File No. 08-70064

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:

ROBERT LAMONTAGNE
AND TRACY LAMONTAGNE

COMPLAINANTS

AND:

BILL HOWICH CHRYSLER LTD.
(Dealer No. 9332)

MOTOR DEALER

DECISION OF THE REGISTRAR OF MOTOR DEALERS

1. On June 24, 2008, a hearing was held before me whereby it was alleged that Bill Howich Chrysler Ltd., Dealer Number 9332, committed a deceptive act or practice on or about September 12, 2006, in Campbell River, British Columbia, by failing to declare a material fact to Robert Lamontagne and Tracy Lamontagne (the "Lamontagnes"), specifically that a 2005 Volkswagen Jetta with VIN 3VWSE69MX5M050764 (the "Jetta") had sustained prior damage of $4,734.66 ($535.12 for glass and $4,199.54 for collision); contrary to sections 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (the "BPCPA") and 23(b)(ii) of the *Motor Dealer Act Regulation* B.C. Reg. 447/78 (the "Regulation").

2. Present at the hearing was Howich's dealer principal Bill Howich. Mrs. Tracy Lamontagne appeared at the hearing and was accompanied by her father Brian Dickson.

3. Prior to the hearing, Howich was served with a Notice of Hearing which was entered as Exhibit 1. The Affidavit of Mike Dorran, a Compliance Officer with the Motor Vehicle Sales Authority (the "VSA"), and sworn on March 22, 2008, was entered as Exhibit 2. Mike Dorran was present at the hearing. Howich acknowledged receiving the Affidavit prior to the hearing.

Attached as exhibits to the Affidavit is the complaint and written statement of the Lamontagnes, along with supporting documents regarding the allegations before me.

4. While I may not comment on all the oral and written evidence provided during this hearing, I have reviewed all that evidence and given it all the appropriate consideration and weight.

FACTS

5. On September 12, 2006, the Lamontagnes purchased the Jetta from Howich with 44,659 km on the vehicle. The purchase price of the Jetta before taxes was $20,700.00. After taxes and documentation the amount was $23,724.35. The Lamontagnes financed the whole amount and when the total finance charge is included, the cost of the Jetta to the Lamontagnes was $30,864.32.

6. The purchase agreement shows Howich failed to make its statutory declarations of whether the Jetta had sustained damage requiring repairs over $2,000.00. A notation on that purchase agreement shows "Dec's unknown." Bill Howich conceded without argument that this declaration was missed and agreed that the motor dealer was aware that the vehicle had a prior claim of $4,734.66. What Howich disagrees about is the amount of compensation the Lamontagnes claim for its failure to declare damage.

7. The Lamontagnes kept the Jetta until they traded it in on a 2008 Mazda 3 at Coastline Mazda on January 18, 2008. The Lamontagnes kept the Jetta for 1 year and 4 months. The odometer reading on the Jetta at the time of the trade-in was 76,723 km – meaning 32,064 km had been put on the Jetta by the Lamontagnes.

8. The purchase agreement for the Mazda (Exhibit H of the Affidavit) shows they received a trade-in amount of $20,300.00 for the Jetta. At first blush, this means the Jetta lost only $400.00 in value in the year since the Lamontagnes purchased the vehicle. When one considers the vehicle also had 32,064 km put on it since purchase; this is no real depreciation at all. The purchase agreement also shows the Lamontagnes still owed $20,300.00 to Coastal Community Credit Union on the Jetta.

9. While the purchase agreement for the Mazda shows it was priced at $29,368.00, Mike Dorran's Affidavit indicates that the Lamontagnes and Mazda had inflated the retail price of the Mazda upwards from $26,024.00 to enable the Lamontagnes to obtain financing. Mike Dorran's

Affidavit also notes that Coastal Mazda in reality offered to take the Jetta in on trade at $16,750.00 before it was aware of the damage. After becoming aware of the damage, Mazda did not decrease that amount. The trade-in amount was apparently also inflated to offset the inflated retail price. There was apparently no objection from the Lamontagnes to this manipulation of the numbers so that they could secure financing.

