



**RE: 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**

BETWEEN:

JENNIFER NAPLES

Complainant

AND:

**RIVER CITY AUTO SALES LTD.
(Dealer # 18841)**

Motor Dealer

AND:

**PHILLIP RUSSELL
(Salesperson # 111008)**

Salesperson

AND:

**LARRY AKINS
(Salesperson# 118419)**

Salesperson

DECISION OF THE REGISTRAR OF MOTOR DEALERS

Date and Place of Hearing: January 8, 2013 at Courtenay, British Columbia

Appearances for:

The Complainant	Jennifer Naples
The Motor Dealer	Phillip Russell, Dealer Principal
Phillip Russell	In person
Larry Akins	In person
Motor Vehicle Sales Authority of BC	Daryl Dunn, Manager of Compliance and Investigations
	Mike Dorrان, Compliance Officer

INTRODUCTION

[1] On October 13, 2011, River City Auto Sales Ltd., motor dealer registration 18841 ("River City") sold Ms. Jennifer Naples a 2003 Kia Rio (the "Kia") for a price that was under \$3,500 before taxes and with an odometer reading of 111,236 kms. River City is located in Powell River as was Ms. Naples when she bought the Kia. Ms. Naples subsequently moved to the Courtenay area.

[2] Soon after purchase, Ms. Naples experienced mechanical issues with the Kia. She brought these issues and her dissatisfaction with the Kia to the attention of River City for resolution. Those discussions failed and Ms. Naples filed a complaint with the Motor Vehicle

Sales Authority (the "Authority") on February 21, 2012. Ms. Naples made some repairs to the Kia but ultimately parked the car at her home in October of 2012 with the odometer reading 133,044 kms.

[3] After conducting an investigation, the Authority discovered documents which may suggest the Kia was sold when it was in an unsafe condition. The Hearing Notice (Exhibit A) alleges that River City, either knowingly or ought to have known, that the Kia was unsafe and by words or by conduct represented to Ms. Naples that the Kia was safe, contrary to the *Business Practices and Consumer Protection Act*.

[4] Phillip Russell and Larry Akins, both licensed salespersons with River City, are part of the dealer's ownership structure. They were personally made a part of this hearing. It is alleged that it was they who made the misrepresentations. Therefore, they can be held responsible individually as salespersons in conjunction with River City who is liable for the conduct of its employees and principals.

[5] Ms. Naples seeks the equivalent of rescission, meaning the cancellation of the contract, and to be able to return the Kia to River City for a full refund.

ISSUES

[6] Based on the Hearing Notice and the evidence presented, the issues before me are:

- (1) Did River City misrepresent the Kia as safe when it was not; and
- (2) If the answer to question 1 is yes, what is the appropriate remedy?

JURISDICTION

[7] Based on the evidence presented and especially that of Ms. Naples, it is important to be clear on the extent of my jurisdiction.

[8] I am empowered to review and adjudicate claims of dealers and salespersons who are possibly in breach the *Motor Dealer Act* (the "MDA") and its regulations, and the deceptive and unconscionable act or practice provisions of the *Business Practices and Consumer Protection Act* (the "BPCPA"). If I find a breach of the BPCPA, I can issue a compliance order under that Act which can include paying damages or the equivalent of rescission of a contract. In this case, the claim involves a breach of the deceptive act provisions of the BPCPA – which in essence is a prohibition against making misrepresentations. If I find a breach of the MDA, I can order a violation ticket be issued or order the suspension or cancellation of a motor dealer's registration. I may also order conditions to be added to a dealer's registration. It is always open to me to take no regulatory action if the circumstances suggest that is the appropriate remedial action.

[9] If I do not find a breach of the BPCPA, a misrepresentation in this case, I cannot issue a compliance order. I also cannot adjudicate claims solely based on a breach of contract or solely based on a breach of the implied warranties and conditions found in the *Sale of Goods Act*.

[10] If I do find a breach of the BPCPA, I may look at the whole of the law, including the *Sale of Goods Act*, in order to properly establish the rights and obligations of the parties and fashion a remedy so as to ensure consistency in the law, a proper and informed conclusion and that justice is properly served: *Werbeski v. Ontario (Director of Disability Support*

Program, Ministry of Community and Social Services) [2006] 1 S.C.R. 513 (Supreme Court of Canada) at paragraph 26.

POSITION AND EVIDENCE OF THE PARTIES

(a) Ms. Naples

[11] Ms. Naples position is straight forward. She says River City sold her an unsafe vehicle.

[12] Ms. Naples purchased the Kia on October 13, 2011. In November the Kia developed a noise from the front wheels on a trip back from Tofino, B.C. It was determined to be a wheel bearing and River City replaced this at no charge. Around this time, River City had replaced the front brake pads and machined the front brake rotors as part of the original agreement made on October 13, 2011.

[13] In early December, Ms. Naples says the Kia had smoke coming from the front wheels. River City looked at it and determined a caliper problem existed but was unable to repair the issue right away as the parts had to be ordered. At this time River City also looked at other issues raised by Ms. Naples such as a smell of gas from the rear of the Kia and water in the spare tire well. River City replaced the fuel filter and drained the spare tire area. They tried to locate the water leak but could not determine where the leak was coming from. Ms. Naples took the car back to her home in the Courtenay area.

[14] About nine days later Ms. Naples took the Kia to a mechanic in Comox where he replaced the right front brake caliper. At this time, the mechanic noted various issues with the Kia which, in his opinion, made the Kia unsafe. He found that the fuel tank was seeping fuel and rusty, there were worn out front end components and he opined the Kia was from back east because of the extent of rust under the Kia including on the steel brake and fuel lines.

[15] Ms. Naples engaged in discussions with River City to return the Kia. She no longer trusted them and was not willing to take another vehicle in trade. She also no longer trusted their offers to repair the Kia including replacing the gas tank.

