loss problems with the vehicle and excessive blue smoke from the exhaust. Blue smoke from the exhaust is well understood in the automotive industry as indicating the engine is burning oil, which it should not be doing. Pietrarroia took the vehicle to Langley Chrysler who determined that there were H/P [High Performance] injectors in the vehicle and after conducting a cylinder balance test and other tests, it determined that the number 6 cylinder had blow-by and the piston itself was damaged. The notation on the inspection sheet [p. 68 of the Affidavit exhibits] says engine damage. Langley Chrysler provided an estimate of \$6,000.00 for overhauling the engine and replacing one piston [p. 66 of the Affidavit Exhibits]. There is no indication that this would be covered by warranty. It is to be noted that this inspection was conducted on March 13, 2007, and that there is a cover sheet showing this information was faxed to Applewood Kia’s service department at about the same time. Applewood had this information one month prior to selling the Dodge to Thompson.

10. At the hearing, Mr. Graham was asked about the fact that Applewood sold the Dodge to Thompson with the knowledge that the engine was damaged and repairs would cost approximately \$6,000.00. Mr. Graham ultimately stated that the finding of engine damaged was just one opinion.

## THE LAW

11. Section 5(1) of the BPCPA prohibits a supplier of goods conducting a consumer transaction from committing a deceptive act or practice. Under Section 4(3) of the BPCPA, the B.C. Legislature has deemed certain conduct to be deceptive acts or practices. The Notice of Hearing identifies two such sections which state:

(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,

(b) a representation by a supplier

(vi) that uses exaggeration, innuendo or ambiguity about a material fact **or that fails to state a material fact**, if the effect is misleading,

12. Also applicable in this case is Section 4(3)(b)(iv) which states:

(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,

13. The case law provides guidance in the application of these provisions. In *Rushak v. Henneken Auto Sales & Service* (1991), 59 B.C.L.R. (2d) 250, (C.A.), the BC Court of Appeal 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:

- a. 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;
- b. a deceptive act is one “that tends to lead a person astray into making an error of judgment”;
- c. 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
- d. the Act imposes a high standard of candour on a supplier of goods.

14. 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); leave to appeal to the Supreme Court of Canada refused (December 20, 2007, S.C.C. File No. 32248, 2007 CanLII 66731) Russell J. treated the deceptive act provisions of the *Trade Practices Act* and the BPCPA as the same and applied *Rushak* to her ladyships consideration of a deceptive act or practice under the BPCPA. Thus the principles in *Rushak* have application under the BPCPA.

15. Under Section 5(2) of the BPCPA, the onus is placed on the dealer to show that the alleged 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.

## ANALYSIS

16. In *Rushak*, the dealer Henneken was merely suspicious that the vehicle had rust underneath it due to the fact that aftermarket undercoating had been sprayed on. The BC Court of Appeal stated the failure by Henneken to inform Rushak of this mere suspicion was a deceptive act and upheld the trial judges order that Henneken pay Rushak \$6,000.00 in damages. It is clear from the evidence that Applewood did not disclose to Thompson that the engine was damaged and needed repairs approximately valued at \$6,000.00, or that high performance injectors were on the Dodge. The evidence is also clear that it knew of both these facts prior to selling the Dodge to Thompson. A motor vehicle is propelled by its engine and becomes virtually useless if that engine is not properly functioning. The fact that the Dodge, in the opinion of a Chrysler/Dodge dealer, had engine damage was certainly a material fact that needed to be disclosed to Thompson. I find that this conduct is captured by section 4(3)(b)(vi) of the BPCPA and is a deceptive act or practice.

17. Applewood also warranted the manufacturer's warranty on the Dodge. This meant it represented to Thompson that he had certain rights in relation to future repairs, including the engine. Applewood also knew the Dodge had high performance injectors which could potentially void the manufacturers' warranty. It would be reasonable to conclude that Thompson would be led to believe there were no issues with the manufacturers warranty and that it would be

honoured. I find this conduct is captured by section 4(3)(b)(iv) and (vi) of the BPCPA and is a deceptive act. I also find the failure to inform Thompson that the Dodge was modified from its factory specifications, potentially voiding the manufacturers' warranty, and that it had engine damage, would also be captured by Section 4(3)(a)(ii) of the BPCPA and is a deceptive act or practice.

18. Mr. Justice Taylor, writing for the unanimous Court of Appeal in *Rushak*, stated it thusly:

It seems to me that where a seller has factual evidence gained from inspection suggesting that the thing offered may have a latent defect of great importance to the potential buyer, then to express a commendatory opinion without qualification must be "conduct having the capability of misleading", within the meaning of the section, because to adopt the words of Mr. Justice Hutcheon, cited above, such a statement must tend to lead the potential purchaser "astray into making an error of judgment".

