

IN THE MATTER OF THE DISCIPLINE HEARING

held pursuant to Regulation 332/08 of the Motor Vehicle Dealers Act 2002 of the  
ONTARIO MOTOR VEHICLE INDUSTRY COUNCIL

DISCIPLINE DECISION

ONTARIO MOTOR VEHICLE INDUSTRY COUNCIL

and

Maceka, Milan o/a Car Import Export

Date of Hearing:	September 29, 2011
Panel:	Sandra Shime (Chair) Walter Pietraszko Jeoff Dietrich
Fine:	\$6,000.00
Education:	Successful Completion of the OMVIC Certification Course
Date of Decision:	November 29, 2011

1. This hearing held on September 29, 2011 relates to a Notice of Complaint, dated January 24, 2011, which alleged that the Respondent, Maceka Milan o/a Car Import Export (“Dealer”), had breached sections 40(6), 42(10), 42(19), 42(22), 42 (25) of Regulation 333/08 as well as sections 7 and 9 of the Code of Ethics. The Dealer was notified of the allegations in the Notice of Complaint, dated January 24, 2011.
2. The Panel amended the Notice of Complaint to provide the appropriate sections of the Regulations for each violation in its decision. As indicated in the Rules of Practice, the Panel may exercise its powers under the Rules on its own initiative. In addition, the Panel notes that under the Rules of Practice, no proceeding is invalid by reason only of a defect or irregularity of form. The Panel, however, advises OMVIC that the Notice of Complaint should reflect the appropriate regulations in the Notice of Complaint.
3. The hearing was conducted pursuant to Regulation 332/08 of the Motor Vehicle Dealers Act 2002 and the rules of the Ontario Motor Vehicle Industry Council (“OMVIC”). Ms. Sara Aouchiche represented OMVIC. Mr. James Silver appeared on behalf of the Dealer.
4. The allegations against the Dealer relate to the sales of vehicles without proper written disclosure on the bills of sale. The relevant particulars alleged as follows:
  - a) On or about September 7, 2005, the Dealer was inspected by OMVIC. At that time, the Dealer was advised that he was not providing proper disclosure on the bills of sale to consumers. The Dealer signed the Inspection Findings and was provided a copy of the report. The Dealer was provided a copy of the Standards of Business Practice by the inspector.
  - b) On or about February 15, 2007, OMVIC conducted a routine inspection at the Dealer’s premises. The Dealer was again advised that he was not providing proper disclosure for *as is* vehicles. The inspector noted numerous vehicles at the inspection locations that had improper and faulty paperwork, including, but not limited to the required *as is* disclosures. On this occasion, the inspector had an extensive discussion with the Dealer regarding his obligations to provide proper disclosure in bills of sale. The Dealer signed the Inspection Findings on the same date.
  - c) On or about April 22, 2010, the Dealer purchased a 2002 Ford Taurus. The auction company noted that the car had structural damage on its bill of sale to the Dealer. On or about May 21, 2010, the Dealer sold this vehicle *as is* without disclosing the vehicle’s history to the purchaser on the retail bill of sale.
  - d) On or about June 17, 2010, the Dealer purchased a 2000 Pontiac Sunfire. The vehicle history report indicated that the car had been in an accident on October 1, 2004 with damage in the amount of \$4, 417.00. The Dealer sold this car *as is*

on or about June 19, 2010 to the purchaser without disclosing the accident history on the bill of sale.

- e) On or about July 29, 2010, the Dealer purchased a 1998 Cadillac Seville. The vehicle history report indicated that the car had been in two separate motor vehicle accidents, dated November 30, 1999 and November 9, 2004 with damage in the amounts of \$2,912.00 and \$271.00 respectively. On or about September 3, 2010, the Dealer sold this vehicle *as is* to the purchaser without providing accident history on the bill of sale.
- f) On or about August 26, 2010, the Dealer purchased a 1999 Volkswagen Golf. The vehicle history report indicated that the car had been registered in Quebec. On or about September 15, 2010, the Dealer sold this vehicle *as is* without providing notice that the car had previously been registered out of province.
- g) On November 19, 2010, the Dealer was once again found to be in non-compliance with the proper disclosure requirements for bills of sale and warned again. These findings are not the subject matter of this Complaint. The Dealer signed the Inspection report.

## **EVIDENCE AT THE HEARING**

### **Witness 1**

Robert Todd (hereinafter "R.T."), a consumer, testified at the hearing that he saw an advertisement on Kijiji for the Dealer. The Dealer asked the consumer to meet him at his home and provided the address. Mr. Todd met the Dealer at his home in order to purchase a vehicle for his stepdaughter. The Dealer had several vehicles available at his home for sale. R.T. did a test drive on the vehicle, the 2002 Ford Taurus. The consumer returned a few times to the Dealer's home to check on the same vehicle.