[16] During the investigation, documents were discovered from Finneron Hyundai ("Finneron") showing they had inspected the Kia after they had taken the Kia in trade. Finneron found the need for repairs to be extensive and the Kia did not fit their pre-owned requirements. The Kia was sold by Finneron to River City through the Vancouver ADESA auto auction. Ms. Naples says the inspection by Finneron notes the Kia was viewed as unsafe by Finneron and before it came into the possession of River City. Ms. Naples says the inspection and work order documents from Finneron lists the same issues her own mechanic identified on his December 21, 2011 invoice.

[17] At the hearing, and for the first time while under questioning by River City, Ms. Naples admitted that she had been in an accident with the Kia on November 26, 2011. This is after she purchased the Kia and before she had it inspected by her mechanic. She says it was a low velocity impact while in stop and go traffic in Vancouver with no real damage. She had rear ended another vehicle. ICBC did not inspect the Kia for damage until sometime in mid to late January of 2012. Ms. Naples admitted to changing the ICBC Transfer/Tax form by checking off the out of province declaration which was River City's to make.

[18] It was also under this questioning by River City that Ms. Naples admitted not transferring the ownership of the Kia from River City to herself until January 20, 2012. Further, from October 13, 2011 until January 20, 2012, Ms. Naples was driving the Kia while it was uninsured. She had used the plates from the Mazda she traded in to River City. Ms. Naples explained that she had much going on in her life at that time. She went to transfer ownership and get insurance but she says she was initially rejected by the agent because River City had not checked off the out of province declaration on the transfer form. Ms. Naples explains she was in a rush to get back home and could not go back to River City. She then forgot to finalize the transfer and insurance of the Kia until ICBC confronted her with this when ICBC inspected the Kia in January, 2012 – some three months later.

(b) River City

[19] Through evidence given by Mr. Russell, the documents, and the closing submissions and cross examination by Mr. Akins, River City's position can be summarized as follows:

- (a) The inspection completed by Finneron was done by an apprentice mechanic and was a basic inspection and not the full government Private Vehicle Inspection ("PVI"). Finneron sold the Kia to River City through the ADESA auto auction.
- (b) When the Kia came into B.C. it had passed a government PVI conducted by Canadian Tire with a licensed mechanic and designated government inspector. The mileage noted at the time of inspection was 105,095 km or about 6,000 km less than when the Kia was sold to Ms. Naples. River City admitted to being unaware of this fact until the Authority's investigation discovered these documents.
- (c) When the Kia was bought through Auction, River City paid ADESA to do an inspection on the Kia in order to get ADESA's buyer protection package and ensure it was in a safe condition.
- (d) River City did its own inspection of the Kia prior to transferring it to Ms. Naples. River City did admit that the person who did the inspection was not a licensed mechanic, was still learning and was not overseen when he inspected the Kia.
- (e) All of the real concerns Ms. Naples had with the Kia started occurring after her accident. Further, River City says they had no opportunity to inquire whether the Kia's problems were related to the accident. Ms. Naples never advised River City of this accident so they could investigate.
- (f) River City says that part of her brake problem was probably related to her driving up and down Mount Washington the nine times. Ms. Naples admits having done so in a short period of time.
- (g) Ms. Naples had put on considerable mileage on the Kia in a short period of time.
- (h) Finally River City described when they do run car history reports and when they do not. At the time of the sale to Ms. Naples, River City did not run such reports as a routine part of their business. If a consumer wanted one, they could get one. They say that now, they get such a report (CarProof) when they buy a vehicle from ADESA as they now come automatically from ADESA. Also, River City generally does not

inspect all vehicles as a matter of its normal business practice. The facts of each vehicle coming into inventory will dictate if an inspection will be done.

THE LAW

(a) Safe Vehicles

[20] A motor dealer has a positive duty to declare that a motor vehicle meets the minimum safety requirements of the *Motor Vehicle Act* under section 21(2)(e) of the *Motor Dealer Act Regulation*. This requirement is not based on a motor dealer's best information or belief. The dealer must get this correct:

21(2) Where a motor dealer makes a written representation in the form of a sales or purchase agreement respecting the sale by him of a used motor vehicle, he shall include the particulars required for a new motor vehicle under subsection (1) and

(e) a statement that the motor vehicle complies with the requirements of the *Motor Vehicle Act*.

[21] Section 222 of the *Motor Vehicle Act* and section 8.01 of the *Motor Vehicle Act Regulation* prohibit the sale or even the display or the offering of a motor vehicle for sale for use on the roads unless the vehicle meets the minimum safety requirements of the *Motor Vehicle Act* and its regulations:

222 A person must not sell, offer for sale, expose or display for sale or deliver over to a purchaser for use a motor vehicle, trailer or equipment for them that is not in accordance with this Act and the regulations.

8.01 No person who is engaged in the business of selling motor vehicles shall keep for sale, or sell or offer for sale, any new or used motor vehicle unless the motor vehicle is equipped as required by these regulations.

[22] I would note that a "person" also includes a corporation or other business entity: section 29 *Interpretation Act*. Therefore section 222 of the *Motor Vehicle Act* and section 8.01 of the *Motor Vehicle Act Regulation* was applicable when Finneron sold the Kia to River City through ADESA.

[23] Section 219 of the *Motor Vehicle Act* states no person may operate a motor vehicle that is not in compliance with the *Motor Vehicle Act* and its regulations. If such a vehicle was sold to a consumer for use on the roads, it would be grounds to repudiate (cancel) the contract under the *Sale of Goods Act* and the consumer would be entitled to a full refund as the vehicle was not fit for its intended use of driving it on the roadways: *Balderston v. Cheng* 2006 BCPC 64 (BC Prov. Ct.) at paragraph 13.

