

THE COMMON LAWYER

Trends from the Trenches



By Justin Jakubiak and Adam Varro

AS WE DRIVE INTO 2023, it is a good time to stop and review the state of the automotive industry, especially from a regulatory and general compliance

perspective. For me and my team, that means reviewing last year's cases: the wins, the losses, the compromises and the reasons behind each result. We hope that by reflecting on the year we can continue to better understand the regulatory regime that dealers and salespeople operate in, with a view of spotting trends and anticipating the areas where dealers should focus their risk mitigation strategies.

Generally

Ontario dealers are facing increased pressures caused by a tightening economy due to increasing interest rates

and lingering supply issues. In addition, OMVIC is taking a more active role and scrutinizing the activities of dealers of all sizes. Many of our larger dealerships and dealer groups are facing increased scrutiny by, and interaction with OMVIC that is unparalleled to anything I have seen in over 15 years working in the automotive space.

OMVIC is generally increasing its oversight and becoming firmer in the way it governs both dealers and salespeople. While OMVIC should be lauded overall for its efforts to ensure Ontario's dealers and salespeople are abiding by their obligations under the MVDA, it sometimes appears that OMVIC has become too firm and relentlessly pursues matters against some dealers and salespeople where the facts don't warrant such actions – or any action at all.

The Spark which Ignited Change

Last spring, I wrote an article for the Ontario Dealer which reviewed the OMVIC Value for Money Audit, prepared by the Auditor General for Ontario and released in December 2021. As a brief recap, it is a 68 page report that contains a detailed analysis of OMVIC, its mandate, its funding and overall operations.

The report was critical of OMVIC and noted a number of areas which required improvement. One of my main concerns arising from the report was the potential impact that it would have on how OMVIC

carries out its mandate. I was nervous that OMVIC would translate it to mean that it needed to significantly change the way discipline matters, proposals to refuse and revoke registrations, as well as prosecutions under the *Provincial Offences Act* are pursued.

Now, a year later, has anything changed and were the suspicions justified? Yes and no.

On the positive side, OMVIC has become more efficient in some respects, particularly with registration matters, which serves everyone better. In other ways, and as I feared, OMVIC has become less efficient and/or more aggressive; this is most evident in the manner in which OMVIC handles and looks to resolve matters before the OMVIC discipline panel or the Licence Appeal Tribunal.

In the last year, OMVIC has often maintained unreasonable (in our opinion) positions in various proceedings. We believe these positions are a direct consequence of the Auditor General's report, and less about OMVIC's mandate and its desire to protect the car buying public. The consequence of the change in OMVIC's approach towards registrants is that discipline and tribunal proceedings often cannot be resolved without a hearing, or take much longer, resulting in increased costs to registrants and time away from the business of selling cars.



Registration

As noted above, we have seen improvements in how OMVIC's registration department is processing routine applications. Compared to a year ago, applications, especially individual applications for registration as a salesperson, are generally being processed more quickly. Registration officers continue to be responsive and reasonable and do their best to keep our office informed of developments as the applications proceed through to completion.

It is the more 'difficult' applications which continue to move slowly and often stall without reasonable explanation. These files often relate to an applicant who may have had previous issues with OMVIC (such as previously selling while unregistered), or who may have had issues in another regulated industry.

The bottleneck in these files appears to be when the applications are forwarded to OMVIC's management level for review. Sometimes management will quickly process the application to the next stage, but too often applications will be stuck at the management review stage for unreasonable amounts of time – sometimes for months on end – with little to no explanation or transparency into the reasons for the delay.

Business Plan

OMVIC has made submission of a detailed business plan a requirement for all new dealership applications. A form in this regard has been created which applicants must complete before the business application will begin to be processed – essentially, the form serves a gate keeping function and ensures applicants have really thought through their plans to open a new dealership.

Applicants must thoroughly describe their business model and provide detailed financial information. This is in direct response to the Auditor General's report, which recommended that OMVIC

"review the application process and develop guidelines to fully assess the new dealer applicants' financial strength to ensure they have sufficient funds to operate their business".

Our big concern with the new business plan requirements is that the current form is rigid and doesn't easily apply to all applicants. It also requires a high degree of speculation to complete – especially when not all of the details of the proposed dealership are known at the time of application, such as the location of the applicant dealer (given most dealers find a location as a last step before registration), and the local target market.

Letters of Credit

OMVIC is increasingly requesting that new dealers provide a letter of credit as a condition of registration, typically from applicants who, in their view, have financial red flags. This too is directly in response to the Auditor General's report, which found that OMVIC's failure to obtain letters of credit from dealers contributed to unrecovered losses to the Compensation Fund.