The consumer works at Chrysler so he could tell that the fender had been recently painted. R.T. asked the Dealer about the damage to the fender. Dealer informed R.T. that he had purchased the vehicle at auction and that the vehicle had been fine when it was purchased. The Dealer informed R.T. that the car had some minor damage in the two week period when it was waiting to be picked up by the Dealer. The Dealer informed R.T. that it was a minor parking lot fender bender and made no additional disclosure about the vehicle. R.T. also testified that the Dealer did not advise him regarding the *as is* provisions on the bill of sale. R.T. would not have purchased the car for his stepdaughter if he had known there had been structural damage to the car.

R.T. subsequently purchased a vehicle for another family member from a different dealer. In that transaction, R.T. was advised of the car's history and that it had

been in a motor vehicle accident. In addition, R.T. was shown a copy of the carfax report by the dealer.

Under cross-examination, R.T. testified as follows:

The Ford Taurus is not dangerous. R.T. also stated that he did not consider structural damage to be a minor issue and that the accident should have been disclosed to him.

## **Witness 2**

Marcella Coellar testified that she has been an OMVIC inspector for over nine years. She testified that OMVIC inspected the Dealer's location on September 7, 2005 and February 15, 2007. The inspector on those dates, J. Cameron, was unavailable to testify. Ms. Coellar attended at the Dealer's location on November 19, 2010.

Ms. Coellar testified that the Dealer was inspected on September 7, 2005. Ms. Coellar referenced the inspection report from the same date, which was marked as an exhibit. On that occasion the Dealer was found in violation of failing to disclose material facts. Dealer failed to do due diligence on the motor vehicles he was selling. Out of fifteen cars, ten of those vehicles had disclosures under the carfax report. The Dealer failed to provide information to the consumer regarding structural damage and accident history. The witness also testified that even if the Dealer failed to do his due diligence, he was aware of the structural damage noted in the auction report for the 2002 Ford Taurus sold to R.T., which he failed to disclose on the bill of sale to R.T.

Ms. Coellar noted that the Dealer failed to provide the appropriate disclosures as follows:

### **Pontiac Sunfire**

- Dealer did not have purchaser sign *as is* paragraph on the bill of sale.
- Dealer did not indicate accident claim amount on bill of sale.
- Dealer failed to provide information regarding odometer.

### **Cadillac Seville**

- Dealer failed to disclose accident history and damage amounts even though information was provided on auction disclosure form.

### **Volkswagen Golf**

- Dealer failed to disclose that the vehicle had been registered in Quebec.

Ms. Coellar testified that pursuant to section 40, dealers must have customers read disclosure information and have consumers initial when selling vehicles in *as is* condition. Ms. Coellar also testified that pursuant to section 42, the amount of accident damage should have been reported to the purchaser on the Pontiac Sunfire.

Under cross-examination, Ms. Coellar reiterated that Dealers are required to conduct due diligence and make material disclosures under the regulations.

### **Witness 3**

Laura Halbert testified that she has been Director of Compliance for OMVIC since 1997. She oversees the inspection team at OMVIC, which consists of 10 inspectors. She testified that the Dealer was registered in 1992. Ms. Halbert testified that the Dealer was not complying with the regulations on a number of occasions. She also testified that the Dealer had been previously advised in 2005 and 2007 that he was not providing the proper *as is* disclosure to purchasers.

Ms. Halbert stated that the Dealer was specifically informed of the *as is* provision by the inspectors in 2005 and 2007. She also testified that the requirements regarding the *as is* provision were in the Standards of Business Practice manual provided to the Dealer in 2005.

Ms. Halbert testified that the *as is* disclosure protects dealers if the consumer has a problem with a vehicle. She also testified that the *as is* disclosure paragraph makes the industry more professional. She stated that a material fact is one which could impact price or could affect the purchaser's decision. She testified that full disclosure is required under sections 42 and 5 of the regulations and that section 5(25) was a catch-all provision.

### **OMVIC Submissions**

Ms. Aouchiche submitted to the Panel that the Motor Vehicle Dealers Act (*MVDA*) is legislation enacted to protect the public. She noted that the Code of Ethics and the Standards of Business Practice were enacted in 2001 and codified under *MVDA* 2002 as of January 1, 2010.

Ms. Aouchiche argued that the bills of sale submitted into evidence were in direct violation of the regulations. She also argued that the Dealer was in violation of sections 7 and 9 of the Code of Ethics. She made the following additional arguments to the Panel:

- The Dealer was not a new registrant who did not know the rules;
- Ignorance is not a defence for the Dealer as he acknowledged he had not complied with the regulations;
- The Dealer failed to meet the standards in November 2010 despite ample warnings in 2005 and 2007;

- The Dealer has a history of non-compliance and continuously stated that he would comply, but never complied with the disclosure rules;
- The Dealer knew he was required to provide written disclosure, rather than verbal disclosure based on two prior inspections;
- The Dealer stated that he had orally informed purchasers about the history of cars. This fact was not borne out by witness 1, R.T., who testified that he was never told by the Dealer about the accident history of the motor vehicle he purchased for his stepdaughter in May 2010. In addition, the Dealer lied to the purchaser about the cause of damage when he was asked about the fender paint job.
- R.T. has no interest in fabricating evidence as he gains nothing from his testimony at the hearing;
- The Dealer has complete disregard for the law and despite warnings and notices, has continued to violate the regulations repeatedly.