[24] For a dealer to sell a vehicle that is not fit for use on the roads the dealer must declare the vehicle as "Not Suitable for Transportation" and that it is sold for "parts only or purposes other than transportation." The motor dealer must state "Not Suitable for Transportation" on all written representations about the motor vehicle including the purchase agreement and any advertisements. The law also requires displaying on the motor vehicle itself the words "Not Suitable for Transportation": sections 21(2)(f), 22 and 27(b) of the *Motor Dealer Act Regulation*.

[25] Given this positive duty to inform the consumer of unsafe vehicles, silence on the part of a motor dealer can be taken by the consumer as a representation that the vehicle is suitable for transportation.

(b) Positive Duty

[26] Various court decisions have affirmed time and again that a motor dealer has a positive duty to inform itself about the history of a motor vehicle, especially looking for prior damage. It may not solely rely on the representations of a prior owner or even an ICBC vehicle history report.

Robillard v. Comox Valley Ford Sales (1964) Ltd. and Gordon Leo Rugg (Third Party) and Port Chevrolet Oldsmobile Ltd. (Fourth Party) [1995] B.C.J. No. 436 (BC Court of Appeal)

Motley v. Regency Chrysler 2002 BCSC 1885 (BC Supreme Court)

Key Lease Canada Ltd. v. Bott 1994 CanLII 788 (BC Supreme Court)

Clarke v. Abbotsford Imports (1983) Ltd. 1992 CarswellBC 2044 (BC Supreme Court)

Fraser v. Richmond Imports Ltd. dba Richmond Honda 2001 BCPC 211 (BC Prov. Ct.)

[27] In reviewing several court decisions, the Provincial Court in the *Fraser* decision noted the following in relation to the positive duty on motor dealers to declare prior damage:

[54] I find that it is insufficient for the Defendant to claim that it relied on the representation of the Third Party who did not have access to the records of the Insurance Corporation of British Columbia at the time of the transfer. The fact remains that this "positive duty" demanded by the legislation was in effect prior to the general public having access to such records, and therefore imposed on dealers the requirement to carefully examine vehicles for transfer for prior damage requiring repairs costing in excess of \$2,000.00. I would suggest that access to the records of the Insurance Corporation of British Columbia, merely made it easier for dealers to find out the repair status of vehicles. However the caution remained throughout that damages and repair are not always reported to the Insurance Corporation of British Columbia, and the "positive duty" remains regardless.

[28] Where a motor dealer chooses to rely on others to aid it in its due diligence, to do inspections for them, the dealer remains liable to their consumer if those others are in error. It would be up to the dealer to seek contribution from those it relied on: see the *Robillard* decision cited above and the *Fraser* decision cited above.

(c) Misrepresentations

[29] Under the BPCPA a misrepresentation can be innocent, negligent or deliberate (fraud) and the consumer would be entitled to a remedy. Whether the misrepresentation is innocent, negligent or deliberate and what the misrepresentation was in relationship to, can affect the type of remedy available to a consumer and any disciplinary measures taken against the dealer or salespersons: see *Chyplyk et al v. Technique* (Registrar's decision: File 10-U039: June 21, 2011) and the various court decisions cited at paragraph 18 of that decision; see also *Cummings v. 565204 B.C. LTD. dba Daewoo Richmond*, 2009 BCSC 1009 (BC Supreme Court); *Casillan v. 565204 B.C. Ltd. dba Daewoo*, 2009 BCSC 1335 (BC Supreme Court) and *Balderston v. Cheng* noted above.

[30] Where representations are made about a vehicle, but a dealer remains silent about material facts regarding the vehicle, the dealer may have committed a misrepresentation by silence: *Applewood Kia v. Ratte and the Registrar* (April 13 2010: S.C.B.C. Action S094126, Vancouver Registry). Certainly, if a motor dealer says nothing about a motor vehicle's roadworthiness and the vehicle is not roadworthy, the dealer will have made a misrepresentation contrary to the BPCPA.

[31] Section 5(2) of the BPCPA reverses the onus of proof regarding a deceptive act or practice. Where a consumer has provided some evidence that a deceptive act or practice (misrepresentation) occurred, then the onus shifts to the dealer to show that no misrepresentation occurred: see the *Cummings* decision noted above. The burden of proof is on a balance of probabilities: *F.H. v. McDougall* 2008 SCC 53 (Supreme Court of Canada).

(d) Witness Credibility

[32] Where witness credibility is in issue I have considered the judicial guidance in such decisions as: *Farnya v. Chornya* (1951), [1952] 2 D.L.R. 354 (BC Court of Appeal); and *Fillion v. Fillion* 2011 BCSC 3414 (BC Supreme Court) at paragraphs 106-109.

DISCUSSION

OUT OF PROVINCE DECLARATION

[33] During the hearing, and in the documents submitted, there was evidence that the Kia was from outside BC and that River City failed to declare this to Ms. Naples. Section 21(2)(c) of the *Motor Dealer Act Regulation* requires a dealer to declare if a vehicle was from outside BC and all jurisdictions known to the dealer other than B.C. in which the vehicle had been previously registered. The purchase agreement shows River City declared the Kia as not being from out of province.

[34] It was discovered during the investigation that the Kia had spent time in Nova Scotia and it appears it was there that the Kia was first registered. Ms. Naples says if she had known the Kia was from back east she never would have purchased the Kia. She has lived back east and knows what the weather there does to cars.

[35] As noted, Ms. Naples was questioned by River City regarding the ICBC transfer form. It was Ms. Naples' evidence that much was going on in her life at this time causing her to forget to register the Kia in her name and to insure the Kia. This went on for over three months until ICBC confronted her with this fact.

