

# THE COMMON LAWYER

## Modernizing the MVDA – For Whose Benefit?



By Justin Jakubiak

**I SHOULD START BY ADMITTING THAT I DON'T LIKE CHANGE.** I like consistency and knowing what lies down the road ahead.

That said, I will admit that change can sometimes be positive, especially if applied thoughtfully – and with respect to the automotive industry – if applied with the best interest of consumers as well as the industry as whole, including dealers and salespersons. Fairness across the board should be the name of the game.

This purpose of this article is to discuss some industry changes that are coming down the pipe, some of which will have a significant impact on dealers and salespersons. Notably, especially having regard to the current economic environment, some of the proposed changes will likely result in significant economic costs to dealers. In response

to these proposed changes, one must ask what is really driving them.

My fear is, that while cloaked under the auspices of consumer protection, many of the proposed changes are really designed to empower the Ontario Motor Vehicle Industry Council ("OMVIC"), simplify the industry, and make it harder to be a successful dealer or salesperson in Ontario. The changes may certainly address some of the bad behaviour of some dealers and salespersons – and that isn't inherently a bad thing - but at what cost? And who is left to bear that cost?

Should all dealerships and all salespersons be punished (i.e., deprived of certain economic benefits and opportunities) because of the bad behaviour of some? Or, should OMVIC be better and do better and focus on targeting and punishing the industry's bad actors?

I, for one, would like to see the bad actors punished and be made examples of; and the good actors given all the opportunities in the world to thrive, reach new economic milestones, and to grow in all aspects of their business. The proposed changes don't achieve these goals.

### Revisions to the Motor Vehicle Dealers Act, 2002 (the "MVDA")

The Ministry of Public and Business Service Delivery is contemplating changes to the MVDA and its regulations, which has sparked significant debate within the industry. The proposed

changes mostly aim to enhance consumer protection measures and regulate the vehicle sales process more effectively. However, several dealers, dealer groups and trade organizations, such as the Used Car Dealers Association of Ontario (the "UCDA"), have expressed concerns about the potential negative ramifications of the proposed changes, to dealers and salespersons alike.

The following are a few examples of the proposed amendments:

- Requiring OMVIC to develop an information guide for consumers and for registrants to provide a copy to consumers.
- Allowing trade outside a dealer's place of business when the consumer has initiated contact with the registrant and requested a trade outside of the place of business.
- Limiting the ability of dealers to require consumers to purchase add-on goods and services in a motor vehicle sale.
- Limiting the sale of "as-is" vehicles.

### Improve OMVIC, Improve the Industry

While the above are reflective of some of the industry's pain points, I remain unsure if amending the MVDA is the panacea some people believe it to be. I have long believed that more consistent and better enforcement by OMVIC would be much more effective in improving the industry and ensuring compliance with the MVDA and its regulations.



BUT – by improvement, I do not mean to suggest that the answer is to give OMVIC more powers or greater jurisdiction. I sincerely fear that if we were to do so, without improving OMVIC's knowledge and in-depth understanding of the industry, we are in for some very rocky roads ahead.

I work with OMVIC nearly daily on behalf of dealers and salespersons of all types – on behalf applicants, new registrants, as well as established industry kingpins with decades of experience and multiple stores throughout Canada and beyond.

While the vast majority of OMVIC's team members are truly excellent people that are great to deal with, there is currently a lack of industry depth (among some) when it comes to their understanding of dealerships and their operations, automotive financing, and in some cases, even what is provided for by the MVDA and the regulations thereunder. This problem has been compounded in recent years with the steady stream of OMVIC veterans who have departed for other regulators and taken their institutional knowledge and experience with them.

OMVIC cannot regulate effectively or efficiently without in-depth knowledge, experience and a full understanding of the industry, its people, and its practices. It is that simple. Knowing the MVDA and its regulations is not nearly enough.

I regularly see OMVIC focus on the wrong dealers and the wrong salespersons – choosing to grab some low hanging fruit rather than focus its efforts on the industry's real problem children and systemic issues. What can OMVIC do to improve? Here are 3 initial suggestions (I have many more, but only so many words):

- Hire from the industry – engaging a few experienced former salespersons and managers will be hugely beneficial in helping OMVIC lawyers, investigators and staff understand what is typical, what is common and what are the industry standards.

- Educate on the industry – regularly train OMVIC staff on the products and services offered by most dealers. OMVIC staff should intimately understand the various warranty and other products available for consumers to purchase, the different forms and types of leasing and financing available, how dealer management systems work (and often don't), and how the operations of a franchise dealer differ from a small mom and pop store, etc.
- Understand subprime and all its facets. Without understanding how subprime works on a granular level, and what typical deals look like (and how salespersons, dealers and banks make money from subprime financing), OMVIC will never be able to police it.

The above examples are but a few of many. I can't tell you how many times I have been working with an OMVIC representative and it is painfully clear that they don't know key aspects of the industry. If you don't know it, you can't explain it, nor can you provide any meaningful or effective enforcement or training.

### **Do Not Give Discipline More Power!**

While I am generally concerned about most of the proposed changes, none concern me more than the proposal to provide OMVIC's Discipline Tribunal (previously Committee) with greater powers.