Letters of credit (LOC) are a significant barrier to new registrants, especially those who have a limited amount of start-up capital and will be running modest operations.

These individuals often do not have sophisticated banking relationships, or the financial ability to secure a LOC from a bank. To complicate matters, OMVIC has recently advised our office that \$20,000 is the minimum LOC amount that will be accepted for the smallest new dealers.

While we appreciate the need for LOC's for some new dealers, we believe there needs to be more flexibility in the LOC requirements – both in terms of the minimum amount, and also in form. An alternative to a traditional bank LOC is required for new unsophisticated dealers without established banking relationships.



Licence Appeal Tribunal Proceedings

We have seen and participated in some interesting LAT proceedings over the past year.

If you receive a Proposal to Refuse or Revoke, do not assume that the decision will be based only on the allegations set out in the Proposal, or any further and other particulars that you may receive. We have observed an increased willingness by LAT to consider issues and matters that fall outside the four corners of a Notice of Proposal.

LAT hearings are hearings de novo ("anew"), and the case law has interpreted this to mean that the LAT can rely on any conduct or subsequent fact brought to light in the course of a proceeding to ground its decision; LAT is therefore not restricted to only considering issues that have been raised by OMVIC in support of a Notice of Proposal. Registrants can often be caught flat footed by having to respond to issues that they did not anticipate in the midst of a hearing. It is therefore very important for applicants to consider the evidence and documents upon which they want to rely at a hearing, and the possible consequences of putting same into evidence.

On a positive note, LAT has been releasing its decisions much more quickly. Previously, LAT decisions often took upwards of four months to be released. The last two decisions we received have been released within one month of the hearing's completion. Whether these are anomalies, or the new standard

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remains to be seen.

Recently, we were successful in obtaining a cost award from a LAT adjudicator against OMVIC pursuant to the costs provisions provided for under the *LAT Common Rules of Practice and Procedure*. Costs awards before LAT are rare in general, and it is extremely rare for a cost award to be made against an industry regulator. The adjudicator, in a detailed cost decision, found that OMVIC acted unreasonably before and during the course of a 14 day hearing. She found that the evidence against our clients was lacking and that overall OMVIC was unreasonable in its handling of the matter.

Unfortunately, OMVIC was successful in having the cost award overturned. A different adjudicator was tasked with reviewing the cost award and determined that the basis upon which costs were awarded did not strictly fit within the confines of the costs rule. It was a technical ruling that focused more on when and how costs should be awarded, and did not, for the most part, deal with the substance of the previous adjudicator's findings regarding OMVIC's unreasonable behaviour.

While we were disappointed with the reconsideration decision, it is a good sign that LAT is at least open to the idea of awarding costs against a regulator and does truly consider the conduct of all the parties that appear before it.

Proceedings Before the Discipline Committee

OMVIC's Discipline Committee has become a more difficult place for registrants.

Most discipline matters resolve themselves in advance of a hearing. Historically the parties, once a settlement had been achieved, would advise the Committee of the settlement and it would be accepted and approved without much process or fuss.

Unfortunately, this is no longer the case. The Committee has developed a practice of rejecting resolutions that have been negotiated by OMVIC and registrants and submitted to the Committee in writing for approval – even in cases where both OMVIC and registrants are represented by counsel.

In response to this, a new practice has developed whereby OMVIC and registrants have to request a formal hearing before the Committee to present the settlement proposal.

While these hearings are proving successful at concluding the settlements, they are much more time consuming and expensive for OMVIC and registrants alike. I was recently involved in one where it took approximately 4 hours of hearing time before the Committee finally accepted the resolution that was being proposed on a joint basis – which is longer than some disputed hearings before the Committee.

Multiple Proceedings at Once

A troubling development we have observed is the frequency with which OMVIC uses multiple tools at once to enforce the Motor Vehicle Dealers Act. OMVIC will carry on POA proceedings and/or Discipline Proceedings at the same time as LAT proceedings, or in close succession to one another. I called this "over punishing" in my May 2022 article and I maintain the position that OMVIC should pick a lane when deciding how to address conduct that is concerning to it.

It is procedurally unfair to have to defend two proceedings that while in different forums and with different standards of proof, relate to the same subject matter(s). Concurrent proceedings lead to the difficulty of needing to protect oneself in one proceeding for the sake of a defence in another proceeding and can prevent a registrant from being able to entertain early resolution of one or both of the matters.

We recently acted for a salesperson who was forced to concurrently defend both a Notice of Proposal to Revoke his licence and POA charges relating to the exact same conduct. Although our client was ultimately successful before LAT and the POA charges were subsequently withdrawn, he was forced to incur legal fees to defend two related matters, as well as endure the stress and aggravation of looming charges on top of a revocation hearing.

