Motor
Vehicle Sales Authority
of British Columbia

Hearing File No. 10-U039
Investigation File No. 10-70482

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:

BILL CHYPLYK AND CHERYL ANNE TREWHITT

COMPLAINANTS

AND:

TECHNIQUE AUTO SALES CORPORATION
(Dealer # 11035)

MOTOR DEALER

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing:	January 26, 2011, at Surrey, British Columbia
Appearances for:	
The Motor Vehicle Sales Authority	Denis Savidan, Manager of Compliance and Investigations Ross Coté, Compliance Officer
Complainants	Bill Chyplyck in person
Technique Auto Sales Corporation	Mohsen Elahi Khansari - Owner

INTRODUCTION

1. This hearing was called pursuant to sections 5 and 6 of the *Motor Dealer Act* R.S.B.C. 1996 c. 316 ("MDA") and section 5(1) of the *Business Practices and Consumer Protection Act* S.B.C. 2004 c. 2 (BPCPA). The Complainants, Bill Chyplyk and Cheryl Trewhitt, state that Technique Auto Sales Corporation ("Technique") sold them a 1999 Jeep Cherokee representing by words or by conduct that they were obtaining the Jeep with good and clear title, when the Jeep was in fact a stolen

vehicle subsequently seized from the Complainants by the Royal Canadian Mounted Police.

BASIC FACTS

2. The major facts are not in dispute.

3. The Complainants purchased the Jeep from Technique on or about August 25, 2003. They dealt with a salesperson at Technique but they no longer remember his name. Mr. Chyplyk did say it was not Mr. Mohsen Elahi Khansari.

4. Over the past several years the Jeep went through AirCare inspections without a problem. There was no indication that the Jeep was not as described.

5. In early 2010, the Jeep was taken into AirCare for its emission testing. The attendant noted there was something wrong with the vehicle identification number (VIN) on the Jeep's dash. This issue made its way to ICBC's special investigations unit who investigated further. Using other VIN's that are hidden on the Jeep, Ed Luft, investigator with ICBC, determined that the Jeep was actually reported stolen on June 4, 2001. ICBC had paid out on the theft claim and thereafter took ownership of the Jeep.

6. The dash VIN on the Jeep in question was incorrect and was a fake VIN using an actual VIN from another Jeep. The Jeep in question here was what is known in the industry as a cloned vehicle – pretending to be another vehicle by using the fake VIN.

7. Ross Coté, Compliance Officer with the Motor Vehicle Sales Authority (the "Authority"), determined that the VIN that was used on the dash of the Jeep belonged to another Jeep that was and is registered in the State of Washington. He used the CarProof vehicle history reporting service to make that determination.

8. The Complainants and Technique entered into discussions to resolve this matter. The Complainants initially stated they wanted (1) "the vehicle returned with legal VIN number; (2) replaced with a vehicle of equal or better quality; or (3) reimburse them in cash based on ICBC's appraisal of the Jeep ($9,500 + 12% taxes):" Complaint Form which is Exhibit A to the Affidavit of Ross Coté.

9. Technique offered various vehicles to the Complainants. According to Mr. Khansari's oral testimony, if the vehicle was a better quality vehicle, it would be offered with a request to pay more for the "upgrade." In each case the Complainants refused and an impasse arose leading to this hearing.

POSITION OF THE PARTIES

(a) Complainants

10. At the time they filed their complaint with the Authority, the Complainants advanced three proposals to resolve the issues:

(i) return of the Jeep with its proper vehicle identification number;

(ii) the dealer to provide another vehicle of equal or better quality; or

(iii) reimburse the Complainants for the vehicle as estimated by ICBC of $9,500 + 12% taxes.

11. Compliance Office, Ross Coté, spoke with ICBC about the dealer buying the Jeep. However, that was not to be.

12. Evidence from Technique explained the attempts to obtain another vehicle. From Technique's own evidence, a similar quality vehicle was hard to obtain and Technique asked the Complainants to pay an additional sum for vehicles of greater quality. Eventually, Technique and the Complainants could not agree on a replacement vehicle.

13. The Complainants are now seeking the $9,500 +12% taxes based on ICBC's appraisal of the Jeep.

14. Mr. Chyplyk noted that Technique never advised the Complainants that the Jeep was a stolen vehicle.

(b) Technique

15. Technique says the Complainants were being difficult in not accepting the vehicles that were offered to them. Technique's view is that it is very hard to find the exact same type of Jeep, in similar condition and with similar distance traveled. Some of the vehicles were of better quality and Technique required the Complainants to pay additional to gain the better quality vehicles.