### **COMPLIANCE ORDER**

19. As I have found that Applewood committed a deceptive act or practice contrary to Section 5(1) of the BPCPA, I have jurisdiction to issue a compliance order in this matter pursuant to Section 155 of the BPCPA.

20. There is only one estimate for the repair of the engine being that of Langley Chrysler at \$6,000.00. However, that is only an estimate and the vehicle has been driven since. Mr. Graham noted that additional mileage could possibly increase the cost of repair. For instance, the Langley Chrysler quote includes the replacement of only one piston, the part being about \$300.00 in value alone. If a few more pistons need to be replaced, then there will be additional costs. However, any additional engine damage can be attributed to Applewood's original non-disclosure of engine damage to Thompson. Of course Thompson would drive the vehicle - that is why he purchased it. In this case, it would be almost impossible to award Thompson a monetary sum and it would be unjust to make him assume the risk that the repairs exceed a monetary award. It would also be reasonable to expect Thompson would not have purchased the Dodge had he known the extent of the engine damage. Under these circumstances, it seems most reasonable and just that Applewood should bear the cost in both dollars and time to have the Dodge repaired. I therefore, make the following compliance order:

- (a) Applewood is to abide by the *Business Practices and Consumer Protection Act* S.B.C. 2004 c.2;

- (b) Applewood is to refrain from engaging in deceptive acts or practices, and is to ensure it discloses all material facts to consumers regarding its consumer transactions – especially damage to vehicles;
- (c) Appelwood is to reimburse the VSA for its investigation and hearing costs, an invoice will be provided in due course; and
- (d) Applewood is to take back the Dodge and refund all monies paid by Thompson for the purchase of the Dodge ensuring Thompson has no more legal obligations to the Dodge. There will be no deduction for the kilometers used by Thompson, as the use of the Dodge is directly related to the conduct of Applewood. Thompson will be required to sign-over ownership of the Dodge to Applewood upon receiving his refund.

#### **ADMINISTRATIVE PENALTY**

21. Pursuant to Section 164, I may impose an administrative penalty for a contravention of section 5(1) of the BPCPA. In considering the amount of the penalty I must consider those factors set out in Section 164(2) of the BPCPA. Those factors are:

164(2) Before the [Registrar] imposes an administrative penalty on a person, the [Registrar] must consider the following:

- (a) previous enforcement actions for contraventions of a similar nature by the person;
- (b) the gravity and magnitude of the contravention;
- (c) the extent of the harm to others resulting from the contravention;
- (d) whether the contravention was repeated or continuous;
- (e) whether the contravention was deliberate;
- (f) any economic benefit derived by the person from the contravention;
- (g) the person's efforts to correct the contravention.

22. I have noted and considered all those factors in this case. I would especially note that Mr. Graham denied responsibility over this matter at the hearing and when confronted with Langley Chrysler's determination of engine damage which was known to Applewood prior to its sale to

Thompson, he noted that was only one opinion. An opinion confirmed by a subsequent inspection by another Chrysler dealer.

23. It is also important to note that Applewood's deceptive act was in fact a series of acts in that it:

- (a) failed to disclose the engine damage;
- (b) failed to disclose the presence of high performance parts;
- (c) failed to inform Thompson that the manufacturer's warranty may be voided because of the high performance parts; and
- (d) specifically warranted the manufacturer's warranty leaving an impression that nothing was wrong in that regard.


24. I do recognize Mr. Graham had previously offered to pay for half the repairs, or if half would not suffice, he would consider a higher amount, so long as the repairs were carried out at Applewood: email from Darren Graham to Holly Childs dated April 29, 2008, page 94 of the Affidavit Exhibits. However, Applewood is located in the Lower Mainland while Thompson is located in the Campbell River area. This would place some hardship on Mr. Thompson.

25. I must also consider that this is not the first time Applewood has been found to have committed a deceptive act or practice, by failing to disclose damage to a vehicle. In the decision of Registrar Smith in *Re Applewood Kia and Paul Ratte* dated April 16, 2008, Applewood was found to have committed a deceptive act or practice by failing to disclose damage to a vehicle sold to Mr. Ratte and imposed an Administrative Penalty of \$2,000.00.

26. In considering all the above factors, an Administrative Penalty in the amount of \$10,000.00 is appropriate in this case and is so ordered.

27. Pursuant to Sections 155(7), 166(2) and 181 of the BPCPA, this decision may be reconsidered on the provision of new evidence, or identification or an error upon a written request made to Denis Savidan, Manager of Compliance and Investigations #150 – 6400 Roberts Street Burnaby, B.C. V5G 4C9.

Date: July 23, 2008

  
Ian Christman, B.A., LL.B.