File No. 08-70070

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

RECONSIDERATION OF THE JULY 22nd DECISION OF THE REGISTRAR OF MOTOR DEALERS

On June 22nd, 2008, a decision in this matter was rendered and wherein, Ian Christman, acting as the Registrar of Motor Dealers, decided that Applewood Kia (Applewood) had committed a deceptive act or practice contrary to Section 5(1) of the BPCPA. Based on this determination, a Compliance Order was given directing Applewood to, amongst other things:

(a) Refrain from engaging in deceptive acts or practices, and ensure that it discloses all material facts to consumers regarding its consumer transactions – especially damage to vehicles;

(b) Reimburse the VSA for its investigation and hearing costs;

(c) Take back the 2004 Dodge Ram truck and refund all monies paid by Thompson for the purchase of the Dodge; and

(d) Pay an Administrative Penalty in the amount of $10,000.00.

On September 5th, 2008, Seema Lal, solicitor for Applewood, requested by letter that the Registrar (acting as Director under the Business Practices and Consumer Protection Act) reconsider the above determinations. Section 182 [2] of the Act, states that;

> *"the director may vary or cancel a determination…… only if the director is satisfied that new evidence has become available or has been discovered that*
>
> *(a) is substantial and material to the determination, and*

(b) did not exist at the time of the review or did exist at the time but was not discovered and could not through the exercise of reasonable diligence have been discovered.

On December 4th, 2008, a letter was sent to Ms. Lal highlighting the above requirements in the Act and pointing out that Applewood's formal request for reconsideration did not specifically address the questions raised by Section 182 [2]. It remains my view that Section182 [2] of the Business Practices and Consumer Protection Act (BPCPA) makes it clear that I can only vary or cancel Mr. Christman's decision if, firstly, there is new evidence uncovered or discovered, and, secondly, if that evidence meets the requirements of sub-sections (a) and (b) [i.e. material, substantial, and not otherwise available at the time of the hearing "*through the exercise of reasonable diligence"].*

The evidence in question here is an Affidavit by Carlyn Porteous, the "Fixed Operations Manager" for Applewood, completed on 5th of September, 2008. The evidence presented in this Affidavit relates to Applewood's knowledge (or lack of knowledge) regarding the condition of the engine of the 2004 Dodge Ram truck at the time of the sale to Mr. Thompson. The central theme of this evidence being that the dealer did not know of the engine problems at ***"the time of the sale"*** (emphasis is mine).

Firstly I would like to point out that by Applewood's own affidavit, Ms. Porteous makes it clear that there is in fact no new evidence here at all in this case. Applewood, in the hearing before Mr. Christman, and now, has simply failed to provide evidence to show that it did not commit a deceptive act as required under Section 5(2) of the BPCPA (see quote below).

Accordingly, the first and perhaps the only question is, whether or not the details outlined in Ms. Porteous' affidavit could have been discovered "*through the exercise of reasonable diligence"* ***before the time of the hearing*** (emphasis is mine). The difficulty with Applewood's argument here is that the law of British Columbia (discussed below) is clear that Applewood needed to discover and disclose the information regarding the engine issues with this truck to Mr. Thompson before ***"the time of the sale"*** (emphasis is mine) – not just before the time of the hearing.

What Ms. Porteous' affidavit shows is that Applewood's accounting staff knew nothing beyond what was billed by Langley Chrysler on an invoice for service. This does nothing to speak to nor refute the important evidence from the previous owner Shane Pietraroia, found in Exhibit #I of Ms. Child's affidavit, where it is stated that Mr. Pietraroia returned the vehicle to Applewood because of Langley Chrysler's advice that the truck needed substantial engine repairs and that Mr. Pietraroia had advised Applewood of these facts. Therefore the evidence at the hearing, whether or not we accept Ms. Porteous' affidavit, was that; there were serious issues with the motor in this vehicle at the time of the sale to Mr. Thompson in April of 2007, Applewood was made aware of these issues when taking the truck back from Mr. Pietraroia, and Applewood did not investigate these issues further with Langley Chrysler before selling the truck to Mr. Thompson.

In Applewood's Submissions, sent along with Ms. Porteous' affidavit, there is the repeated reference pointing out that the dealer principle, Mr. Graham, had provided testimony at the hearing in this matter that contradicts Mr. Pietraroia's evidence as discussed above. I would point out that Mr. Christman did not accept Mr. Graham's evidence at the hearing so raising it again is of no value in this application.

What dealers need to understand is that proper documentation at both the time of taking a vehicle into inventory, as well as proper documentation when selling the vehicle out of inventory, are absolutely essential and are the only defense in situations such as this. Presenting an almost empty file and claiming “no prior knowledge” is not enough in the face of the reverse onus provisions in Section 5 of the BPCPA (see below). Also, the B.C. Supreme Court made it clear that a motor dealer has a positive duty to make inquiries in order to meet its declaratory requirements under the *Motor Dealer Act Regulation* where it is on notice that a vehicle it intends to sell may have damage:

> The defendant is bound by the *Motor Dealer Act* Regulation (B.C. Reg 447/78) paragraph 23, which requires a dealer:
>
> . . . in every written representation . . . to disclose to the best of his knowledge and belief . . . whether a (used) motor vehicle has sustained damage requiring repairs costing more than $2,000. . . .
>
> The regulation placed a positive duty on the defendant to make its own assessment of prior damage, not simply to accept the word of a prior owner. That duty is one tested on reasonableness and, where extensive prior damage is apparent to an experienced automotive repair person as it was here, but has not been noted and disclosed to a prospective purchaser, then that duty is not met. It is a material requirement that ought to have been met both as to observation and as to its disclosure. There was negligence in not doing so. . . .
>
> *Motley v. Regency Chrysler Inc.* 2002 BCSC 1885 at paragraph 6 citing *Clark V. Abbotsford Imports (1983) Ltd.*, [1992] B.C.J. No. 471

Having documentation to show that the dealer took reasonable steps to meet this declaratory requirement is crucial.

This all leads us back into Section182 [2](a) where the BPCPA requires that for this matter to be reviewable, any evidence now being presented must also be material and substantial. Clearly it is neither, as the important evidence regarding the engine issues with this truck were available and should have been discovered by Applewood and disclosed to Mr. Thompson before the time of the sale. In my view, the information provided in Ms. Porteous is neither material nor substantial in regards to Mr. Christman’s findings.

I quote the following key excerpts from Mr. Christman’s decision in this matter;

p. 5 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.*

p. 4 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;*

p.6 …. 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 ….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".*

The second issue raised in this submission is in regards to the penalty assessed. This part of the application fails as well for reasons cited above. I find I cannot vary or cancel any part of Mr. Christman's original decision as no new evidence material to the issues considered has been presented. I believe Section 182 [2] of the BPCPA is very clear in this regard.

Date: March 18th, 2009

Ken Smith - Registrar of Motor Dealers for
Province of British Columbia