16. Mr. Khansari, on behalf of Technique, says ICBC over-values vehicles and believes the $9,500 value is too high. He said for that price Technique could obtain a vehicle that was five (5) years newer. Technique provided no evidence as to what it thought the actual value of the Jeep should have been.

17. Technique raises other legal, procedural or general questions for my comment. In some cases, Technique provides case law or statutory citations in support of its position. In others, Technique simply makes certain statements and asks why or how? There are six questions from Technique that I summarize here:

(1) Is there a time-limit in which a consumer can come back to a dealer in such a situation?

(2) How can the Authority review conduct that occurred before the Authority came into existence?

(3) How can the Authority apply the *Sale of Goods Act* provisions as noted in the court decision of *Carolina v. Brown* 2002 BCSC 276?

(4) How does the *nemo dat* rule that is part of section 26 of the *Sale of Goods Act* apply in this case?

(5) Prior to the hearing, Manager of Compliance, Denis Savidan, sent an undertaking (Exhibit 5 at the hearing) suggesting Technique sign it. Should Mr. Savidan not explain it to the dealer?

(6) In a court proceeding, a losing party has to pay costs. Why does a dealer have to potentially pay costs as well as a fine?

THE LAW

18. Section 5(1) of the BPCPA prohibits a supplier from committing a deceptive act or practice – generally, a misrepresentation. A deceptive act or practice need not be intentional, it may by innocent, negligent or fraudulent and the consumer will still be entitled to a remedy: *Pirvulescu v. Parkwood et al* (August 6, 2010 File 07-70285, Registrar of Motor Dealers)[1] paragraphs 39-46 citing the following:

Rushak v. Henneken (1991), 59 B.C.L.R. (2d) 250 (BC Court of Appeal) affirming [1986] BCJ No. 3072 (BC Supreme Court)

Mikulas v. Milo European Cars Specialists Ltd. [1995] BCJ No. 638 (BC Court of Appeal) affirming [1993] BCJ No. 2818 (BC Supreme Court)

[1] http://www.mvsabc.com/decisions/File07-70285PirvulescuvParkwoodAugust62010.pdf

British Columbia (Director of Trade Practices) v. Landsdowne Pontiac Buick GMC Ltd. [1987] BCJ No. 2325 (BC Court of Appeal.) affirming [1985] BCJ No. 2065 (BC Supreme Court)

The Consumer's Association of Canada et al v. Coca-Cola Bottling Company et al. 2006 BCSC 863, additional reasons 2006 BCSC 1233 (BC Supreme Court), affirmed by 2007 BCCA 356 (BC Court of Appeal), leave to appeal to the Supreme Court of Canada refused [2007] S.C.C.A. No. 464 (SCC)

Cummings v. 565204 B.C. Ltd. dba Daewoo Richmond 2009 BCSC 1009 (BC Supreme Court)

Casillan v. 565204 B.C. Ltd. dba Daewoo Richmond 2009 BCSC 1335 (BC Supreme Court)

Findlay v. Couldwell [1976] 5 W.W.R. 340 (BC Supreme Court).

19. The BC Legislature has set out a general definition of what constitutes a deceptive act or practice in section 4(1) of the BPCPA. The BC Legislature has also identified conduct that it deems to be deceptive acts or practices. In the current context, the following would appear to be in issue here:

> 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.
>
> 4 (3) Without limiting subsection (1), one or more of the followingconstitutes a deceptive act or practice:
>
> (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,

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

20. In *Applewood v. Ratte et al* (Oral Reasons for Judgment S.C.B.C. Action# 094126, Vancouver Registry, April 13, 2010) (BC Supreme Court), Justice Willcock noted that section 4(3)(b)(vi) of the BPCPA provides that any type of representation coupled with a failure to state a material fact, the effect of which is misleading, can constitute a deceptive act or practice under the BPCPA: *Applewood* paragraph 34.

21. Once an allegation of a deceptive act or practice is made against a supplier, section 5(2) of the BPCPA places the onus on the supplier to prove that they did not commit a deceptive act or practice: *Cummings* and *Casillan*.

22. The burden of proof remains on the balance of probabilities, even for claims that could amount to deceit or civil fraud: *F.H. v. McDougall* [2008] 3 S.C.R. 41 (Supreme Court of Canada).

