

**IN THE MATTER OF A DISCIPLINE HEARING
held pursuant to By-Law No. 1 of the
ONTARIO MOTOR VEHICLE COUNCIL**

DISCIPLINE DECISION

ONTARIO MOTOR VEHICLE COUNCIL

-and-

**TORONTO SMART CARS LTD.
o/a NORTH YORK CHRYSLER JEEP DODGE**

Date of Hearing: June 16, 2009

Panel: Glen Fenwick (Chair)
Bruce Wilson
Jeff Prossler

Findings: Contravention of Sections 1, 2 and 4 of the MVDA Code of Ethics

Fine: \$1,500.00

Other: OMVIC Certification course to be taken by Mr. Hossein Totonchian and the Dealer's Sales Managers and Business Managers

Date of Decision: December 23, 2009

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DECISION AND REASONS

Introduction

1. A hearing was held on June 16, 2009 at the Crowne Plaza Don Valley, 1250 Eglinton Avenue East, Toronto in relation to a Notice of Complaint dated November 5, 2008 (the "Complaint"). The hearing took place before a Discipline Panel comprised of Glen Fenwick (Chair), Bruce Wilson and Jeff Prossler (the "Discipline Panel"). The Complaint alleged that Toronto Smart Cars Ltd. o/a North York Chrysler Jeep Dodge (the "Dealer") breached sections 1, 2 and 4 of OMVIC's Code Of Ethics, Standards of Business Practice (the "Code of Ethics" or "Standards").
2. Mr. Christopher Ezrin represented the Ontario Motor Vehicle Industry Council ("OMVIC"). Mr. Hossein Totonchian and Ms. Miriam Cohen represented the Dealer. Mr. Brian Gover acted as independent legal counsel to the Discipline Panel.

The Allegations

3. The violations alleged in the Notice of Complaint centered on liquidated damages claimed by the Dealer. Damages of this type arise when a consumer refuses to take delivery of a vehicle. After the consumer informs the dealership that he or she will not be taking delivery, the dealership is responsible for specifying the costs that it has incurred as a result of cancellation of the transaction. These costs should not be in the nature of a penalty, but should represent what was described in the evidence as "true out-of-pocket costs".
4. The particulars of alleged violations as set out in the Notice of Complaint are attached as Appendix "A"

The Evidence at the Hearing

5. Mr. Ezrin called three witnesses on behalf of OMVIC: Tim Hines, Andrew Barber and Andrea Korth. Documentary evidence at the hearing consisted of a Book of Documents prepared by OMVIC [Exhibit 1], a Book of Documents prepared by the Dealer [Exhibit 2], a vehicle purchase agreement between the Dealer and Consumer 1, dated June 3, 2008 [Exhibit 3], and Mr. Totonchian's business card [Exhibit 4].

6. Tim Hines manages OMVIC's complaints handling process. Mr. Hines described liquidated damages complaints as being in the top three complaints received by OMVIC. Part of a complaint handler's role is to direct the complainant back to the dealership as a way of resolving the complaint. This includes informing complainants of services that the dealership has to offer in the event that it does not readily return the deposit. Complaints handlers also ask for documentation. Financing issues may be involved, and there may be issues under the *Consumer Protection Act*.
7. It was Mr. Hines' evidence that he is familiar with the Dealer and its history with OMVIC, especially in relation to cancellations and liquidated damages. This began in 2004. In March of 2007, as the problem escalated, Mr. Hines and Ms. Korth met with Mr. Totonchian and the dealership's controller, Ms. Cohen.
8. In that meeting, which took place on March 16, 2007, Mr. Hines referred to what he described as a "recent influx" in cancellation complaints against the Dealer. Mr. Hines testified that Mr. Totonchian claimed that the law gave him the right to retain consumers' deposits, but that he (Mr. Hines) maintained during the meeting that there was no automatic right to retain the full deposit. Referring to Item #13 in the Notice of Complaint [Exhibit 1, Tab 1], which alleged, "OMVIC continues to receive an above average number (of) consumer complaints involving this dealer," Mr. Hines testified that the Dealer was within a small (<1%) part of the dealer population that have been the subject of that number of complaints. Moreover, Mr. Hines testified in cross-examination, the trend of consumer complaints in relation to deposits had existed since 2004. Mr. Totonchian said that he would look into the issue, but refused to share his findings with OMVIC. He suggested ways of reducing the number of complaints. It was Mr. Hines' evidence that the meeting "ended on a sour note".
9. In his evidence, Mr. Hines reviewed the following aspects of OMVIC's Book of Documents [Exhibit 1]:
 - (a) An inspection report dated October 13, 2004 [Exhibit 1, Tab 3], describing the Dealer's failure to advise OMVIC of a change in officers and the fact that it had retained the services of an unregistered salesman;¹
 - (b) OMVIC's record of the meeting of March 16, 2007 that was attended by Mr. Hines and Ms. Korth of OMVIC, and Mr. Totonchian and Ms. Cohen on behalf of the Dealer [Exhibit 1, Tab 4];
 - (c) Part of OMVIC's complaint file in relation to a complaint by Consumer 2 [Exhibit 1, Tab 11]. This complaint included an allegation that someone had forged the co-signer's signature on the bill of sale.² The salesperson was not interviewed by OMVIC in its handling of the complaints process, as this is not standard practice. However, the sales manager was interviewed.

