

THE COMMON LAWYER

Some say a pendulum swings between sense and nonsense – where is it now?



By Justin M Jakubiak

IN DECEMBER 2021 the Office of the Auditor General of Ontario (AG) released a pretty scathing report about OMVIC, prepared further to its completion of a value-for-money audit.



A scathing report is never a good thing – it is obviously bad for OMVIC – but it is also potentially bad for the industry as a whole. Coming down hard on a regulator of an industry can have a negative impact by implying that the industry is out of control and needs much greater oversight. The AG's report may also result in the pendulum swinging too far and lead to more OMVIC investigations, more enforcement, more scrutiny and overall less flexibility by OMVIC when it comes to resolving issues between it and registrants or potential registrants.

But first, what did the AG find? Among other things, the AG found that OMVIC had routinely engaged in the types of activity that OMVIC puts registrants through the ringer for – including financial and general operational mismanagement, as well as the making of false statements in OMVIC's reporting on consumer protection and consumer awareness issues. In terms of financial concerns, the AG found that while OMVIC, a not for profit, increased its surplus and reserves from \$6.3 million in 2015 to \$23.6 million in 2020 (nearly 4 times!), it failed to invest this money into key operating areas such as the complaint, inspection and registration departments. So while dealers are paying 100% more for the transaction fee due to its 2015 increase from \$5 to \$10, OMVIC's key departments are remaining stagnant and neither consumers nor registrants are benefiting from OMVIC's increased resources.

The AG also found that OMVIC overstated the number of motor vehicle dealers it had inspected between 2016 and 2020 by 25%; and that OMVIC significantly understated the time required to process both dealer and salesperson applications. These findings are ironic, given that many dealers have been taken to the OMVIC Discipline Panel and/or the Licence Appeal Tribunal for analogous conduct – such as misleading vehicle advertisements, or false statements contained in applications submitted for the purposes of registration.

So what does the AG report mean - Is OMVIC bad? Is it ungovernable? Should it lose its authority to regulate the automotive industry?

NO.

OMVIC is Good (Mostly!)

Some of you, especially those of you who are my clients or have worked with me before, may be surprised to see me write this. Don't get me wrong, I get annoyed by OMVIC from time to time. Delays, nit-picky questions during an application review and unreasonable (to me) positions on files can all be frustrating. That said, by and large, OMVIC is staffed by some pretty great people – people who truly care about their jobs, who are knowledgeable and who care about consumer protection. They truly want to rid the automotive industry of the bad apples that give it a bad reputation. In particular, my mind turns to OMVIC's registration department. I have worked with many of OMVIC's registration representatives for more than 15 years. While it often feels that they ask too many questions, they do so with an earnest desire to make sure the right people and the right businesses achieve registration, and can operate successfully. OMVIC's legal department is another that is well staffed with talented people who genuinely care about their files and OMVIC's consumer protection mandate. Most prosecute files without regard to 'winning or losing', but ensuring that



their actions are fair and maintain public confidence.

So Why is the AG's Report a Problem for the Industry?

While reviews and feedback are incredibly important tools to achieve improvement, they can sometimes have adverse consequences.

In my view, OMVIC has clearly heard the criticisms set out in the AG's report and is now potentially overcompensating on certain files in an apparent effort to redress past alleged mistakes. If I am correct, this is not only obviously inappropriate, it poses a risk to the good registrants that may get caught up in OMVIC's potentially overzealous response to the AG's report.

In short, a dealer who makes a mistake today can't be 'overpunished' in an effort to make up for a different dealer that may have been 'underpunished' in 2019.

1 A Few Examples The Established Dealer

I am currently acting for a well-known and established dealer and its dealer principal. The dealer has been successfully operating for over 30 years, and its dealer principal has been

registered for over 35 years without issue. However, in 2020, one of the dealer's business managers engaged in some conduct which did not meet the high standards that all registrants should strive for. While the conduct did not result in any consumer harm, and the business manager didn't personally benefit from the conduct, it was still wrong. It was the type of conduct that in normal times the business manager would be taken to discipline for.

What happened instead – the business manager and the dealer and the dealer principal were each issued a Notice of Complaint through OMVIC's discipline process AND SUBSEQUENTLY the dealer and the dealer principal were also issued a Notice of Proposal to Revoke their respective registrations. This is despite the fact that neither the dealer principal nor anyone else at the dealer were aware of the impugned conduct of the business manager at the relevant time, and in spite of the fact that the dealer quickly conducted an investigation into the impugned conduct and disciplined the business manager once its investigation was complete.

In full transparency, and acknowledging that I write from an obviously biased perspective, the Notice of Proposal to Revoke does raise some other issues;

however, in my opinion, they aren't material issues that are industry related, go to the heart of OMVIC's mandate or speak to consumer protection. Instead, they are an aggressive attempt to trump up the allegations against my client and overcompensate for OMVIC's potential past deficiencies.