PRELIMINARY QUESTIONS BY TECHNIQUE

(1) Time Limit

BPCPA

23. The Complainants have brought their complaint to the Authority and for the Registrar to adjudicate, and it is being reviewed under the deceptive act or practice provisions of the BPCPA. The general limitation period for bringing such a claim is governed by section 3(5) of the *Limitation Act* R.S.B.C. 1996 c. 266. That section sets a limitation period of six (6) years from the date of the breach in which someone may bring forward a claim. However, section 3(5) of the *Limitation Act* is subject to the postponement of time provisions in section 6 of the *Limitation Act*, when one of the enumerated provisions is involved – including fraud and deceit or mistake. The postponement of time is subject to an ultimate limitation period of 30 years: section 8 of the *Limitation Act*.

Knight v. Imperial Tobacco Canada Ltd. 2005 BCSC 172 (BC Supreme Court), varied 2006 BCCA 235 (BC Court of Appeal).

24. The Complainants brought their claim to the Registrar on June 8, 2010. The date of purchase of the Jeep from Technique was August 25, 2003. On the face of the evidence, the Complainants are out of time to bring their claim by about ten (10) months. Therefore, the Complainants must show that the running of time should be postponed: section 6(6) of the *Limitation Act*.

25. In considering whether the running of time should be postponed, I keep in mind the applicable legal principles to be applied as noted in sub-sections 6(4) and (5) of the *Limitation Act* and as discussed in *Il Caminetto di Umberto Restaurant (1982) Ltd. v. Mountainside Lodge Ltd.* 2005 BCSC 876 (BC Supreme Court) at paragraphs 61 to 73, aff'd 2006 BCCA 408 (BC Court of Appeal).

26. The evidence indicates that the Jeep was a stolen vehicle and its vehicle identification number (VIN) was altered to make the Jeep appear to be a different vehicle, as opposed to the stolen vehicle that it was. This fact was discovered by a technician at the AirCare centre in and around May 2010.

27. The Complainant's gave evidence that the Jeep had been put through AirCare several times, without anyone noticing the altered VIN. Under questioning from Technique, Mr. Chyplyk noted the Jeep was never taken in for servicing at a motor dealership.

28. Technique also gave evidence that they had checked the VIN on the Jeep both at the dash and the door post and found nothing unusual. Technique is in the business of selling motor vehicles and it works with and around vehicle identification numbers regularly. Technique also gave evidence that it spoke with the special investigator from ICBC who noted that determining an altered VIN was difficult even for the special investigator whose job it is to investigate such matters.

29. I find on this evidence that the Complainants would not have discovered the altered VIN on their own. It was hidden deliberately and deceitfully by someone. I further find that the altered VIN caused a mistake by the Complainants as to an essential fact in this matter, the true nature and ownership of the Jeep. Once the altered VIN was discovered, the Complainants took steps to discuss this matter with the police and Technique and eventually made their complaint to the Authority

within a few months of discovering the issue. I find there is no prejudice on Technique in defending the claim here. Technique still had information about the person from whom they bought the Jeep. The claim is only ten (10) months past the limitation period noted in section 3(5) of the *Limitation Act*.

30. I am satisfied on all this evidence that the postponement of time provisions in section 6 of the *Limitation Act* should apply to this matter and that the 30-year ultimate limitation period does not apply. The Complainants are not barred by the *Limitation Act* from bringing this matter before me for adjudication.

Motor Dealer Act

31. For the purpose of granting a licence, or suspending or canceling a licence, there is no time limit in which the Registrar may review a motor dealer's past "conduct" under sections 5 and 6 of the *Motor Dealer Act*. If the Registrar intended to pursue a motor dealer's breach of the *Motor Dealer Act* by way of prosecuting it as an offence contrary to sections 35 and 35.1 of the *Motor Dealer Act*, then the Registrar must do so within *"2 years after the facts on which the proceeding is based first came to the attention of the registrar"*: section 36 of the *Motor Dealer Act*. This matter is not time barred under the *Motor Dealer Act*.

2. How can the Authority review conduct that occurred before the Authority came into existence?

32. Technique advances no legal authority on this point. It simply raises the question.

33. Section 203 of the BPCPA makes the deceptive act or practice provisions in that Act fully retroactive. This means that all past "consumer transactions" must not breach the current deceptive act or practice provisions in the BPCPA, unless predecessor legislation authorized the conduct in question. The onus would be on Technique to show that the conduct in question here was authorized under the predecessor legislation. It has provided no such evidence.

> *Knight v. Imperial Tobacco Canada Ltd.* 2005 BCSC 172 (BC Supreme Court) at para. 17-21, varied but not on this point 2006 BCCA 235 (BC Court of Appeal)

Koubi v. Mazda Canada Inc. 2010 BCSC 650 at paragraph 48, additional reasons 2011 BCSC 59 (BC Supreme Court)

34. The fact that the current Registrar's authority to enforce or adjudicate claims arising under the BPCPA did not occur until after the 2003 transaction in issue here, does not mean the Authority or the Registrar do not have jurisdiction. The Legislature or government are free to change who may enforce laws or adjudicate claims at anytime. Doing so does not somehow "wipeout" the existence of past conduct. It simply means someone else is now enforcing that law or adjudicating claims arising from breaches of that law.