[36] Ms. Naples said she made the out of province declaration on the ICBC Transfer/Tax form when she finally registered the Kia on January 20, 2012. It is also in evidence that Ms. Naples suspected the Kia was from back east after talking to Comox Valley. She said it was when she saw the CarFax report that she knew the Kia was from outside of B.C. The CarFax report shows it was run on February 22, 2012 a month after Ms. Naples made the declaration to ICBC. Again, I would note that the declaration was to be made by River City, but Ms. Naples chose to change the transfer form instead of having River City amend the original one or issue a new one.

[37] River City gave evidence that Ms. Naples was aware the Kia was from out of province as she saw that declaration on the ADESA website when she was reviewing the Kia before

purchase. The ADESA invoice shows the details about the Kia including that it was from out of province.

[38] Based on the evidence, I find on a balance of probabilities that Ms. Naples was aware the Kia was from out of province. Ms. Naples' evidence is inconsistent with the documentary evidence and her own testimony. If Ms. Naples can forget an important fact such as to register ownership of, and insure, the Kia, for over three months, then she is most capable of forgetting that she was informed the Kia was from out of province. Further, by January 20, 2012, Ms. Naples did not know for sure the Kia was from out of province when she herself made that declaration to ICBC. It was not until a month later that the Kia's out of province origin was found in the CarFax report.

[39] Ms. Naples has admitted to changing the ICBC Transfer/Tax form regarding this very declaration. It was River City's position that it was they who initially made the declaration on the ICBC Transfer/Tax form at the time of sale. Unfortunately, they did not come to the hearing with their copy of the original Transfer/Tax form. However, the form in evidence shows the declaration being made as was River City's position. While River City should have brought all their documents relating to this transaction, River City was not aware Ms. Naples would make the claim that it was her that made the out of province declaration on the ICBC transfer form. That only occurred at the hearing while Ms. Naples was being questioned by River City. By withholding this information, Ms. Naples prejudiced River City's ability to defend itself on this allegation.

[40] Had I not been able to make the above findings on the evidence presented, I would have had to dismiss this allegation against River City in any event. This allegation was not included in the Hearing Notice (Exhibit A). Where there is no allegation presented to a defendant, River City here, then it would be unfair to proceed on that allegation at a hearing as River City was not put on notice that it had to defend itself on the allegation: *May v. Ferndale Institution* 2005 SCC 82 at paragraph 92 (Supreme Court of Canada) and see *Brook v. Wheaton Pacific Pontiac Buick GMC Ltd.* 2000 BCCA 332 (BC Court of Appeal) at paragraphs 21 to 25 for the civil context.

MISREPRESENTATION

[41] I am satisfied that the transaction here is a consumer transaction and that River City is a supplier as defined in the BPCPA.

[42] In this case it must be determined whether, at the time of the sale, the Kia was legally unsafe for the roads. The main documents indicating the Kia's unsafe condition are the Finneron inspection and work order documents completed prior to the sale in question (see pages 38 and 39 of the exhibits attached to the Affidavit of Mike Dorran – Exhibit B at the hearing). These would be compared with the notes on the work order of Comox Valley Automotive Service Ltd. made on December 21, 2011 (see page 15 of the exhibits attached to the same Affidavit). These documents were supplemented by the testimony of the service manager at Finneron, Mark Hurworth and the operator and mechanic at Comox Valley Automotive Service Ltd., Michael Osborne along with the testimony of Ms. Naples and River City.

[43] I say legally unsafe because what is unsafe can be a subjective view. The *Motor Vehicle Act*, the *Motor Vehicle Act Regulation* and the *Schedule* attached to the *Vehicle Inspection Regulation* (being the Provincial Vehicle Inspection Manual) both of which are regulations under the *Motor Vehicle Act*, set the legal minimum safety requirements and

standards for the various components of motor vehicles in British Columbia. If a motor vehicle meets those requirements, it is legally roadworthy. It is to this standard that a motor dealer is obligated to ensure a motor vehicle meets before that vehicle is offered for sale by virtue of section 222 of the *Motor Vehicle Act*, section 8.01 of the *Motor Vehicle Act Regulation*; and section 21 of the *Motor Dealer Act Regulation*.

(a) Comments on the Finneron Documents and the Evidence of Mark Hurworth

[44] The Finneron inspection was a basic inspection conducted by an apprentice mechanic. It was admitted by Mr. Hurworth that the inspection did not go into the depth that a Provincial Private Vehicle Inspection (government inspection) ("PVI") would. Mr. Hurworth stated it was his opinion that the Kia was unsafe when it was inspected at Finneron and before it was sold on to River City.

[45] Mr. Hurworth described his work history. He did not say he was a mechanic but had worked in the service tower and in the capacity of a service manager amongst other positions. He did say the service department is a designated government inspection facility and that the apprentice mechanic would have been overseen by a licensed technician. Mr. Hurworth did not say who that technician was or whether that technician was a designated government inspector.

[46] The Inspection Manual makes clear that the person conducting a PVI must be a trade qualified technician and also be designated by the Province as an inspector. The Finneron apprentice mechanic was neither. Mr. Hurworth did not indicate that he was a government inspector.

[47] Under cross examination Mr. Hurworth could not really comment on how Finneron could send an unsafe vehicle through the ADESA auction. Mr. Hurworth said this was not his area of the operations. He agreed that no signature appears on the work order or inspection but said a time stamp would be on the reverse of the page indicating who did the work. It was Mr. Hurworth who approached the sales manager at Finneron and asked if repairs were to be made to the Kia and was told no.

(b) Comments on the Comox Valley Automotive Services Ltd. documents and the Evidence of Michael Osborne.

[48] The Comox Valley Automotive Services Ltd. ("Comox Valley") invoice of December 21, 2011 and March, 2012 are straight forward but do lack some details which Mr. Osborne was able to provide in his testimony.