¹ The report also records that OMVIC inspector David Lee explained to Mr. Totonchian how liquidated damages should be handled (p.15).

² In cross-examination, Mr. Hines testified that he could not say why this file was included in OMVIC's Book of Documents.

10. In 2008, a total of 13 OMVIC opened complaints files in relation to the Dealer. Numerous other contacts did not reach the level of a complaint file.
11. Andrew Barber was the OMVIC complaints handler who responded to some of the consumer complaints against the Dealer. He described his role as including receiving incoming telephone calls from complainants and, in the course of doing so, trying to determine whether they could be resolved outside the formal complaints process. However, Mr. Barber testified, in attempting to resolve complaints in this manner, complaints handlers do not say that dealers have to return deposits.³
12. Mr. Barber testified that he resolved a number of complaints against the Dealer. He advised the Dealer how to avoid future complaints. However, toward the end of his interaction with the Dealer there was a breakdown in communications and everything had to be put in writing. It was Mr. Barber's evidence that he has never had this arise with a dealer before.
13. By reference to Exhibit 1, Mr. Barber identified complaints against the Dealer that were resolved outside the formal process. Included among the complaints resolved informally were the complaints of
 - (a) Consumer 3 [Exhibit 1, Tab 5], in which there was no allowance for a cooling off period and which was resolved after approximately one month of communication among Consumer 3, the Dealer and Mr. Barber;⁴
 - (b) Consumer 4 [Exhibit 1, Tab 6], which was eventually resolved by allowing the Dealer to keep the portion of the deposit that represented out-of-pocket costs relating to tinting windows, safety inspection and cleaning;⁵
 - (c) Consumer 1 [Exhibit 1, Tab 7], which was resolved with Ms. Cohen's agreement to return the consumer's deposit, although Mr. Barber felt that the consumer was being unreasonable by insisting on delivery within two days of a vehicle that had to be located;⁶ and

³ Mr. Totonchian challenged Mr. Barber on this statement, putting it to Mr. Barber in cross-examination that on September 10, 2008, one week after Mr. Barber spoke to him about the Consumer 5 complaint [Exhibit 1, Tab 9], the deposit was returned "on your (i.e., Mr. Barber's) advisement".

⁴ In cross-examination, Mr. Barber testified that he could only assume that the Dealer's General Sales Manager, John Gionnas decided to refund the deposit after OMVIC became involved. Mr. Barber testified that he would have suggested to Mr. Gionnas that the Dealer's damages be liquidated and that dealers have the right to do so provided that the expenses in question are true, out-of-pocket expenses incurred in connection with the transaction.

⁵ Mr. Barber testified in cross-examination that in his view, the complaint was meritorious. The customer had second thoughts and the matter was resolved amicably and Mr. Gionnas "broke down his damages". It was Mr. Barber's evidence that in this instance, the Dealer went above and beyond what was required in returning half of the deposit, or \$250.00.

⁶ No delivery date was specified on the vehicle purchase agreement. Mr. Barber testified that it would be odd for a purchaser to claim that he wanted a vehicle within two days but not include it in the bill of sale. The customer's deposit was refunded on July 8, 35 days after he entered into the vehicle purchase agreement. The customer had threatened to sue OMVIC after seeking its permission to purchase another vehicle, something that was beyond Mr. Barber's authority to grant.