Tying up judicial and administrative resources by pursuing registrants in multiple forums does not better advance OMVIC's mandate to protect consumers. It is an abusive process that is unfair to registrants.

Application Responses Can Haunt You

In terms of OMVIC forms, we have noticed that they have slowly evolved for the better over the years. The language has become clearer and there is an effort to make sure the person completing the application understands what is being asked of them.

While the forms are evolving for the better, they are still not perfect and we take this opportunity to remind registrants of the importance of completing OMVIC applications and forms accurately. Too often we work with dealers who suffer the consequences of filling out a routine form too quickly, or answering a question without critically thinking about what is being asked. Please always read the entire application/form/document and read it slowly and carefully. If there are questions, call OMVIC or your legal advisor.

It is critically important that registrants ensure they understand what they are agreeing to when they affix their signature to an OMVIC form – so if you never read the 'fine print', I strongly urge you to make OMVIC forms the exception and read them front to back.

I cannot count the number of times that a dealer or salesperson has suf-

ferred negative consequences because they incorrectly completed an application years before (with such mistake often being compounded because it is repeated on subsequent applications). OMVIC will often take these repeated mistakes as repeated instances of the supplying OMVIC with "false" information and will equate same as evidence of dishonesty or a breach of one's obligation to carry on business with honesty, integrity and in accordance with the law.

Tips to Avoid Being the Subject of Proceedings

This new era of OMVIC's enforcement is a good opportunity for dealers and salespeople to take all steps necessary to ensure they comply with their obligations.

Here are some tips to get you there:

- If your dealership or its salespeople are registered on terms and conditions, make a point of reviewing them every few months to remind yourself of the contents. Breaches of terms and conditions are taken very seriously by OMVIC.
- Regularly review and update training and policy materials and ensure that all staff are aware of their duties and obligations in their specific role. Managing a dealership with many moving parts and staff can mean that standards may not be known, and as a result, not met. If you are a dealer principal, you are ultimately responsible for the conduct of your employees.

Training is therefore key!

- Take your time when completing renewal applications. A single oversight or mistake could lead to an investigation and possibly a Notice of Proposal. A failure to disclose any potentially damaging information goes straight to honesty and integrity in OMVIC's view.
- Cooperate fully with any dealer audits and inspections, and provide requested information without delay.
- If you are concerned that OMVIC may commence proceedings against you for any reason, contact the UCDA or a lawyer who understands the MVDA/OMVIC. Sometimes a brief consultation can put a matter to rest or direct you to a course of action you would not have otherwise considered.

We hope this article gives you some insight into what we are seeing from our perspective as lawyers that work with dealers and salespeople daily.

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This article is intended for general information purposes only, and should not be relied upon as legal advice. Views and opinions are Justin and Adam's alone. ■

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E-SIGNATURES | RONDA PAYNE

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As outlined in the bulletin, there are no differences between a traditional “bricks and mortar” dealership and an online dealership, so both must follow the same standards. In essence this levels the playing field, allowing those with a physical location to provide remote test drives, electronic signatures on contracts and sale to remote customers.

Delivering to a customer’s home

Delivery to a customer’s home is permitted so long as the contract has been completed prior to delivery and

may also change the old adage “buyer beware” to “seller beware.” Hamilton says that the electronic documents act makes E-signature as binding as a wet signature “for all kinds of contracts” but don’t expect your traditional lender to be jumping on board to make that happen any time soon.

“Banks are quite shy about having that happen,” he says. “They say, ‘so, you’re not going to meet them face to face? Not if you’re going to want to use our money.’”

It’s understandable that dealers want to get ahead of the curve and provide more convenience as soon as possible, but while the desire for electronic contracts

was done so via electronic means. Dealers are not able to take the contract to the customers as this still is seen as trading off-premises.

When seen through this filter, online sales may be a way to provide additional convenience to a customer, but it

and signatures grow, so too does the technical skill of fraudsters.

“It’s not going to get better,” says Hamilton.

The change therefore, is likely to be an acceptance of the risk. Some dealers are ready to take that on, but their lenders aren’t.

Dealers who want to embrace the electronic option need to ensure they follow OMVIC’s guidelines for doing so and offers an electronic record-keeping guideline document. Taking on fully-electronic sales isn’t a no-brainer in used care sales. It’s going to take time for everyone to know the tools that work, accept certain risks and ensure their processes are up to snuff.

Those who are ready to take the plunge now will be “playing with their own money” but also banking on providing a consumer-savvy service. ■

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