3. How can the Authority apply the Sale of Goods Act provisions as noted in the court decision of Carolina v. Brown 2002 BCSC 276?

4. How does the nemo dat rule that is part of section 26 of the Sale of Goods Act apply in this case?

35. The above two points are similar in nature and have the same answer. Again, Technique provides no legal authority on these points, but simply poses the above questions.

36. There is a distinction to be made about the jurisdiction of a tribunal to hear a matter and provide a remedy, with the tribunal's ability to interpret and apply the law to a particular case. Subject to any limits placed upon it by the Legislature, a tribunal may look beyond its enabling legislation in order to properly and fairly discharge its mandate by applying the whole of the law; whether common law or by statute. This legal principle was noted by Justice Bastarache:

> 26 The presumption that a tribunal can go beyond its enabling statute - unlike the presumption that a tribunal can pronounce on constitutional validity - exists because it is undesirable for a tribunal to limit itself to some of the law while shutting its eyes to the rest of the law. The law is not so easily compartmentalized that all relevant sources on a given issue can be found in the provisions of a tribunal's enabling statute. Accordingly, to limit the tribunal's ability to consider the whole law is to increase the probability that a tribunal will come to a misinformed conclusion. In turn, misinformed conclusions lead to inefficient appeals or, more unfortunately, the denial of justice.

Werbeski v. Ontario (Director of Disability Support Program, Ministry of Community & Social Services) [2006] 1 S.C.R. 513 (Supreme Court of Canada)

37. I would note that the Supreme Court of Canada recently dealt with the above noted issue of a tribunal ruling on constitutional validity as well as breaches of the *Charter of Rights and Freedoms*. That Court expanded the role of tribunals, constituted such as the Registrar is, to consider constitutional validity and *Charter* breaches and render remedies which is within their jurisdiction to provide: *R. v. Conway,* 2010 SCC 22, [2010] 1 S.C.R. 765 (Supreme Court of Canada).

38. I note from the Notice of Hearing, section 4(3)(b)(iv) of the BPCPA is in issue. That section deems misrepresenting a consumer's or a motor dealer's (supplier's) rights and obligations under a consumer transaction as being a deceptive act or practice.

39. The rights of a consumer in a transaction with a motor dealer are not limited to the BPCPA or the *Motor Dealer Act*. Other sources of law may be applicable both statutory and common law. This includes the *Sale of Goods Act*. Where the *Sale of Goods Act* may have a bearing on these matters, I may consider that Act. This is especially so if the motor dealer may have misrepresented to a consumer their rights contained in the *Sale of Goods Act*. For these same reasons, I may also consider the common law where necessary including the common law maxim "*nemo dat quad non habet [a person cannot sell or give away what he or she does not own]*:" *Yu v. Insurance Corp. of British Columbia* 2006 BCSC 2028 paragraph 20, affirmed by 2007 BCCA 89 (B.C. Court of Appeal).

40. In *Yu*, the motor vehicle in question was stolen and subsequently resold to another person. It was discovered stolen by the RCMP who seized the vehicle from the unknowing purchaser. The purchaser obtained compensation from the selling dealer. ICBC initially did not re-instate the registration of the vehicle to the rightful owner and that owner sought a court order for damages. The court in *Yu* applied the *nemo dat* rule and noted that absent evidence of a better claim to ownership of the motor vehicle, ICBC was obligated to register the motor vehicle back to its rightful owner. This decision aids in my considerations about the seizure of the Jeep from the Complainants.

41. As to the question of applying *Carolina v. Brown* 2002 BCSC 276 (B.C. Supreme Court), if a remedy is needed in this matter and a court decision has

applied a common law or statutory principle in arriving at a remedy relevant to the issues here, I may look at that decision for guidance on the proper application of the law. If the remedy fashioned by the court is one I may also make under my authority under the BPCPA, then it is even more important I consider that decision in order to ensure consistency in the law: *Werbeski*, *supra*. This would be even more important if the facts of the two cases are similar.

5. Prior to the hearing, Manager of Compliance, Denis Savidan, sent an undertaking (Exhibit 5 at the hearing) suggesting Technique sign it. Should Mr. Savidan not explain it to the dealer?