[49] Mr. Osborne is an inter-provincially licensed (red seal) mechanic. He is also a designated government inspector and Comox Valley is a designated government inspection facility. Mr. Osborne provided an opinion that the Kia was unsafe when he inspected it on December 21, 2011. When asked what specifically made the Kia unsafe he said basically everything he noted on the repair order (to be discussed individually below).

[50] Under questioning by River City, Mr. Osborne agreed that some of the items were wear and tear items. However his view was that at least 50% of the concerns he noted stemmed from what he opined was impact damage and that the Kia looked like it had been in an accident. He noted the unibody of the Kia looked compressed and some of the bushings on the front suspension were torn out like in an accident.

[51] At this point it should be noted that the CarProof and the CarFax history reports for the Kia that were obtained on February 22, 2012 do not show any accidents. The only accident in evidence is the one admitted to by Ms. Naples after she purchased the Kia and before Michael Osborne of Comox Valley inspected the Kia.

[52] Also while under questioning Mr. Osborne admitted that his view was that the Kia was not safe but he did allow Ms. Naples to drive away with the Kia. Mr. Osborne said he discussed this with Ms. Naples. He also agreed that when he did repairs to the rear brakes on March 22, 2012 (121,261 km) he said the repairs of concern had not been completed and he again allowed Ms. Naples to drive away with the Kia. The only note on that repair order is that the front stabilizer bar links were in "poor cond." Mr. Osborne did not feel they had to rewrite all the concerns as Ms. Naples was already aware of them.

[53] Finally, I find Michael Osborne's comments at the outset of his direct testimony of interest. He was describing when he first saw the Kia. He noted the wheels on the Kia were hard to turn and believed the Kia needed "complete brake work." He only replaced the one front brake caliper and his following comments are of interest:

We got it [the Kia] rolling and it was safe to move. That's actually kind of questionable, but - but it [the Kia] needed a lot of work.

Transcript of Proceedings, page 22, paragraph 51.

[54] Mr. Osborne's evidence here is somewhat inconsistent with other parts of his evidence where he felt the Kia was not safe for the road. It appears that Mr. Osborne is not completely sure about whether or not the Kia was or was not safe when he saw it on December 21, 2011 and replaced the brake caliper.

[55] I turn now to each individual mechanical item which is claimed made the Kia unsafe at the time River City sold it to Ms. Naples.

(c) Components claimed to be unsafe

i. Fuel system

[56] The Finneron inspection document indicates the Kia's fuel system was non-complaint. Unfortunately I was not informed whether this meant non-compliant with the *Motor Vehicle Act* or non-compliant with Hyundai's standards or any other standard. Again, it was an apprentice mechanic that did these inspections albeit apparently overseen by a technician whose qualifications are unknown.

[57] The notes to the inspection document states that the fuel tank is rusty at the seam, the fuel lines were very rusty and the fuel filter was original. Apparently it is for these reasons that the fuel system was found non-compliant.

[58] The fuel system safety standards are found in section 21 of the Schedule to Division 7 of the *Motor Vehicle Act Regulation* and in the Vehicle Inspection Manual - Light Vehicle - Section 1, Power Train, item 2. A vehicle's fuel system does not fail an inspection for rust at the seam of the tank, for rust on the fuel lines or because the fuel filter is original. A failure occurs if there is a leak, the tank is unsecure, patched in certain ways or the lines are rubbing and unsecure.

[59] Ms. Naples did not complain of a fuel smell until mid-December. This is contained in her complaint documents to the VSA – an enclosed email to River City. The closest date noted by Ms. Naples was December 12, 2011 when she complained of a gas smell and brought the Kia into River City. River City found fuel seeping from the fuel filter connection near the gas tank and Mr. Russell noted the filter was hanging down like it was knocked out of place. The filter was replaced.

[60] Comox Valley noted that the fuel tank was rusty at the seam and weeping slightly (bubbling) on December 21, 2011. This was after the November 26, 2011 accident admitted to by Ms. Naples. Mr. Osborne did say that the Kia looked as if it had been in an accident and that the accident seemed to be much of why the Kia's components were in an unsafe condition.

[61] Ms. Naples admitted that maybe the accident on November 26, 2011 did something to cause the leak and did not contest that the smell of fuel and the fuel leak occurred after the accident: (Transcript of Proceedings pages 95-96 paragraphs 300 to 301 and pages 98-99, paragraphs 304 to 305).

[62] Based on the above evidence, I am not satisfied on a balance of probabilities that the Kia's fuel system was non-compliant with the *Motor Vehicle Act* at the time River City sold the Kia to Ms. Naples.

ii. Clutch worn

[63] The Finneron documents actually place a question mark beside the clutch notation. The Vehicle Inspection Manual, section 1, Power Train, item 4 fails a clutch if it fails to fully disengage the transmission or otherwise does not operate to manufacturer's specifications.

[64] The clutch operation is not identified by Comox Valley as an issue. Further, Ms. Naples has not complained about the clutch operation including up to when she parked the Kia in October, 2012 after some 20,000 km of use.

[65] Based on the above evidence, I am not satisfied on a balance of probabilities that the Kia's clutch condition made the Kia legally unsafe and non-compliant with the *Motor Vehicle Act* at the time River City sold the Kia to Ms. Naples.

iii. Brakes

[66] The Finneron documents state the pads and rotors are rusty and the rotors are warped. River City replaced the front pads and machined the rotors as part of the original agreement with Ms. Naples. I would note that the *Motor Vehicle Act Regulation* or the Vehicle Inspection Manual do not fail pads and rotors for these reasons, unless they do not allow the vehicle to brake within the required distances set by the legislation. There is no evidence of that here.