A Notice of Complaint combined with a Notice of Proposal is overkill, plain and simple. By issuing two serious processes against my clients, OMVIC is both expecting an unreasonable standard of perfection from registrants and is over punishing the behaviour in question.

2 The General Manager

I recently completed a long hearing before the Licence Appeal Tribunal on behalf of a General Manager. This individual had been registered without issue for over 10 years, and had received high praise and respect from almost all that had worked with him.

Just prior to the pandemic, my client had been promoted from Sales Manager to General Manager at a large and very busy franchise dealer. The pandemic hit and as I am sure you know, chaos ensued. This GM all of sudden had to deal with a many issues that were foreign to even the most experienced GM's, let alone new ones, such as: mask mandates, safety protocols, lock-downs, staff layoffs, supply issues, consumer fear and more.

During the course of the pandemic, there was one Business Manager at the GM's dealer who acted inappropriately



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on a number of files. He was hoarding documents, signing for other dealer members, overcharging and generally abusing customers. That said, he was extremely charismatic and kept most of his activities under the radar.

Eventually, the General Manager discovered the activities of the Business Manager and took them to the dealer's senior management/ownership team. After an investigation the BM's employment was terminated.

It is important to note that much of the Business Manager's impugned activities resulted in significant financial gain for himself, and for the owners of the dealer. Much less so for the General Manager. In this case, OMVIC eventually issued a Proposal to Revoke against the Business Manager (as they should have), but also the General Manager! But not the dealer, nor the dealer principal. As a side note, and to the credit of the Licence Appeal Tribunal, this is something that the LAT member took OMVIC to task for at the hearing. How could OMVIC aggressively pursue a General Manager, but not the higher ups who would have been equally aware of the goings on in the dealer, and benefitted the most financially?

This matter proceeded to LAT for 13 days of hearing; despite repeated witnesses for OMVIC speaking highly of my client, his professionalism and hard work during COVID, OMVIC chose to complete the hearing and did not attempt to settle it. In the past, in my opinion, this matter would have never gone to a hearing and would have been settled early on. A settlement involving some education and maybe some appropriate terms and conditions would have been reasonable

and fair, and avoided the immense resources that are consumed when a hearing proceeds.

3 The Compensation Fund

The impact of the AG's report has also (again, only in my opinion) impacted proceedings before the Compensation Fund.

The Compensation Fund is a bit funny because it is a consumer protection program financed by Ontario's registered dealers, but doesn't truly include them in the process of determining whether a claim to the Fund is valid or not. A dealer doesn't have official standing before the Compensation Fund, and is not entitled to make submissions or otherwise respond to allegations which may be made against it by a consumer.

I recently dealt with a Compensation Fund matter for another long-time dealer registrant (30+ years) located in cottage country. In this matter a consumer of the dealer approached the Fund further to his belief that the odometer on his vehicle had been rolled back prior to his purchase (by a previous owner, not my client); an alleged material fact which wasn't disclosed to him at the time of his purchase.

It should be noted that the consumer had not obtained a judgment from the Small Claims Court before approaching the Fund, as is typical of many claims submitted to the Fund.

The Fund ultimately accepted the claim, notwithstanding that my client vigorously objected to the allegation that the odometer had ever been rolled back. My client maintained that the alleged odometer discrepancy, for which the only proof was a CarFax Canada report, was the result of human error in reporting to CarFax Canada, and not because anyone had in fact tampered with the odometer. Notwithstanding my client's vigorous efforts, and despite a complete lack of clear evidence that the odometer was rolled back, the Fund approved and paid

out the claim. OMVIC subsequently issued a Proposal to Suspend my client's registration as a dealer pending repayment to the fund.

My client appealed the Proposal to Suspend was successful in having it withdrawn, but only to be served instead with the Notice of Complaint taking him before discipline AND a small claims court action by the Fund seeking repayment of the amount it paid out to the consumer – being the full purchase price of the vehicle.

Conclusion

The above are but a few examples. Maybe my feeling that the AG's report has already had a negative impact on the way OMVIC carries out its mandate is entirely wrong. Maybe it is merely a coincidence that I have a few more files that are more difficult to resolve than history would suggest they ought to be.

However, whether I am right or wrong, I think all registrants should take notice of the AG's report and be prepared for increased scrutiny into their affairs by OMVIC. Dealers should audit their own files, increase training and take a hard look at those team members who don't quite exemplify best practices and who may put you or your dealership at risk.

As always, I am happy to assist you and your teams to ensure your continued success.

Justin is a Partner with Fogler, Rubinoff LLP and is recognized by the Law Society of Ontario as a Specialist in Civil Litigation – most importantly, he loves cars and the automotive industry, representing auto clients throughout Canada.

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