42. Again, Technique advances no legal authorities in advancing this question. There appears to be no issue of procedural fairness or natural justice advanced on this issue. I note Technique is speaking of an undertaking pursuant to section 154 of the BPCPA. That section is a means to deal with a breach of the BPCPA without the need for a formal hearing or for the Registrar to issue a compliance order.

43. Exhibit 5 at the Hearing is the referenced Undertaking along with the cover letter from Denis Savidan dated August 29, 2010. From the cover letter I note the following was mentioned by Denis Savidan:

(i) The allegations that were being advanced against Technique and that he was recommending a hearing before the Registrar;

(ii) That instead of a hearing, it was possible to enter into an undertaking;

(iii) Noting that signing "an undertaking operates as an acknowledgement by you that you have breached, were about to breach, or are in breach of the BPCPA;"

(iv) Enclosing a "draft undertaking **(not for signature)** for your consideration and for discussion purposes. You may agree to the contents of the draft undertaking in whole or in part or not at all. If you wish to enter into an undertaking on these or different terms than presented in the draft undertaking, please contact me" [emphasis in the original];

(v) Asking for a response by September 15, 2010; and

(vi) Advising that Technique should seek legal counsel and enclosing a copy of *Caroling [sic] Industrial Equipment Sales Ltd. v. Browne et al.* 2002 BCSC 276.

44. It seems clear to me that Mr. Savidan did explain the undertaking to Technique, provided a draft copy for discussion purposes and invited Technique to

contact him to discuss the issue of an undertaking. Why Technique did not call Mr. Savidan for further information if it did not understand the undertaking is unknown.

6. In a court proceeding, a losing party has to pay costs. Why does a dealer have to potentially pay costs as well as a fine?

(a) The BPCPA provides five ways to respond to the same conduct

45. It should be noted that the BC Legislature created, within the *Business Practices and Consumer Protection Act*, five different ways to address and remedy a deceptive act or practice.

46. First, the BC Legislature has provided for a regulatory response if a supplier commits a deceptive act or practice. The BPCPA creates a Director with authority to enter into undertakings (section 154), to issue a compliance order (section 155), to issue administrative penalties (section 164) and other regulatory responses such as issuing a freeze order preventing a supplier from disposing of its property (section 159). By virtue of section 8.1 of the *Motor Dealer Act* and section 29 of the *Motor Dealer Act Regulation*, these same regulatory powers have been proscribed to the Registrar in relation to a consumer transaction with a registered motor dealer.

47. Second, a person who has suffered damages due to a supplier's deceptive act or practice, may instead choose to bring a law suit in the Provincial or Supreme Court of B.C. (section 171).

48. Third, the Director, or fourth, any other person, even one without an interest in the consumer transaction, may bring a court action in BC Supreme Court for a declaration that a supplier breached the BPCPA, an injunction to prevent further breaches of the BPCPA and the Court may order the supplier to pay damages and do other things (section 172): see for example *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 (Supreme Court of Canada).

49. Fifth, a supplier who has committed a deceptive act or practice may be prosecuted for having committed an offence. If convicted, the Court: (1) may impose a fine[2] and/or incarceration of up to 6 months for an individual, (2) order

[2] Up to $10,000 for an individual and up to $100,000 for a corporation.

the supplier to pay to a consumer as a pecuniary loss an amount up to $25,000[3]; and order the supplier to pay a special assessment to the consumer advancement fund of up to $1,000 (sections 189-192).

(b) The general regulatory response administered by the Registrar under the BPCPA

50. The BPCPA, in conjunction with section 8.1 of the *Motor Dealer Act,* sets up a regulatory regime to remedy consumer claims that a motor dealer has breached the BPCPA. The BPCPA provides for the Registrar to recover its costs to investigate and resolve the matter either as part of an undertaking (section 154(2)(e)) or as ordered in a compliance order (section 155(4)(d)). These are cost recovery provisions.

51. In order to regulate the industry, the BPCPA provides for administrative penalties for breaches of that Act which are designed to ensure future compliance and act as a deterrent against future breaches: section 164 of the BPCPA. The type of deterrence can either be specific, against the motor dealer, or as a general deterrent to the industry, or for both: *Cartaway Resources Corp (Re)* [2004] 1 S.C.R. 672 (Supreme Court of Canada) and see *Hogan v. B.C. Securities Commission* 2005 BCCA 53 (BC Court of Appeal). Administrative penalties do not involve cost recovery, but are a tool to obtain and maintain future compliance.

