

THE COMMON LAWYER

New Year, New Challenges and New Opportunities



By Justin M. Jakubiak

HAPPY NEW YEAR.

May 2021 bring new roads, new business and better times without delay. I am sure most of you are like me and ready to trade-in 2020 for a better year!



On the one hand, the pandemic has been terrible on so many levels and particularly ruthless in that it has seemingly spared next to no one. On the positive side, it has forced many industries to radically shift business practices and to embrace technology much faster than would have otherwise been the case.

The legal profession has historically been one of the slowest and most adverse to change. Pre-pandemic, almost every legal process was paper driven, and very few courtrooms had sufficient technology to allow for remote witnesses, let alone remote hearings. In the first

several months of the pandemic all of my hearings were adjourned and matters languished in the hope that the virus would be a short blip in time and things would return to "normal" in due course – as we know, that was wishful thinking. Behind the scenes, senior judges and lawyers across the province had to scramble to develop systems and processes to take advantage of the pandemic and move the legal industry into the next century. After months of no hearings or trials, most courts and tribunals are back and running at near normal capacity.

In the last two months alone, I have had one virtual trial, and three virtual hearings before the Licence Appeal Tribunal. I now regularly communicate with clients via zoom – and even commission and witness legal documents remotely on a regular basis. Sadly, it has now become a strange occurrence when a client says they would like to meet me in person.

The automotive industry has also radically shifted and been forced to adapt as a result of the pandemic. Just a year ago I was speaking to senior members of both OMVIC and the UCDA about their real concerns regarding the risks and downsides of online sales – that same conversation would be almost laughable today. Concerns about consumer harm and the importance of the physical car buying experience have been replaced by how do we keep such an important sector of our economy alive, while balancing consumer safety and the practical realities (and limitations) of online sales.



In the legal world, there was great debate over whether it would be possible to assess a witnesses' credibility over Zoom; it was assumed that this important pillar of advocacy could only be done in person. Nearly 12 months in and I am a convert – I actually find it easier over zoom as the witness is right there, in high definition. Every facial tick and bead of sweat is visible. In speaking with members of the automotive industry, I am hearing many similar stories about various virtual processes that were feared, but have since been embraced and seen to be better, more efficient and more consumer friendly.

Whether we like them or not, online car sales and online dealerships are here to stay. Beginning in May 2020, registered dealers were given more opportunity and tools to sell or lease vehicles online. The processes put in place are not perfect and still need to be fine-tuned, but at least we are driving in the right direction.

This article will provide some commentary on the various recent shifts in the industry, and share some tips on how to best navigate this new world.

Immediate Concerns

First, a word on the most recent provincial mandate in light of COVID-19.

Under the new provincial stay-at-home order that came into effect on January 14, 2021, car dealerships are still considered essential. However, dealers may only operate between 7 a.m. and 8 p.m. and must operate on an appointment only basis – no walk-ins!

Test drives are still allowed, but only if they are no longer than 10 minutes in length. The 10-minute limit really bugs me, as I don't think there is a magic amount of minutes that COVID waits to infect someone. Also, how can anyone truly evaluate a car in 10 minutes – especially a used vehicle. It takes at least 15 to 20 minutes to adequately test out a vehicle at various speeds and in various sorts of traffic conditions.

Finally, a maximum of two people only are permitted on a test drive, including the salesperson AND all the windows must be open at all times if the two people are not from the same household. This is not a Canadian winter friendly provision and prevents a consumer from truly experiencing a car, listening for rattles, little squeaks and hearing the sound of the engine – but certainly makes it more likely the test drive will be only 10 minutes long.

This is a more extensive lockdown situation than we saw in the latter half of 2020, and I would not be surprised if it gets more dealers thinking about the prospect of beefing up their online sales and presence. Some dealers are uploading "test-drives" and detailed vehicle reviews to YouTube so that a consumer can get a feel for a vehicle from their living room couch.

Consumer Attitudes are Changing

In our current pandemic climate, online car sales are a safe and effective way for consumers to purchase vehicles. Do



not expect that consumer demand for online car sales will lessen as pandemic restrictions and lockdowns ease. I think the pandemic will have the effect of training most of us to resort to the computer to complete most shopping – cars included.

An OMVIC survey of consumers in collaboration with the Automobile Protection Association (APA) in August 2020 found that car shopping patterns are invariably changing. Consumers are more concerned for their health and safety when attending a dealership, more consumers were skipping a test drive, and some consumers listed remote paperwork as a component of a better buying process. OMVIC concluded that this consumer response meant that dealers should "embrace" online sales.

Of course, and despite this shifting attitude among consumers, many consumers will still want the traditional in-person car buying experience at the end of the day. For some, this experience is irreplaceable.