10. At the hearing Tracy Lamontagne emphasized that if they had known about the amount of the damage, they would not have purchased the Jetta. When I asked what they are seeking to remedy this issue, Mrs. Lamontagne could not arrive at a specific number, but spoke to certain costs. She entered as exhibits repair receipts from Sunwest Auto Centre (Exhibit 4) and from Fountain Tire (Exhibit 5).

11. Mrs. Lamontagne explained at the hearing that their demand letter to Howich was for $12,568.00. She explained this number was comprised of $4,734.66 being the amount of the non-declared damages and $7,833.38 for interest on their financing. The Lamontagnes are also seeking the costs they incurred for repairs to the Jetta. Mrs. Lamontagne also sought $336.00 representing 12 round trips from Campbell River to Courtney (960 kilometers in total) at .40¢ per km, a number which she states she obtained from the Canada Revenue Agency's website. The Lamontagnes also claim they lost over $9,068.00 value on the trade-in due to the non-disclosure of the Jetta's prior damage.

12. Mrs. Lamontagne also wanted to make me aware that Coastal Mazda was owned by someone named Carl and that she is aware that Carl and Bill Howich jointly owned the local Honda car dealership. Another discussion brought up by Mrs. Lamontagne was the Black Book value for the Jetta. Two black books were entered as Exhibit 6 – September 15, 2006 and January 15, 2008. These will be discussed below.

THE LAW

(i) Deceptive Act or Practice

13. Section 5(1) of the BPCPA prohibits a supplier of goods conducting a consumer transaction from committing a deceptive act or practice. This section would apply to Howich. 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 in issue here which state:

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

(iii) have a particular prior history or usage that they do not have, including a representation that they are new 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,

14. 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.), (BC Court of Appeal) 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 unsuspicious and are credulous; and
d. the Act imposes a high standard of candour on a supplier of goods.

15. *Henneken* was recently applied 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), where Madame Justice Russell stated that the key is that the deception must have "lead a person astray into making an error of judgment".

(ii) Onus of Proof

16. 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.

17. This is a reverse onus provision, but that reverse onus only applies to the deceptive act or practice. As for any damages suffered by the Lamontagnes, the "[o]rdinary principles of litigation put the burden of proof on the party making the assertion": *WIC Radio Ltd. v. Simpson* 2008 SCC 40 at paragraph 30 (Supreme Court of Canada). This means that the Lamontagnes must substantiate any damage claims with some acceptable and credible evidence.

(iii) Breach of the BPCPA versus the Regulation

18. Where a deceptive act under s. 5(1) of the BPCPA has been found, an order may be made under section 155 of the BPCPA to remedy that breach. That section does not automatically void the transaction. That section gives the decision-maker discretion to determine the most appropriate remedy. It may be that the transaction should be unwound or it may be compensation in a specified amount is appropriate. What is appropriate and just must be assessed on the totality of the evidence, the nature of the deception and the nature and amount of loss, if any, to the consumer attributable to the deceptive act.

19. Where it is found that a motor dealer failed to declare damage over $2,000.00 contrary to the *Regulation*, there is no jurisdiction under the Motor Dealer Act to order restitution to a consumer. Under the Motor Dealer Act, I may consider whether the dealer's registration may be suspended or cancelled or whether placing a condition on the motor dealer license is appropriate. It is also possible to issue a violation ticket under the *Offence Act* for breach of the *Regulation.*

20. I would note that I cannot use the breach of s. 23(b)(ii) of the *Regulation*, in and by itself, as conclusive evidence of a deceptive act: *British Columbia (Director of Trade Practices) v. Van City Construction Ltd.* 1999 CarswellBC 2011 at paragraph 102 (B.C.S.C.). For example, if the dealer failed to declare damage, but the consumer had already done a history check on the vehicle and was already aware of the damage, then there has been no deception causing a consumer to have made an error of judgment: *Consumers*.

DISCUSSION

21. Howich has admitted to failing to declare the damage over $2,000.00. As such it is in breach of s. 23(b)(ii) of the *Regulation*. There is no evidence that the Lamontagnes were otherwise aware of the damage to the Jetta. The Lamontagnes stated had they been aware of the damage, they would not have purchased the Jetta. There being no evidence contrary to this assertion by the Lamontagnes, the evidence satisfies the requirements of the BPCPA, as applied by the case law, and I find that Howich has committed a deceptive act or practice. I am also satisfied that the breach was inadvertent.