[67] The Finneron documents identify that the front brakes are dragging and a question mark beside calipers. Therefore, no determination was made by Finneron regarding the brake calipers. *The Motor Vehicle Act Regulation* Division 5 and the Vehicle Inspection Manual section 3 does not fail a vehicle for "dragging" brakes. It does fail if the caliper is seized or the dragging brakes do not allow the vehicle to brake within the required distances set by the legislation. There is no evidence of that here.

[68] The evidence also shows that the seized caliper did not occur until early to mid-December, 2011 (around December 12, 2011) and after the Kia travelled some 3,000 to 4,000 km. Comox Valley did not change the seized right front caliper until December 21, 2011 and the work order notes the Kia had travelled some 4,200 km since it was purchased by Ms. Naples. There was much ado about whether the seized caliper was caused by overheating due to Ms. Naples driving up and down Mount Washington at least nine times in a short space of time. However, I find it unnecessary to decide if this was so.

[69] Another concern is whether the accident on November 26, 2011 contributed to this caliper problem. Ms. Naples said she rear-ended someone in stop and go traffic in Vancouver. Did she do a panic stop causing her to press hard on the brakes? No one was able to inquire about the effects of the accident on the Kia and these various brake problems as Ms. Naples said nothing about the accident until she was being questioned by River City. She said nothing: on her complaint form to the Authority; during the investigation; nor during the hearing when she was asked to provide evidence. It was only when River City asked her questions about the ICBC transfer form that she finally divulged the accident. Ms. Naples' conduct has prejudiced the ability of River City to inquire about the effects of the accident on the Kia's brake system and to be able to make a full defense.

[70] Finneron's documents note the steel or hard brake lines on the Kia were very rusty. Michael Osborne's Comox Valley work order says the brake lines were "fairly rusty" in several places. These descriptions are similar but not the same. The Vehicle Inspection Manual does say that a motor vehicle is to fail an inspection if there is corrosion on the brake lines that have deteriorated them.

[71] However the notes of the apprentice mechanic lack sufficient detail to say the lines would fail an inspection, and he was not qualified to make that opinion. Mr. Osborne's testimony was also not consistent on this point. He let the Kia go on December 21 after repairing the caliper and again after he repaired the rear brakes in March of 2012 where the Kia had 121,261 km or had travelled some 10,000 km since it was purchased. As noted by Ms. Naples, the Kia was parked in October, 2012 having put on some 20,000 km on the Kia and there is no evidence the steel brake lines have been replaced.

[72] I also take into consideration that the Kia passed the vehicle inspection at the ADESA auction (page 49 of the Affidavit exhibits) and the government inspection performed by Canadian Tire (page 40 of the Affidavit exhibits). The Canadian Tire inspection occurred over one year before the Kia's sale to Ms. Naples, but the odometer reading was 105,095 km, which is 6,000 km of travel before the sale to Ms. Naples. These inspections are not necessarily determinative of these issues, but they do weigh into the mix.

[73] I cannot say, based on the evidence presented, that I am satisfied on a balance of probabilities that the corrosion on the steel brake lines were to a point that they had deteriorated enough to make the Kia legally unsafe at the time River City sold it to Ms. Naples.

[74] Based on all the above evidence, I am not satisfied on a balance of probabilities that the condition of the Kia's brakes at the time River City sold the Kia to Ms. Naples were legally unsafe.

iv. Transmission operation and rattle in the muffler

[75] Finnerons' documents indicate the transmission is non-compliant due to hard shifting. The muffler is simply noted as having a rattle.

[76] I would note none of these items were stated by Ms. Naples or by Comox Valley as being concerns. There is nothing in the *Motor Vehicle Act Regulation* or the Vehicle Inspection Manual about hard shifting. So if Finneron is stating this was non-compliant it presumably means non-compliant with some other standard.

[77] Based on this evidence, I am not satisfied on a balance of probabilities that the condition of the Kia's transmission and muffler at the time River City sold the Kia to Ms. Naples were legally unsafe.

v. Steering and suspension components and need for a wheel alignment

[78] Finneron's documents are somewhat inconsistent regarding the condition of the Kia's suspension and steering. The inspection report says the steering and suspension components are compliant. On the work order, the notation about the stabilizer links simply says "LF & RF Stab links". It provides no description as to their condition. There is a note about the control arm link being almost torn and what I believe says "out". Even so, Finneron's inspection sheet indicates that the Kia's suspension and steering were compliant.

[79] The Vehicle Inspection Manual addresses these bushings in various places depending on whether the Kia had a coil spring or MacPherson Strut front suspension. Most newer front wheel drive vehicles have the later. Regardless, the suspension section of the Manual provides for the failure of these items for the same reason, their being loose. Certainly if the bushings are worn to the point that they are loose, the Kia would fail the inspection.

[80] The Comox Valley document notes the "sway bar links (bushings)" and "Rt Front Radius Rod Bushing" but the document provides no details as to conditions. Comox Valley also recommended a wheel alignment. However, it was these specific components, the bushings, that Mr. Osborne says looked like they had been ripped out because of an accident and the recommendation for an alignment grew out of the failure of these bushings: (Transcript of Proceedings: page 27, paragraph 76 and page 30, paragraph 90). In other words, the need for an alignment was not necessarily a stand-alone concern. I would note Mr. Osborne and the Comox Valley document say nothing about the control arm bushing as noted by Finneron. It is also important to note here that Finneron's documents say nothing about the radius rod bushing.

[81] Mr. Osborne was not sure he could identify when the Kia was in an accident. His view though was that the radius rod bushing damage seemed to be older and not a recent accident. I note that the only evidence of the Kia being involved in an accident is the one Ms. Naples admitted to at the hearing and which occurred after Finneron inspected the Kia and River City sold the Kia to Ms. Naples and before Comox Valley looked at the Kia.