- (d) Consumer 5 [Exhibit 1, Tab 9], who was denied non-dealer arranged financing and whose deposit was returned after approximately one month.⁷
14. However, the complaint of Consumer 6 [Exhibit 1, Tab 10] remains unresolved. That complaint related to a change in the financing terms, and in particular, the term of the loan. Mr. Barber testified that he had several conversations with Mr. Totonchian about it. He advised Mr. Totonchian that the change in the financing made that case identical to another case in which the deposit was returned. Under cross-examination by Mr. Totonchian, Mr. Barber denied screaming at Mr. Totonchian or cutting him off during their conversations. In his testimony, Mr. Barber pointed out that the expenses claimed by the Dealer were incurred (that is, the vehicle was reconditioned) before the vehicle purchase agreement was signed.
15. Andrea Korth is OMVIC's Business Standards Coordinator and is responsible for correspondence in relation to business practice matters. Ms. Korth testified that she is familiar with the complaint of Consumer 2 [Exhibit 1, Tab 11]. The most recent notes in the file date to January 2009. There has been no resolution of the matter. Ms. Korth further testified that the hearing was originally scheduled to take place in March, 2009. On two occasions, she advised Mr. Totonchian of his obligation to disclose evidence on which he wished to rely at the hearing. Subsequently, she advised him that he would have to disclose any such material by June 8.⁸ Ms. Korth was not cross-examined.
16. The sole witness called on behalf of the Dealer was Mr. Totonchian himself. His evidence was wide-ranging and included the following:
- (a) The assertion that the Dealer sells and delivers almost 1,000 vehicles annually;
 - (b) The assertion that the Dealer returned 218 deposits without any intervention by OMVIC; however, there were 4 cases in which "rightly or wrongly, we thought we could retain it;"⁹
 - (c) The assertion that OMVIC never interviewed the salesperson regarding the alleged forgery of the co-signer's signature on the bill of sale involving Consumer 2 [Exhibit 1, Tab 11]¹⁰;
 - (d) Mr. Totonchian's denial that he ever withheld any documents from OMVIC;
 - (e) Mr. Totonchian's assertion that the problems with OMVIC started at his meeting with Mr. Hines and Ms. Korth in March, 2007. He was called in for this meeting,

⁷ The deposit was returned despite the fact that Mr. Totonchian had taken the position that the consumer, Consumer 5 had agreed to new financing terms.

⁸ Despite the information provided to him by Ms. Korth, Mr. Totonchian did not disclose the documentary evidence he was relying on until just before he was cross-examined. He apologized for failing to make timely disclosure, explaining that he ran out of time.

⁹ Mr. Totonchian testified that he had written more than 1,200 deals in the last year, and that he felt that he could keep some or all of the deposits in 4 of those deals.

¹⁰ Mr. Totonchian testified that he was "really frustrated" with this allegation.

but there was no process. He denied several aspects of what was reflected in OMVIC's record of that meeting;¹¹ and

- (f) Mr. Totonchian's assertion that he had done his best to be a fair dealer, that he felt he had nothing wrong and that given the opportunity to do so, he would not have done anything differently.
17. When Mr. Totonchian was cross-examined about an inspection in 2004 and the meeting in 2007 and asked what he did as a result of the customer complaints concerning deposits, he testified that he is a 5 Star dealer. He further testified as to his belief that his staff wrote a process for returning customer deposits. He invited the Discipline Panel to look at how many deposits he had refunded, and claimed that "everybody complains about dealerships".
18. Mr. Totonchian also testified in cross-examination that 2008 was a very difficult year. Other Chrysler dealers took deals away from him, using his bills of sale. Nonetheless, he testified, his customer retention rate is 98%. He conceded, however, that his sales manager had been "a little too aggressive". His testimony concluded with the statement, "I'm not perfect."

The Parties' Submissions

19. In his closing submissions on behalf of OMVIC, Mr. Ezrin conceded that many deposits had been returned. However, he submitted that there was a pattern here, and the Dealer failed to take adequate steps to remedy the behaviour, address issues and ultimately, solve the problem. On the evidence, the Dealer falls within the top 1% in terms of the number of customer complaints. Mr. Ezrin invited the Discipline Panel to conclude that the case against the Dealer had been proven.
20. On behalf of the Dealer, Mr. Totonchian submitted that OMVIC had not shown that his dealership falls within the top 1% in terms of customer complaints; "it's just Mr. Hines' say so." On being advised by the Discipline Panel that it would disregard the statistical evidence in this regard, and invited to make the balance of his submissions, Mr. Totonchian spoke only briefly.
21. Mr. Totonchian denied that the Dealer had "failed to promptly respond to consumer complaints, contrary to Section 1 of the Code of Ethics, Standards and Business Practice" as alleged in Item #2 of the Notice of Complaint [Exhibit 1, Tab 1] and submitted that OMVIC had led no evidence in support of Item #11¹² because it failed to speak to the

¹¹ Among the items with which Mr. Totonchian took issue were the following: (1) he was never given the "trend"; (2) he would never have said that he had \$1,000.00 of "room"; and (3) he would never "spiff" a salesman.