22. The question is what is the appropriate remedy? I must first assess the claims for loss advanced by the Lamontagnes. As stated above, the onus is on the Lamontagnes to provide some credible and reliable evidence of their losses. Once the claims have been canvassed, I can look at the case as a whole to determine the appropriate remedy.

(i) The loss of trade-in value of the Jetta

23. The Lamontagnes claim they lost $9,068.00 value for the trade-in on the Jetta. No real explanation was given for arriving at this number. At the hearing, Mr. Dickson, a master mechanic in the forestry industry with 27 years of experience purchasing heavy machinery, stated that there is some $5,000.00 or more of profit on used cars. Mr. Dickson also inferred that a car with damage is also worth less due to that damage.

24. In *Parsons v. Zagrodzki* 2005 BCPC 384 Judge Tweedale referenced various court decisions on the devaluation of a vehicle in an accident. In *Parsons*, Judge Tweedale was considering the expert evidence from a professional car appraiser in a case where the dealer had failed to declare damage to the consumer. Judge Tweedale noted the following problems with that expert's report:

i. There must be evidence of damage and a corresponding reduction in value of the vehicle – the expert relied on assumptions. The mere fact that a car may carry a "stigma" of having been in an accident is not proof of devaluation.

ii. The expert relied on estimates of repairs and did not review the Structural Assessment Integrity Report of ICBC which confirms whether there has been "structural damage" to a vehicle.

iii. The expert relied too heavily on a survey of dealers who provided a mere opinion on the value of the car. This is not evidence. In the words of Judge Tweedale: "Many people sharing an opinion, which is wrong in fact and law, does not make the opinion accurate."

25. In *Miles v. Mendoza*, 1994 CanLII 419 (B.C.S.C.), Madam Justice Newbury of the B.C. Supreme Court, made it clear that absent a sale of the damaged vehicle, close in time to the accident and after repair, assessing the depreciation of such a vehicle is very difficult. Also, Justice Newbury stated that the sale of the vehicle must be at "arms length," meaning the purchaser/appraiser has no other interest in the car other than purchasing it. The expert testimony accepted by Justice Newbury also showed that the depreciating effect of damage to a vehicle declines over time.

26. The only evidence advanced by the Lamontagnes is their belief in the Jetta having a depreciated value along with the testimony of Mr. Dickson. Mr. Dickson's testimony is based on an assumption that used vehicles have at least a $5,000.00 profit margin and he relies on the "stigma" attached to damaged vehicles to say the Jetta is lesser in value than it should be. None of this is evidence as stated by the above court decisions.

27. The only independent evidence provided is that from Coastal Mazda who offered to take the Jetta on trade for $16,750.00 (leaving out the artificially inflated value) before it knew of the damage and did not change that offer once it found out about the damage. It must be stressed that the trade-in amount a dealer offers is generally the wholesale amount of the vehicle. Subtracting that amount from $20,700.00, the original retail purchase price, means a difference of $3,950.00. Therefore, the depreciation of the Jetta over the year is something around $3,950.00. Ms. Lamontagne's testimony about Bill Howich and Carl being partners is an attempt to somehow discredit the trade-in amount the Lamontagnes received. However, that does not take away from the actual amount given for the Jetta for comparison purposes, especially if it is in the favour of the Lamontagnes.

28. The purchase date for the Jetta was September 12, 2006. The September 15, 2006, Black Book wholesale value for the Jetta (4dr sedan 1.8T), adjusted for the B.C. region, places the range at:

X-Clean	Clean	Average	Rough
$22,110.00	$21,010.00	$19,910.00	$18,370.00

29. I would note that the retail price of the Jetta would fall somewhere between clean and average. However, the Black Book values are wholesale values. If one considers a profit of only $1,000.00, then the wholesale value for the Jetta would fall between average and rough.

30. The Black Book defines 'Rough' as: "A vehicle with a below average interior or exterior condition and/or one with excessive kilometrage. Limited serviceable life remaining." The Lamontagnes stated the Jetta had roughly 7,000 km left on the manufacturer's warranty at the time they traded it in on the Mazda.

