

# the common lawyer

## I'm reasonable, are you reasonable? Material facts and the reasonable person

By Justin M. Jakubiak

**M**any dealers will receive, from time to time, complaints from purchasers alleging that they were sold a faulty vehicle. In making these complaints, disgruntled purchasers will often rely upon information about their vehicle which they have learned from a third party, such as their local mechanic.

Depending on the nature of the issue, a purchaser may claim that the dealer withheld information that they knew or ought to have known about the vehicle, and may further allege that the dealer withheld information that they were required to disclose by law.

This can be a problem for the dealer, if OMVIC agrees with the purchaser. While one complaint to OMVIC may not have any significant impact on a dealer's registration status, several complaints may result in a discipline hearing before OMVIC's Discipline Committee, or worse, a Proposal to Revoke a dealer's licence.

### Facts With Influence

As I touched upon in my previous *Ontario Dealer* column "To Disclose or Not To Disclose", one disclosure obligation that often trips up Dealers and salespersons alike is found under subsection 42(25) of the *Ontario Motor Vehicle Dealers Act* ("MVDA")

General Regulation. Subsection 42(25) is an ambiguous catch-all provision that requires a dealer to disclose "**any other fact about the motor vehicle that, if disclosed, could reasonably be expected to influence the decision of a reasonable purchaser or lessee to buy or lease the vehicle on the terms of the purchase or lease**". (Emphasis added)

### Terms & Conditions Of Registration

This statutory obligation is often echoed by OMVIC in terms and conditions, which are regularly presented to dealers as a precondition to registration. Terms and conditions, for the most part, are a reaffirmation of what dealers are already required to do by law. However, some draft terms and conditions go beyond a dealer's or a salesperson's legal obligations and should be carefully reviewed before they are signed. One term which is commonly proposed requires that dealers must "disclose all material facts about the motor vehicles for purchase or lease to its customers ... **whether or not the [dealership] considers a fact to be material**".

Who is the arbiter of whether a fact is material? I often request on behalf of clients that this particular line be

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removed from proposed terms and conditions, as it has the potential to bind a dealer to disclosing facts which may not be material. Just because OMVIC may consider something to be a material fact, does not necessarily make it so.

### Who Is The Reasonable Purchaser?

Despite the use of the term in both the Regulations and by OMVIC, the precise meaning of a “reasonable purchaser” remains blurry. As a result, many dealers are left wondering what, exactly, is a reasonable purchaser, and what is he or she concerned about? Do they care about safety? Comfort? Re-sale value? If the answer is yes to all of the above, to what degree? Without a precise understanding of the reasonable purchaser, it can be difficult for a dealer to know what facts must be disclosed, or to develop the necessary policies and procedures in response.

In a case from the Small Claims Court called *Lefrancois v. Ottawa Chrysler Dodge*, the Deputy Judge relied in part on subsection 42(25) to find that a dealership should have disclosed information about a vehicle's past damage to a consumer, even though the cost to repair the damage was given by the dealer as approximately \$750, well below the statutory disclosure threshold of \$3,000. The Deputy Judge held that the purchaser would not have entered into the purchase, but for the failure to disclose information about the vehicle's damage history (albeit supposedly minor). Unfortunately, the Deputy Judge did not provide an analysis as to whether the purchaser's concerns about the vehicle's past damage were reasonable when compared to the reasonable person standard. As a result, it may be a best practice to conclude that a Dealer should always disclose any information about previous damage to a vehicle, no matter how small.

Additionally, a dealer should always consider disclosing any fact that might have some bearing on a vehicle's safety. This view was recently confirmed by an OMVIC spokesperson providing a comment for a Globe and Mail article. OMVIC's spokesperson stated that a dealer is obligated to disclose the fact that a vehicle is subject to a manufacturer's safety recall pursuant to subsection 42(25) of the Regulations.

Conscientious dealers and salespersons know in general that fulsome disclosure is a good practice to follow. However, disclosing facts about a vehicle's damage history and safety profile might not be where a dealer's obligation ends. I was recently involved in a hearing before the Appeals Committee Panel further to an appeal of a decision of OMVIC's Discipline Committee. In the decision, the Panel commented on the meaning of subsection 42(25) of the Regulations. The Panel stated as follows:

*“if a dog was driven in a car and the car might contain dog*

*hairs, a purchaser who has an allergy would want to know about such a fact. Thus, disclosure of dog hairs to a consumer with an allergy would be something that ought to be disclosed under subsection 42(25) in such a particular case”.*

The Panel's view suggests that a dealer has an obligation to consider a purchaser's personal situation, characteristics, and idiosyncrasies when disclosing material facts. In other words, dealer's should consider whether a reasonable person in the shoes of the individual purchaser would be affected by the disclosure. This raises the disclosure bar too high in my opinion.

### Uber

What if a vehicle was once used as an Uber? Torontonians have been enjoying Uber's services for over three years now, and in December of 2015, it was estimated that the city had over 20,000 Uber drivers. There is no doubt that used Uber cars are starting to make their way into the hands of Ontario's dealerships.

Would a reasonable purchaser want to know that the vehicle they are about to purchase incurred heavy mileage shuttling people around the city, including taking people home from bars at closing time? While dealers are required to disclose whether a vehicle has ever been used as a taxi, limousine, police or emergency vehicle, there is no similar provision that explicitly requires disclosure about a vehicle's past use as an Uber. My thoughts - When in doubt, disclose. It is better to make full and accurate disclosure and avoid a potential finding of liability and the attendant sanctions.

On the other hand, a dealer's knowledge about a vehicle might be based solely on the disclosure of the purchaser trading it in. As such, dealers may want to implement “Uber disclosure” clauses as part of their trade-in documents. By requiring customers to disclose whether a car was ever used as an Uber on a trade-in, dealers can ensure that they have all the information required to keep future customers fully informed.

### Conclusion

I can't say I agree with the reasoning of the Appeals Committee referred to above – and not just because I lost the decision. That said, I do think dealers and salespersons must err on the side of caution and be proactive when it comes to disclosure. I suggest all dealerships make it part of their dealership's practice to research the vehicles in their inventory and pass on as much information as possible to their purchasers. While such disclosure may have an impact on pricing, I expect it will make for satisfied customers who will be more than willing to send referrals your way. **OD**