52. I would further note that the BC Legislature has provided the Registrar with authority to cancel a motor dealer's registration for even one breach of the deceptive act or practice provisions of the BPCPA, if deemed necessary: section 8.1(4)(b) of the *Motor Dealer Act* and see *Re: Parkwood Sales Ltd.* (August 6, 2010, Files 07-70285A, 07-70263A, 08-70631A and 08-70997A: Registrar of Motor Dealers).[4]

53. In summary, sections 154(2)(e) and 155(4)(d) of the BPCPA relate to cost recovery for investigation and legal costs born by the Registrar and the Authority. The administrative penalties in section 164 of the Act, act as a deterrent (specific

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[3] An amount up to the civil limit for a Small Claims action.
[4] http://www.mvsabc.com/decisions/ReParkwoodAutoSalesLtdetalAugust62010.pdf

and/or general) to gain compliance and ensure future compliance with the BPCPA as a means to protect the public interest: *Hogan*.

DISCUSSION - ANALYSIS

(a) Deceptive Act or Practice - misrepresentation

54. I am satisfied on the evidence that the transaction between Bill Chyplyk and Technique was a consumer transaction as defined by the BPCPA. I am further satisfied that Technique was a supplier as defined under the BPCPA.

Casillan, supra and *Cummings, supra*

55. Sections 16 of the *Sale of Goods Act* implies into every contract of purchase and sale of goods, a condition that the seller has the lawful right to sell the goods; an implied warranty that the purchaser will have quiet use and enjoyment of the goods; and an implied warranty that the goods will be free from encumbrances or charges in favour of a third party. These are rights and obligations that are and were part of the consumer transaction in this matter.

56. The evidence is clear that by words or by conduct, Technique represented to Bill Chyplyk that he was getting title of the Jeep free and clear; that Technique had the right to sell the Jeep and Bill Chyplyk would have quiet use and enjoyment of the Jeep, for example:

(i) The Transfer/Tax Form of ICBC (Form APV9T) and see specifically the written declaration of seller above the seller's signature line on the APV9T: page 11 of the Affidavit Exhibits (Exhibit 2 at the Hearing);

(ii) The purchase agreement between Bill Chyplyk and Technique: page 37 of the Affidavit Exhibits (Exhibit 2 at the Hearing); and

(iii) The oral testimony of Bill Chyplyk that Technique never advised him that the Jeep was stolen.

57. As it turns out, Technique was never the true owner of the Jeep and it could not transfer title/ownership of the Jeep to Bill Chyplyk, as Technique was never the lawful owner: *nemo dat;* section 26 of the *Sale of Goods Act; Carolina, supra;* and *Yu, supra*. Therefore, Technique misrepresented to Bill Chyplyk that it was the owner and passing good title of the Jeep unto him, which was not true. Bill Chyplyk

acted on this representation to his detriment as the Jeep was seized and the Complainants no longer have quiet use and enjoyment of the Jeep. In 2003, Bill Chyplyk paid $21,800 for a Jeep the Complainants never lawfully owned and now have no property in hand for that money.

58. I am satisfied that Technique committed a deceptive act or practice as defined by the BPCPA by words or by conduct, misrepresenting the rights and obligations involved in this consumer transaction; a deemed deceptive act or practice: section 4(3)(b)(iv) of the BPCPA.

59. I also find that Technique made representations about the Jeep, and failed to state a material fact – that the Jeep was stolen and Technique was not the lawful owner. This failure to state a material fact misled Mr. Bill Chyplyk into purchasing the Jeep to his detriment. This misrepresentation is deemed a deceptive act or practice: section 4(3)(b)(vi) of the BPCPA and *Applewood*, *supra*.

60. I am also satisfied that on the evidence, these misrepresentations would satisfy the general test for a deceptive act or practice by Technique having, through words or by conduct, misrepresented its ownership in the Jeep and its ability to transfer ownership of the Jeep to Bill Chyplyk: section 4(1) of the BPCPA.

(b) Innocent, negligent or fraudulent misrepresentation

61. Mr. Khansari provided evidence of the steps Technique took to research the history of the Jeep, prior to selling it to Mr. Chyplyk. He provided various documents which became Exhibit 4 at the Hearing. Mr. Khansari noted that in 2003 CarProof was not a well-known service. Mr. Khansari provided the ICBC history report regarding the Jeep which is dated 08/05/03. Mr. Khansari also provided the Motor Vehicle Purchase Agreement when Technique bought the Jeep from a Mr. Diego, also dated August 5, 2003. Also attached was a copy of Mr. Diego's driver's licence.

62. Mr. Khansari also provided oral testimony as noted above, on the difficulty even ICBC has in identifying altered VINs. I also note that for several years the Jeep went through AirCare, and it was not until 2010 that an AirCare technician noted a concern with the Jeep's VIN.