¹² Item #11 of the Notice of Complaint [Exhibit 1, Tab 1] alleges as follows:

On or about September 10, 2008, Consumer 6 purchased a 2005 Dodge Caravan, VIN 1D4GP25R55B192883. The dealer was unable to provide said vehicle at the agreed upon financing terms. During the complaint handling process, a representative of the Registrar advised the dealer of his obligation to return consumer's deposits, when unable to meet all conditions of

salesperson. He concluded his submissions by contending that he had stood up for his rights and that he (and by that, the Discipline Panel takes him to have included, the Dealer) is now doing things right.

Relevant Provisions of the Code and the Standards

22. The relevant provisions of the Code and the Standards provide the following:

1. INTEGRITY

Standard

Conduct activities with honesty, fairness and financial responsibility.

2. DISCLOSURE

Standard

Communicate all material facts, and ensure products and services are fully understood.

4. Accountability

Standard

Fulfill all contractual obligations promptly and completely, and resolve legitimate claims without delay.

Decision and Reasons for Decision - Allegations

23. Having weighed the evidence and considered the submissions made on behalf of the parties, the Discipline Panel concludes that:

- (a) The Dealer contravened Section 2 of the MVDA Code of Ethics in the matter concerning Consumer 5 as presented in Tab 9 of the Book of Documents [Exhibit 1, Tab 9];
- (b) The Dealer contravened Sections 1, 2 and 4 of the MVDA Code of Ethics in the matter concerning Consumer 6 as presented in Tab 10 of the Book of Documents [Exhibit 1, Tab 10]; and
- (c) The Dealer contravened Section 2 of the MVDA Code of Ethics in the matter of Consumer 2 as presented in Tab 11 of the Book of Documents [Exhibit 1, Tab 11];

24. For a number of the complaints referred to in the Notice of Complaint, our sympathy is with the Dealer; however, he is required to respond promptly to consumer complaints as per Section 1 of the Code of Ethics. The Discipline Panel concluded that there was a history of consumer complaints and a slow response to those complaints that dates back to 2004. This slow response was part of a pattern of conduct by the Dealer that

the contract. To date, the Dealer retains Consumer 6's \$500 deposit and the matter remains unresolved.

exacerbated the problem. In some of these cases, the Dealer only returned the deposit after OMVIC became involved. By way of illustration, in connection with the complaint of Consumer 4, the Dealer conceded that the sales manager was too aggressive, but nonetheless attempted to retain the deposit. While it is true that this case involves a high volume dealer, it is also true that his practices have generated a high volume of consumer complaints about deposits. After considering the evidence and the parties' submissions, the Discipline Panel found that the violations alleged in relation to the complaints of Consumer 5, Consumer 4 and Consumer 2 were proven.

Decision and Reasons for Decision – Penalty

25. On behalf of OMVIC, Mr. Ezrin submitted that the penalty in this case should include a fine that in the aggregate would be at the higher end of the range, and the requirement to take remedial courses. Mr. Totonchian responded by saying that if what he called a jury of his peers (i.e., the Discipline Panel) concluded that he did something wrong, he accepted that a penalty would be appropriate. He said that he had no problem with taking a course, if the Discipline Panel wanted him to do so. He concluded by expressing his willingness to learn.
26. The Discipline Panel directs as follows by way of penalty order in this case:
 - (a) The Dealer shall provide proof of the Dealer's 5 Star policy and its implementation to OMVIC within 6 months of the date of this decision;
 - (b) The Dealer shall pay a fine of \$500.00 for contravention of Section 2 of the MVDA Code of Ethics in the matter concerning Consumer 5 as presented in Tab 9 of the Book of Documents [Exhibit 1, Tab 9];
 - (c) The Dealer shall pay a fine of \$500.00 for contravention of Sections 1, 2 and 4 of the MVDA Code of Ethics in the matter concerning Consumer 6 as presented in Tab 10 of the Book of Documents [Exhibit 1, Tab 10];
 - (d) The Dealer shall pay a fine of \$500.00 for contravention of Section 2 of the MVDA Code of Ethics in the matter of Consumer 2 as presented in Tab 11 of the Book of Documents [Exhibit 1, Tab 11]; and
 - (e) Mr. Totonchian, his Sales Managers and Business Managers shall complete the OMVIC Certification course within 6 months of the date of this decision.
27. The Discipline Panel concluded that remedial steps are necessary in relation to this dealer's handling of customer deposits. In imposing this penalty order, the Discipline Panel has attempted to address the need to deter other dealers who might be inclined to engage in similar breaches of the Code of Ethics, and to deter the Dealer in particular. In addition, the Discipline Panel has attempted to be fair to the Dealer.