31. The trade-in date was January 18, 2008. The January 15, 2008, Black Book wholesale value for the Jetta (4dr sedan 1.8T), adjusted for the B.C. region, places the range at:

X-Clean	Clean	Average	Rough
$17,050.00	$15,950.00	$14,850.00	$13,310.00

32. The difference – depreciation - between these is as follows:

X-Clean	Clean	Average	Rough
$5,050.00	$5,060.00	$5,060.00	$5,060.00

33. No matter where the vehicle falls on the above spectrum, it is expected to have depreciated by about $5,050.00 over the year and four months. Whether one uses the $3,950.00 or the $400.00 figure noted above, the Lamontagnes certainly did better than the average depreciation for this make and model Jetta as noted in the Black Book. I do not find the Lamontagnes have provided evidence of a $9,068.00 loss in the trade-in value for the Jetta. I would also note that the $16,750.00 offered for the Jetta in January 2008 falls somewhere between a clean and extra-clean similar Jetta. I also find there is no evidence of accelerated depreciation due to the vehicle being in a prior accident. Also to be noted is that, at least on paper, the Lamontagnes actually obtained $20,300.00 for the Jetta for trade-in purposes.

(ii) The claim for $12,568.00

34. The $12,568.00 claimed is based on the cost ICBC paid to repair the Jetta, plus the financing charge to the creditor for the loan on the Jetta.

35. There is no evidence that the Lamontagnes had to pay for the damage repairs to the Jetta. ICBC did. The Lamontagnes have no basis to claim this amount whatsoever. If they had any claim regarding the repairs, it would be for accelerated depreciation which was discussed and rejected above.

36. The claim for the $7,833.38 is the Lamontagnes cost for having financed the purchase instead of paying cash. The Lamontagnes would pay a financing charge to the creditor whether the Jetta had no damage, had been declared damaged or whether they bought another vehicle and financed it. The cost of financing is related to the amount borrowed, the term of the loan and the interest charged – not to the item purchased. There is no evidence to link the $7,833.38 to the non-declaration of damage on the Jetta. It is simply the cost for borrowing money. I would reject this claim.

(iii) Repair receipts

37. Ms. Lamontagne claims for two tires installed on the car which had cupping wear. Mr. Dickson claims this was due to the bent rims which the Lamontagnes and Dickson believe were missed and not replaced when the vehicle was in the accident.

38. The Sunwest invoice S14692 of September 15, 2006, (3 days after the purchase) shows the tires were checked without notation of a cupping wear problem. The kilometer reading was 45,230 km. On July 30, 2007, Sunwest invoice S19930 noted the right front and left rear rims were bent and that the two rear ties were cupped. The kilometer reading on the vehicle was 66,021 km. If I accept Dickson and Lamontagnes position, that the bent rims were the reason for cupping wear, then the right front and left rear tires should show cupping wear; but of those two, only the left rear did. When the rear tires were replaced by Fountain Tire on November 20, 2007, they replaced and balanced the two rear tires with no notation that the left rear rim was bent. I would also note Ms. Lamontagne entered as part of her claim Fountain Tire invoice 260459 dated October 21, 2007, for a flat tire repair. I have great difficulty in finding Howich's failure to disclose damage on the Jetta is related to a flat tire repair over a year after purchase. I would reject the claim for the tires and the two Fountain Tire invoices.

39. One invoice from Sunwest dated August 1, 2007, shows the Jetta quit running. Sunwest invoice S19959 shows that the fuel was milky and the fuel filter needed to be replaced and the fuel system back-flushed. This was some 22,000 km after being purchased. If there was a

problem with milky fuel at the time the vehicle was purchased, it would be reasonable to have seen a problem shortly after September 12, 2006. Not some ten months and 22,000 km later. I would reject this claim.

40. According to Ms. Lamontagne's evidence at the hearing most of the repairs to the Jetta were covered by the manufacturer's warranty. I have reviewed the balance of those invoices and concluded that there is no evidence to tie the Jetta's prior damage to the repairs made – these claims are only assumptions. In accordance with the court decisions in *Parsons* and *Mendoza* noted above, I would reject the balance of the claims for repairs.