63. Given all the above evidence, I am satisfied that Technique's conduct here was not deliberate. I am also satisfied on the evidence that is before me that Technique was not negligent in this matter given the facts and services that the evidence shows existed in 2003 to research the history of vehicles. I find that Technique made an innocent misrepresentation to Mr. Bill Chyplyk.

(c) Remedy

64. Under section 155 of the BPCPA I may issue a compliance order to remedy a breach of the BPCPA.

65. As earlier stated, the Complainants advanced three possible remedies to this matter:

(i) return of the Jeep with its proper VIN;

(ii) Technique to provide a vehicle of equal or better quality; and

(iii) compensation in the amount of $9,500 + 12% for taxes.

(i) Return of the Jeep

66. The first option is not available as ICBC was unwilling to sell the Jeep back to Technique.

(ii) A Replacement Vehicle

67. The second option also failed because the parties could not come to some agreement. At the Hearing, Technique noted the Complainants were not being reasonable during the time it was attempting to find a replacement vehicle. I note from Technique's evidence that it offered vehicles of greater quality but did so on condition that the Complainants pay additional money. The only agreement that existed between the Complainants and Technique was the one made in 2003, where Technique had no right in the Jeep to begin with. The Complainants were not required to accept any offer of a replacement vehicle from Technique unless they agreed to the offer. The case of *Carolina*, *supra*, is instructive on this point.

68. In *Carolina*, the motor dealer sold a vehicle to a consumer which he later determined was a stolen vehicle. The consumer demanded a replacement vehicle of

equal or better quality and gave the motor dealer seven days to provide a replacement vehicle. During this time, the consumer was in a motor vehicle accident and the vehicle ended up being a total loss. The consumer could not return the stolen vehicle and that vehicle's value was obviously greatly diminished. The consumer sought a complete refund and the dealer refused. The Court in *Carolina* agreed with the consumer that he was entitled to a full refund from the dealer, as the dealer never could transfer ownership to the consumer. The Court in *Carolina* also noted the motor dealer's standing to demand the consumer take something less than a full refund and noted:

> [14] Does the fact of the damage to the truck occurred while it was in the possession of and being used by the plaintiff, after the plaintiff had knowledge that the truck was stolen, affect the result? While the plaintiff may be a gratuitous bailee bound to take reasonable care of the truck, the only person who can advance a claim in respect of its loss or damage is the true owner of the truck. I am satisfied that the plaintiff is entitled to recover the purchase price, and it is under no obligation to the defendants to return the truck or to indemnify the defendants against the damages to it. The defendants' remedy is to pursue their seller.[emphasis added]

69. The motor dealer in *Carolina* had no standing to demand that the consumer take anything less than a full refund. In *Carolina, supra*, the motor dealer's remedy was to pursue the person from whom they obtained the truck. Similarily, Technique was not in a position to demand the Complainants take any deal offered by Technique. Further, Technique was not legally entitled to demand that the Complainants pay any depreciation on the Jeep for their use and enjoyment or "rent" of the Jeep while they possessed it. Like in *Carolina*, only the true owner could demand the Complainants pay for their use and enjoyment of the Jeep or for the Jeep's depreciation while it was in the possession of the Complainants.

70. I note that Technique has provided evidence that it knows who sold it the Jeep, before they sold it to Mr. Bill Chyplyk: Exhibit 4 at the Hearing. Technique may be able to pursue someone else for any of its loss: *Robillard v. Comox Valley Ford Sales (1964) Ltd. v. Rugg (Third Party) v. Port Chevrolet Oldsmobile Ltd. (Fourth Party)* (1995), 3 B.C.L.R. (3d) 374, 1995 CarswellBC 64 (BC Court of Appeal). I make not comment on whether Technique would be successful in this regard.

(iii) $9,500 + 12% taxes

71. The Complainants advance a damages claim of $9,500 + 12% taxes based on an estimated value of the Jeep provided by ICBC.

72. Technique simply contested that amount as being too high as, according to Mr. Khansari, ICBC always over-values vehicles. Mr. Khansari said he could get a vehicle that was five (5) years newer for that price: Transcript of Proceedings, January 26, 2011, at page 23. However, from Mr. Khansari's evidence when Technique did in fact find a five-year newer vehicle, Technique offered it to the Complainants only if they were willing to pay " a couple-of-thousand dollars to basically upgrade, and they didn't want to ...": Transcript of Proceedings, January 26, 2011, page 21.