A Viable Business Model

More and more dealers are opting to conduct their business entirely online, and many are seeing the advantages of this business model from both an economic and efficiency basis. Exclusively online dealerships do not have to pay for as many overhead expenses, which can translate into savings for both the dealer and the buyer. Online car sales also mean the vehicle can come to the consumer, not the other way around, creating a more consumer focused and potentially friendly experience. People typically feel comfortable in their own surroundings, and online sales capitalizes on this important consumer satisfaction piece.

Apprehension from those in the industry about the risks of online sales should not dominate this discussion. Resistance to change is expected, but concerns about widespread illegality, breaches of OMVIC's Code of Ethics or an unfair market advantage over traditional dealers are not well-founded and have been proven to be mostly unsubstantiated

over the course of the pandemic and the increasing popularity of online sales. OMVIC is equipped to respond to the increasing move to online and has generally demonstrated its willingness to work with dealers to facilitate the trading of vehicles without undue restriction when consumers do not want to, or cannot, visit dealerships in person. That said, the online car sale business model fits uncomfortably within the current regulatory regime and hopefully new regulations and amendments will come soon to further smooth this digital transition.

I and my legal colleagues are getting used to virtual and phone-in court proceedings rather than in-person proceedings. This shift is long overdue in Canada's legal world. The rapid modernization is helping clients save on legal fees and expediting the resolution of some matters, all while maintaining the same standards for lawyers in the discharge of their professional duties. The same benefits can accrue to the car sales industry if online car sales are welcomed and promoted by all members of the industry, including government.

Requirements for online sales

OMVIC has made it clear that online car dealerships are required to adhere to the same standards as traditional dealers. Specifically, OMVIC requires:

- A physical premises accessible by OMVIC staff and members of the public.
- Records storage at the registered premises (unless remote storage is approved).
- A sign at the premises, visible to the public.
- Compliance with all aspects of the MVDA, *Code of Ethics, Standards of Business Practice, Consumer Protection Act* and other applicable legislation.

OMVIC further allows electronic signatures on contracts, remote test-drives, and the sale of vehicles to remote customers. Note, however, that



OMVIC places limits on the purpose of the test drive and none of the requirements pertaining to salespeople are relaxed. A remote test drive is only allowed if the dealer representative who provides the remote test drive is a registered salesperson and the test drive is offered solely for evaluating a vehicle's performance, suitability and/or condition prior to purchase or lease.

All trading still must take place at the dealer's registered premises, or completely online. Unfortunately, this means that a dealer cannot take a purchase or lease contract (or any other related agreement) to a consumer's home for the consumer to sign (but oddly, a dealer can bring an iPad and permit the customer to sign documents through an online application). Physical execution of paper documents must occur at the dealership's premises. A dealer may email a contract to the consumer to print, sign, scan and email back to the dealer at the dealership.

This is where I truly think amendments to the legislation will greatly assist OMVIC and dealers alike – I encourage any dealer who has some experience with online sales and has ideas regarding improvement and best practices to get in touch with both OMVIC and the UCDA. As has become increasingly clear throughout the pandemic, the dealer's

voice matters and needs to be heard. Best practices need to be vetted and reviewed from the perspective of the "salesfloor" – wherever that salesfloor happens to be.

Best Practices

I suggest all dealers go a step further than the baseline requirements to ensure they are going above and beyond for their customers. Dealers should:

- Ensure all-in price advertising, if applicable, is accurate and that the consumer is not caught off guard by any additional fees at the time of sale.
- Make websites user-friendly and navigable such that a consumer can achieve their desired purpose without delays or frustration.
- Especially with "sight unseen" sales, provide ample and clear images of the vehicle inside and out, and organize disclosure in a way that is accessible for the consumer.
- Be patient with the consumer if they wish to take the car for a test drive and allow them to test the car's performance as well as all of its features.
- Make themselves available to respond to consumer's questions and concerns immediately; as prompt and intentional customer service enhances the customer experience and their loyalty to your brand. Be sure to have candid and thorough discussions with buyers prior to any test drive and during negotiations.

- Once the consumer has decided to purchase the vehicle, do not rush the process when emailing the contract to the consumer for review.
- Consider implementing written cancellation periods on every contract, even though this is not required under the *Motor Vehicle Dealer Act*. This will give consumers some comfort in their purchase if they change their mind.

Conclusion

It is no secret that online car sales are here to stay. Dealerships and OMVIC need to work in tandem to ensure a positive car-buying experience for consumers, and to ensure that dealers operating online because of a pandemic, or otherwise, are not unduly hindered by restrictions that do not address health and safety and consumer harm generally. This juncture is an opportunity for OMVIC to purge arbitrary and limiting requirements for dealerships, and for the industry to embrace new methods of doing business that ultimately see more people purchasing the car in a way that works best for them.

Transitioning to the online car sales world may seem daunting for those taking the leap out of interest – or out of necessity – but it will pay dividends for those who endeavour to meet and exceed the standards in place for traditional car sale models. I wish you the best as your business transitions and thrives in the coming year. ■

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