41. Ms. Lamontagne stated she was promised an additional key for the Jetta at the time of purchase. Howich has not stated otherwise. I would allow Ms. Lamontagne's claim for $313.52 ($277.45 + 6% GST + 7% PST) for the key obtained from Sunwest Auto Centre, invoice S15208 dated November 23, 2006.

(iv) Claim of $336.00 for kilometrage

42. I have found only one trip to Sunwest in Courtney can be tied to the failed promise of Howich – to obtain the second key. This was retrieved at the same time that the Lamontagnes had a spoiler installed on the Jetta: Sunwest invoice S15208, November 23, 2006. I find that a claim for kilometrage under these circumstances would not be just. The Lamontagnes were going to Sunwest in any regard.

COMPLIANCE ORDER

43. Under section 155 of the BPCPA, I may make a compliance order to remedy a breach of that Act, and order reimbursement of the VSA's investigation and hearing costs. After reviewing the claims of the Lamontagnes, I have concluded that the only proven loss suffered by them during this transaction is $313.52 regarding the key. As such, it would not be appropriate to order Howich to refund the purchase price of the Jetta to the Lamontagnes or otherwise unwind the deal.

44. I find that the need to investigate this matter and to hold a hearing was not only due to Howich's failure to disclose the damage to the Jetta. The position taken by the Lamontagnes regarding their claimed compensation was clearly a major factor. I believe had the Lamontagnes made a reasonable claim, a negotiated settlement may have been arrived at without the VSA's

intervention. Mr. Dickson commented on that very fact during the hearing. However, as Bill Howich stated, the parties were so far apart that negotiated settlement was unlikely. In these circumstances, I do not believe Howich should be responsible for 100% of the investigation and hearing costs.

45. I make the following compliance order:

(a) Bill Howich Chrysler Ltd. is to abide by the *Business Practices and Consumer Protection Act*;

(b) Bill Howich Chrysler Ltd. is to ensure it states all material facts to consumers regarding all its consumer transactions, and specifically to declare damage to vehicles;

(c) Bill Howich Chrysler Ltd. is to pay the Lamontagne's $313.52 within 45 days of this decision; and

(d) Bill Howich Chrysler Ltd. is to reimburse the VSA for 50% of its investigation and hearing costs in this matter. An invoice will be forwarded as to the amount.

ADMINISTRATIVE PENALTY

46. Under section 164 of the BPCPA I may levy an administrative penalty of up to $50,000.00 on a motor dealer who has contravened that Act. In considering the appropriate amount, I must take into consideration the factors set out in section 164(2). In considering those factors, I would note specifically that: (a) there have been no previous enforcement actions against Howich for this type of contravention; (b) failing to state a material fact about a purchase is serious but was not an unconscionable act and did not involve any danger to the Lamontagnes; (c) the loss to the consumers was found to be $313.52; (d) the contravention was not repeated; (e) the contravention was inadvertent; (f) Howich did profit by selling the Jetta; and (g) Howich made little effort to correct the specific contravention; however, I recognize that the claims advanced by the Lamontagnes were disproportionate to their actual proved losses.

47. While not determinative, under Schedule 2 of the *Violation Ticket Administration and Fines Regulation* B.C. Reg. 89/97, the fine for failing to disclose damage over $2,000.00 is $460.00.

48. In taking all the above into consideration and the need for progressive enforcement, an administrative penalty in the amount of $1,000.00 would be appropriate. I would note that

$1,000.00 is about 2% of the maximum amount that could be levied, and is in line with past Registrar decisions of a similar nature.

REMEDY FOR BREACH OF THE MDA REGULATION

49. I believe the administrative penalty adequately addresses the conduct of Howich. I find it unnecessary to direct that a violation ticket in the amount of $460.00 be issued to Bill Howich Chrysler Ltd.

50. Pursuant to sections 155(7), 166(2) and 181 of the BPCPA, an application for reconsideration of this determination may be made within 30 days of receiving a copy of it. Such an application must be in writing and provide new previously unavailable evidence, and/or identifying an error or other grounds for the reconsideration. The application is to be directed to Denis Savidan, Manager of Compliance and Investigations, Motor Vehicle Sales Authority of B.C., #150 – 6400 Roberts Street, Burnaby, B.C., V5G 4C9.

Date: August 12, 2008

[redacted]

Ian Christman B.A., LL.B.