73. Technique never did provide any evidence to contradict ICBC's valuation of the Jeep. It simply provided a statement and opinion from Mr. Khansari, that ICBC valuations are too high, with no other evidence in support of that fact.

74. The evidence on damages need not be perfect so long as I can make an assessment. On the evidence provided and with no better evidence to the contrary, the Complainants are entitled to $9,500 + 12% (taxes) as damages – a total of $10,640.

75. I would note that the Complainants have not sought a full refund as the consumer did in *Carolina, supra*: see also *Boyd v. A.P.G. Car Sales & Leasing Ltd.* (File 08-70008, July 4, 2008: Registrar of Motor Dealers).[5] As the Complainants were not asking for a complete refund, I make no comment on whether the Complainants would be entitled to a full refund in these circumstances.

(d) Investigation and Hearing Costs

76. Under section 155(4)(d) of the BPCPA, I order Technique to reimburse the Authority its investigation and hearing costs of $1,600.25. An invoice will be provided to Technique. I would note Technique had an opportunity to resolve this issue earlier with the Complainants as well as by entering into an undertaking. It

[5] http://www.mvsabc.com/decisions/File08-70008Boyd-v-APGCarSalesLeasingLtdJuly42008.pdf

chose not to, causing the Authority and Registrar to incur these costs to investigate and adjudicate this complaint.

(e) Administrative Penalty

77. In considering whether an administrative penalty should issue I must consider the factors noted in section 164(2) of the BPCPA. I also note that the purpose of an administrative penalty is to ensure future compliance by the dealer, in this case Technique, and to act as a general deterrent for the motor vehicle sales industry.

78. I note the circumstances in this case are similar to the one in the Registrar's decision in *Boyd*. In that case, the dealer admitted he had a liability to the consumer for selling him a stolen vehicle that was subsequently seized. The dealer also disagreed with the amount of compensation sought by the consumer.

79. In *Boyd*, the consumer bought a stolen vehicle then subsequently traded it in towards the purchase of another vehicle to a second dealer. The consumer had agreed with the second dealer to place a value of $3,969 on the stolen vehicle. The stolen vehicle was subsequently sold by the second dealer to another consumer. When it was discovered that the vehicle was stolen, it was seized from the consumer. The second dealer refunded their consumer the money for the purchase, and then required Mr. Boyd to pay the $3,969 it gave him for his trade-in. Mr. Boyd then sought compensation in the amount of $10,000 from A.P.G.

80. In *Boyd*, the dealer agreed it had to compensate Mr. Boyd but only the damages he was out in relation to the trade-in value. The Registrar agreed and noted that A.P.G. was a victim in that matter.

81. I believe Technique is also a victim in this matter. Its remedy is with the person who initially sold them the Jeep. I believe that on the evidence Technique will take better steps to ensure the VINs on the vehicles it sells are more closely reviewed and that it will now take advantage of the CarProof vehicle history report service, or other similar services, to better identify potential problem vehicles. Also,

a recent development is the ability to search to see if a VIN has been reported stolen on the Canadian Police Information Centre website operated by the RCMP.[6]

82. I also consider the evidence Technique provided at the Hearing to show what it did to research the Jeep at the time it purchased it from Mr. Diego.

83. Under the circumstances, I do not believe an administrative penalty is warranted in this case.

DISPOSITION

84. I have found Technique made a misrepresentation in this consumer transaction contrary to the BPCPA – legally a deceptive act or practice. I have also found this misrepresentation was an innocent one.

85. A Compliance Order will issue on the following terms:

(a) Technique Auto Sales Corporation shall abide by the *Business Practices and Consumer Protection Act* and refrain from making misrepresentations contrary to that Act;

(b) Technique Auto Sales Corporation shall pay jointly to Bill Chyplyk and Cheryl Anne Trewhitt the sum of $10,640;

(c) Technique Auto Sales Corporation shall pay to the Motor Dealer Council of BC dba the Motor Vehicle Sales Authority of BC, the sum of $1,600.25 for investigation and hearing costs.

86. No administrative penalty is ordered in this matter.

87. Pursuant to section 155(7) and sections 180 to 182 of the BPCPA, the Compliance Order may be reconsidered in accordance with those provisions. The request for reconsideration must be in writing and received within 30 days of receiving a copy of this Decision and the Compliance Order. Any request for reconsideration should be addressed to the office of the Authority and to the attention of the Manager of Compliance and Investigations. I would note that any person seeking reconsideration is to meet the evidentiary requirements set out in the above noted sections.

Dated June 21, 2011

[redacted]

Ian Christman, LL.B.

[6] http://www.cpic-cipc.ca/English/search.cfm