I, Glen Fenwick, sign this Decision on my own behalf and on behalf of the other members of the Discipline Panel.

Glen Fenwick, Chair

Bruce Wilson

Jeff Prossler

December 23, 2009.

APPENDIX "A"

The particulars of the violations are:

1. North York Chrysler is a registered motor vehicle dealer. Hossein Totonchian and Massoud Jamali are officers and directors of the corporation.
2. The dealer has failed to promptly respond to consumer complaints, contrary to section 1 of the Code of Ethics, Standards of Business Practice.
3. The dealer has refused to return consumer deposits in situations where the dealer was unable to meet the financing terms and conditions of the contract. This is contrary to section 2 and 4 of the Code of Ethics, Standards of Business Practice.
4. During an inspection on or about October 13, 2004, the dealer was advised by a representative of the Registrar how to properly address contract cancellations and liquidated damages.
5. On or about March 16, 2007 the dealer met with two representatives of the Registrar to discuss the pattern of complaints OMVIC had been receiving concerning this dealership. Said representatives suggested ways to reduce consumer complaints including but not limited to the following:
 - (i) Ensuring a proper system is in place to address consumer complaints prior to OMVIC becoming involved.
 - (ii) Ensure any liquidated damages the dealer chooses to retain are a result of legitimate costs incurred, and not a penalty.
6. On or about April 25, 2007 Consumer 3 signed an offer to lease a 2007 Jeep Wrangler. Consumer 3 refused delivery of this vehicle. Prior to OMVIC becoming involved, the dealer had retained Consumer 3's \$500 deposit in full while failing to provide an itemized list of liquidated damages.
7. On or about February 16, 2008, Consumer 4 signed a purchase agreement for a 2007 Jeep Cherokee, VIN 1J8GR48K37C600448. Consumer 4 refused delivery of this vehicle. Prior to OMVIC becoming involved, the dealer had retained Consumer 4's \$500 deposit in full while failing to provide an itemized list of liquidated damages.
8. On or about June 3, 2008, Consumer 1 signed a purchase agreement for a 2008 Jeep Patriot. Consumer 1 alleges the dealer was unable to provide said vehicle within the verbally specified time frame and thus he refused delivery. Prior to OMVIC becoming involved, the dealer had retained Consumer 1's \$2000 deposit in full while failing to respond to his correspondence or provide an itemized list of liquidated damages.

9. During an inspection on or about June 16, 2008, a representative of the Registrar reminded the dealer of the appropriate method to address contract cancellations and liquidated damages.
10. On or about July 4, 2008, Consumer 5 purchased a 2005 Dodge Caravan, VIN ID4GP24R658371726. The dealer was unable to provide said vehicle at the agreed upon financing terms. Prior to OMVIC becoming involved, the dealer had retained Consumer 5's \$500 deposit in full. During the complaint handling process, a representative of the Registrar advised the dealer of his obligation to return consumer's deposits, when unable to meet all conditions of the contract.
11. On or about September 10, 2008, Consumer 6 purchased a 2005 Dodge Caravan, VIN 1D4GP25R55B192883. The dealer was unable to provide said vehicle at the agreed upon financing terms. During the complaint handling process, a representative of the Registrar advised the dealer of his obligation to return consumer's deposits, when unable to meet all conditions of the contract. To date, the dealer retains Consumer 6's \$500 deposit and the matter remains unresolved.
12. On or about September 24, 2008 Consumer 2 contacted OMVIC, alleging her signature had been forged on a purchase agreement for a 2008 Dodge Caravan, VIN 1D8HN44H58B183442. The dealer has provided OMVIC with documents inconsistent to those provided by Consumer 2. To date this matter remains unresolved.
13. OMVIC continues to received an above average number of consumer complaints involving this dealer.