[82] The ADESA inspection does not seem to cover suspension and steering, however the Canadian Tire inspection passed the Kia's suspension. I keep in mind that there is 6,000 km on the Kia since that inspection and the sale to Ms. Naples.

[83] Given the inconsistencies in Finneron's documents on the bushings and lack of clear detail about their condition at the time Finneron inspected the Kia; and Mr. Osborne's

evidence that their condition was in his opinion due to an accident; and there being no other accident noted except the one involving Ms. Naples after she purchased the Kia; I am not satisfied on a balance of probabilities that the condition of the above mentioned bushings were legally unsafe at the time River City sold the Kia to Ms. Naples.

[84] Because of the importance of the accident in relation to the condition of these components, as opined by Michael Osborne of Comox Valley, it was vitally important for Ms. Naples to have advised the Authority and River City about the accident so its effects on these components (and the other components) could have been investigated. Unfortunately, Ms. Naples' conduct has prejudiced River City's ability to properly defend itself on this point, and possibly regarding the condition of the Kia on the whole. If I was not able to make the above determinations based on the evidence, I would have ruled against Ms. Naples, at least on these components (the bushings), because of the prejudice to River City in its ability to defend its case.

vi. Rear Tires

[85] A combined reading of the two Finneron documents suggests the rear tires had sidewall cracks. This is not necessarily clear from the documents. I would note there is no description as to the extent of the cracks, their length or depth. The inspection sheet indicates they were non-compliant. Again, there is no evidence of what non-compliant means for Finneron Hyundai.

[86] The Schedule to Division 7 of the *Motor Vehicle Act Regulation* section 20(3) says a tire cannot have sidewall cracks "to the extent that body cords are damaged or exposed." The Vehicle Inspection Manual for Light Vehicles, section 9 states cracks in excess of 3 mm in depth and which also expose the cord wrap layer are viewed as unsafe.

[87] The Comox Valley repair invoice of December 21, 2011 says nothing about the condition of the tires on the Kia. Michael Osborne did not comment on the condition of the Kia's tires at the hearing. Therefore, I have no evidence to indicate that at least by December 21, 2011 that the condition of the rear tires of the Kia were not compliant with the *Motor Vehicle Act*.

[88] Ms. Naples noted in her complaint form that at the end of January one of her tires literally exploded. She says the tow truck driver told her the tires were not in good condition. Based on the Comox Valley invoice of December 21, 2011, the Kia had at least 4,200 km by January 2012.

[89] Based on the evidence presented, I am not satisfied on a balance of probabilities that the condition of the rear tires on the Kia were legally unsafe at the time River City sold the Kia to Ms. Naples.

vii. Rear Wiper

[90] Finneron's documents note non-compliance with the rear wiper on both its forms. Unfortunately, there is no detail.

[91] The *Motor Vehicle Act Regulation* and the *Vehicle Inspection Manual* do not fail a vehicle for a faulty rear window wiper. A fail occurs where the front wipers cannot clear a certain percentage of the front windshield. Therefore, if the rear wiper was "non-compliant," it appears it was non-compliant against a standard different than the *Motor Vehicle Act*.

[92] Comox Valley made no mention of this issue on its documents nor did Mr. Osborne comment on this in his testimony. Ms. Naples does not seem to have complained of this issue either.

[93] Based on the evidence presented, I am not satisfied on a balance of probabilities that the condition of the rear wiper made the Kia legally unsafe at the time River City sold the Kia to Ms. Naples.

viii. Inconsistencies between Finneron and Comox Valley Inspections

[94] I find it important to highlight the following inconsistencies between Finneron's and Comox Valley's evidence.

[95] Finneron considered the Kia to be non-compliant because of transmission shifting issues, cracked rear tires and a faulty rear wiper. Finneron also noted a problem with the Kia's control arm bushing and a rattle in the muffler. Comox Valley made no mention of these items being a concern on its invoice nor did Michael Osborne during his testimony. If these items made the Kia legally unsafe for the road, they should have been consistently reported as such by both Finneron and Comox Valley; but they were not. It is for this reason one must have regard to the more objective safety standards set in the legislation when considering if a vehicle is legally safe or unsafe for the roads.

[96] These inconsistencies, especially given their apparent importance in determining the safety of the Kia at the time of sale, are a consideration that weighs into my deliberations.

CONCLUSION ON MS. NAPLES CLAIM

[97] Based on the above noted evidence and my findings on that evidence, River City has rebutted the allegation that it represented the Kia as safe when it was not. It has met its burden of proof under the BPCPA. Having found no misrepresentation on the evidence presented and as alleged, I am without jurisdiction to issue a compliance order in this matter.

[98] I make no comment or decision as to Ms. Naples' rights under the *Sale of Goods Act*.

REGULATORY COMPLIANCE

[99] During the hearing River City described how it sometimes researches the vehicles it acquires for sale and how it sometimes inspects those vehicles prior to sale.

(a) Concern regarding researching prior history

[100] Based on the court decisions noted earlier, and other similar court decisions, it is clear that a motor dealer has a positive duty to inform itself about the prior history of a motor vehicle as demanded by sections 21 and 23 of the *Motor Dealer Act Regulation* to name just a few sections. Those court decisions have said that a dealer's duty requires it to make its own due enquiries, and not rely solely on a prior owner's declarations and not even rely on an ICBC vehicle history report – not everything makes it into these reports. Obtaining information from those types of sources is important, but taken alone are insufficient. The court in *Fraser* made clear that dealers need to also carefully examine motor vehicles prior to sale.

[101] Mr. Russell gave evidence that they probably would not run a CarProof if they know the person trading in the car and River City sold it to them originally: Transcript of Proceedings, pages 84-85, and paragraphs 254 to 258. The B.C. Supreme Court in *Key Lease Canada Ltd. v. Bott* (noted above) dealt with a case where a prior lessee did not declare an accident and damage to the dealer when he returned a vehicle. The court found the dealer negligent for not making its own inquiries of that consumer and for not properly checking over the vehicle when it sold the vehicle on to another consumer. A dealer must make due inquiries and research a motor vehicle, including inspecting it, in order to make its statutory declarations in a due diligent manner.