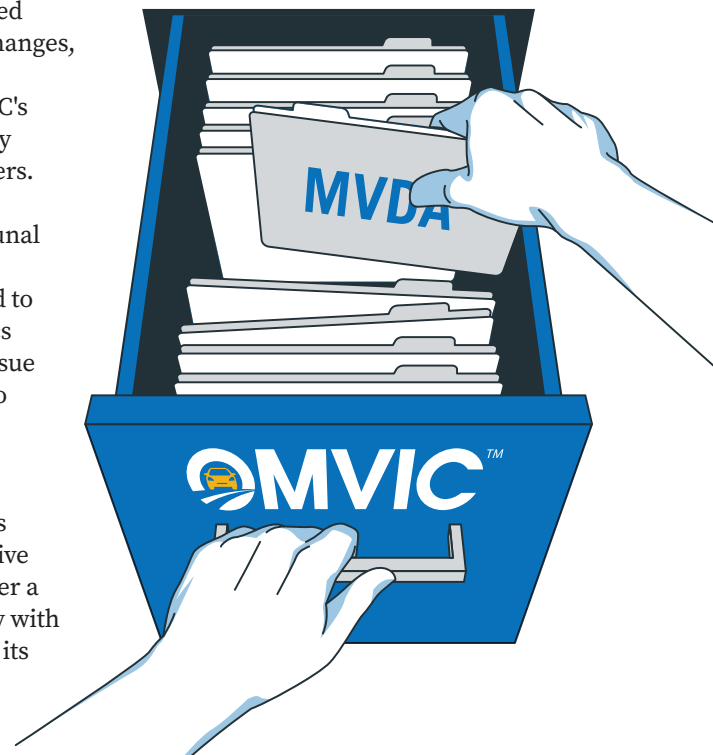
Currently, the Discipline Tribunal may consider and determine whether a registrant has failed to comply with the Code of Ethics and may, by way of penalty, issue a fine or require a registrant to take educational courses.

The ministry is proposing to broaden the scope and powers of the Discipline Tribunal to give it authority to consider whether a registrant has failed to comply with any provision in the MVDA or its regulations, and to provide it with the power to

suspend, revoke or apply conditions to a registration – these powers currently rest with the Licence Appeal Tribunal (the "LAT") – an independent, quasi-judicial body that was specifically established to resolve disputes regarding licensing regimes and activities.

Why would anyone want to move decision making authority regarding one's ability to be registered, or continue to be registered, over to a non-independent quasi-judicial body that is effectively controlled by OMVIC/is OMVIC? It is such a terrible suggestion that I am shocked that I must write about it.

A registrant's licence is extremely important – it is a method of earning an income and can be representative of a registrant's reputation and adherence to high standards. In the case of dealerships, a licence can impact the lives of many individuals (such as employees and their families, and in some cases, whole communities). It is therefore vitally important that a strong, fair, and efficient process is invoked before a licence is revoked.



## History Should Inform the Future

Historically, it has been clear that the Discipline Tribunal's members don't have the skills or the legal training to provide effective and fair process before the Tribunal. Procedural fairness, natural justice and integrity are all cornerstones of our legal regime. The Discipline Tribunal, as it is currently constituted, sides in favour of OMVIC more than 99% of the time. That is hugely concerning and does not instill confidence that the Discipline Tribunal can take on more responsibility (and changing its name doesn't move the needle).

I have been successful many times on behalf of both dealers and salespersons before the LAT in response to proposals to suspend, revoke, and to refuse registration. The simple reality is sometimes the Registrar, MVDA gets it wrong. Sometimes the Registrar doesn't have the full picture or misses some important facts.

Sometimes the punishment desired by the Registrar for conduct is overly punitive and fails to consider other important facts and considerations (such as registration history, volume of vehicles sold, due diligence).

Based on history, I simply don't have the confidence that the Discipline Tribunal would have the ability or capacity to hear

these disputes effectively and fairly. I worry that the inclination will be to side with the Registrar and OMVIC (as that is what happens now, more than 99 times out of 100).

The Discipline Tribunal has a poor track record of siding with Registrants (virtually non-existent). That can't be ignored – and why would we want to give the Discipline Tribunal more responsibility before it has demonstrated that it can provide a fair and balanced process.

Registrants deserve to have a body that is fully separate and independent from OMVIC to determine both eligibility to obtain registration, as well as eligibility to maintain registration.

Having the LAT handle registration matters provides both actual separation from OMVIC, as well as the appearance of separation. This is important for maintaining the trust and confidence of registrants, and of the legal process surrounding the OMVIC licencing regime.

If I understand the proposed change correctly, it appears the proposal is to let the Discipline Tribunal consider whether a suspension, revocation, or conditions of registration are appropriate and impose same as it sees fit. From there, a registrant would only then be permitted

to appeal such a discipline decision to LAT. This would be an extra layer to an already onerous process – and will lead to more delay and expensive legal costs. Registrants are already struggling financially. We should not be taking steps that will increase their financial burden, especially at the expense of procedural fairness and natural justice.

A process to suspend, revoke, or refuse a registrant must be straightforward and streamlined and void of unnecessary process and delay. Adding the Discipline Tribunal into the mix will only serve to drive up costs and may lead to unnecessary delay. Registrants (especially individuals and smaller dealers) will be unable to fund a vigorous defence if more layers are added to the process.

### In summary...

Reducing legal red tape and procedural hurdles should be the goal. The Ministry's proposed changes do not achieve these important goals.

I hope dealers and salespersons unite to push for a balanced and fair regulatory framework and licensing regime. One that supports all industry participants, not just OMVIC.

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.

This article is intended for general information purposes only and should not be relied upon as legal advice. Views and opinions are Justin's alone and do not necessarily represent the views and opinions of the UCDA or Fogler, Rubinoff LLP. ■