(b) Concern regarding vehicle safety

[102] As already noted, section 222 of the *Motor Vehicle Act* and section 8.01 of the *Motor Vehicle Act Regulation* specifically demand that a motor dealer ensure that before a motor vehicle is offered for sale that it is compliant with the safety requirements of the *Motor Vehicle Act* and all its regulations. This is not based on a motor dealer's best information or belief; the motor dealer must ensure the motor vehicle meets the minimum safety requirements. Inspection against the standards set by the *Motor Vehicle Act* and its regulations is the only way to be sure. There is a clear and sound policy reason why motor dealers have this obligation – to reduce the risk of injury or death on the roadways. A motor dealer is not entitled to gamble with the lives of its customers.

[103] As I noted above, the ADESA auction inspection does not cover steering and suspension components of a motor vehicle. Comparing the PVI inspection document from Canadian Tire and the ADESA inspection document shows ADESA's inspection is wholly inadequate for the purpose of determining if a motor vehicle meets the requirements of the *Motor Vehicle Act*.

[104] River City's 25 point inspection (page 12 of the exhibits to the Affidavit) also indicates that it is not as thorough as the PVI. For instance, it says nothing about the fuel system, frame or unibody, vacuum system, hood and safety catches, visors or mirrors, to name a few, as does the PVI.

[105] Further, I have concern that the person doing the inspections at River City is not a licensed mechanic and that he is still learning on the job and sometimes is not supervised by Mr. Russell who is a heavy duty mechanic: Transcript of Proceedings, page 80, paragraphs 232 to 236. Mr. Russell did not supervise River City's mechanic when he did the 25 point inspection on the Kia: Transcript of Proceedings pages 88-89 and paragraphs 277 to 282. A person who is still learning the trade being left alone to do safety inspections on motor vehicles is of grave concern.

[106] It should be noted that a dealer that fails to do an adequate inspection of a motor vehicle prior to the sale of that motor vehicle will not meet its positive duty. In fact, the way River City described how it decides when or when not to inspect a motor vehicle borders on being reckless. For instance, Mr. Russell stated that if a vehicle is bought from Vancouver (referring to the ADESA auction) and ADESA inspects the vehicle, then River City does not inspect the vehicle: Transcript of Proceedings pages 82 to 84, paragraphs 245 to 247. Having an unqualified person, still learning on the job, do safety inspections unsupervised, is clearly reckless. Acting in a reckless manner is generally sufficient in law to say you acted intentionally, especially for claims of misrepresentation: *Casillan v. 565204 BC Ltd. dba Daewoo Richmond* 2009 BCSC 1335 (BC Supreme Court) at paragraphs 20-25.

[107] Based on the evidence of River City at this hearing, I believe adding a condition to its registration is necessary in order to protect the public interest. Given my serious concern of whether River City can ensure all its vehicles meet the minimum safety requirements of the *Motor Vehicle Act*, I place the following condition on its registration:

River City Auto Sales Ltd. is to ensure every vehicle it is offering for sale meets the requirements of the *Motor Vehicle Act*. River City must show proof of a proper inspection by a qualified technician to all consumers prior to the consumer agreeing to purchase a motor vehicle. River City must keep proof of a proper vehicle inspection of all vehicles sold to consumers which are to be available for inspection by the Authority in accordance with the *Motor Dealer Act*.

[108] The above condition is no more than River City's legal obligations. Had I been able to, I would also have imposed a fine on River City for its inadequate approach to ensuring all vehicles it sells to consumers meet the safety requirements of the *Motor Vehicle Act*. I chose not to cancel River City's registration in accordance with past precedents¹ and because this is its first complaint on file. The Manager of Licensing has delegated authority to remove this condition if River City can show it has a process in place to ensure motor vehicles it offers for sale to consumers meet the requirements of the *Motor Vehicle Act*.

[109] The Notice of Hearing in this case did put River City on notice that I may place a condition on its registration as a result of any findings in this hearing.

[110] If in the future, River City is found not to be acting in a due diligent manner to ensure a motor vehicle meets the safety requirements of the *Motor Vehicle Act* prior to being offered for sale, it puts its registration as a motor dealer at risk.

SUMMARY

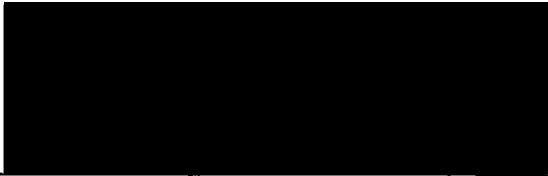
[111] River City has met its burden of proof and rebutted the allegation that it misrepresented the Kia as safe, when it was not. No compliance order shall issue. I make no decision or comment on Ms. Naples' rights under the *Sale of Goods Act*.

[112] River City has the above noted condition added to its motor dealer registration.

[113] If in the future, River City fails to adequately research the prior history of motor vehicles to make its statutory declarations, or River City fails to take steps to ensure motor vehicles it offers for sale meet the safety requirements of the *Motor Vehicle Act*, it risks the loss of its registration.

Dated: February 18, 2013

I certify this document to be a true copy
of the original document placed before me
this 18 day of February 2013.


Ian Christman, J.D., Registrar

¹ *Hurtubise v. Massive Truck Sales Ltd.* (August 18, 2008: Registrar's decision: File 08-70288) at paragraph 36
http://www.mvsahc.com/images/pdf_files/File08-70288Hurtubise-v-MassiveTruckSalesLtdSidhuSidhuAugust182008.pdf

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