In response to the closing submissions of the Dealer, Ms. Aouchiche responded as follows:

- There is a clear obligation to practice due diligence by all registrants. The Dealer cannot try to pass the blame to the auction house. Each Dealer is obligated to practice his own due diligence. Disclosure is not optional. The Dealer was provided with information on how to fulfill his due diligence obligations on multiple occasions and is aware of his obligation to perform his own due diligence.
- The Dealer cannot argue that the X mark on the *as is* provision is a clerical oversight as he has been notified on multiple occasions since 2005 that he is required to have the purchaser sign the provision.

Ms. Aouchiche requested a \$6000 fine (\$1500 per car) and a certification course for the Dealer as penalties for violating the regulations.

### **Dealer Submissions**

The Dealer's representative submitted that the Dealer had been registered for nineteen years and had sold thousands of motor vehicles. He submitted that the Dealer had not previously been charged and that he had not been the subject of consumer complaints.

The representative submitted that the Dealer was entitled to his own opinion about what constituted a material fact under section 5(22). He further argued that the Dealer could only disclose to purchasers what had been disclosed to him in the original bills of sale. He submitted that if the information regarding accident history and other information has not been disclosed to the Dealer, then the second dealer is not legally

and ethically accountable to the purchaser. He submitted a decision by the License Appeal Tribunal, released February 2, 2011, to revoke the registration of Mohammad Hameed O/A ANA Auto Sales in support of his argument.

The representative made the following additional arguments:

- The representative submitted that the auction company failed to disclose to the Dealer that the motor vehicle had been registered out of province. He argued that the charges regarding the Volkswagen Golf should thereby be dismissed.
- He argued that with respect to the allegation regarding the Ford Taurus, a reasonable person would believe that the Dealer had tried to advise the purchaser about the *as is* provision by looking at the bill of sale. He noted that the disclosure was discretionary under section 5(22) and not required under section 5(19). The representative submitted that the Dealer did not have to pass along the opinions of other dealers to purchasers.
- The representative submitted that with respect to the allegations regarding the Pontiac Sunfire, the Dealer is not responsible for the failure to disclose the accident history as it was not disclosed to the Dealer by the auction house. He also submitted that the Dealer made a *bona fide* attempt to indicate the *as is* provision by marking it with an X even though it was not signed. He further submitted that there was `no harm, no foul` as the purchaser had not filed a complaint.
- With respect to the allegations regarding the 1998 Cadillac Seville, the representative argued that all the charges should be dismissed as it fell within the category of discretionary disclosure and submitted that the failures to disclose were not material. He noted that there was no obligation to disclose accident damage under \$3000.00. He argued that the Dealer was entitled to formulate his own opinion about what information was material and that there was no regulation cited in the Notice of Complaint issued by OMVIC that applies to these charges against the Dealer.

## **LAW**

### ***Motor Vehicle Dealer's Act, 2002***

#### **Ontario Regulation 333/08**

The relevant provisions read as follows:

#### **Section 40(2)5**

*If the dealer is selling the vehicle on an as-is basis, a statement in accordance with subsection (6) in 12 point bold font, except for the heading which shall be in 14 point bold font, where the purchaser initials the statement.*

**Section 42(10)**

*If there has been structural damage to the motor vehicle or any repairs, replacements or alterations to the structure of the vehicle, a statement to that effect.*

**Section 42(19)**

*If the total costs of repairs to fix the damage caused to the motor vehicle by an incident exceed \$3,000, a statement to that effect and if the registered motor vehicle dealer knew the total costs, a statement of the total costs.*

**Section 42(22)**

*If the motor vehicle previously received treatment in a jurisdiction other than Ontario that was equivalent to having had a permit issued under section 7 of the Highway Traffic Act or having been traded in Ontario, a statement to that effect and a statement of which jurisdictions, except if one or more permits have been issued for the vehicle under section 7 of that Act to cover at least the seven previous consecutive years.*

**Section 42(25) and Code of Ethics section 5(22)**

*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.*

**Code of Ethics**

**Section 7.(1)**

*A registrant shall ensure that all documents used by the registrant in the course of a trade in a motor vehicle are current and comply with the law.*

**Section 9.(1)**

*In carrying on business, a registrant shall not engage in any act or omission that, having regard to all of the circumstances, would reasonably be regarded as disgraceful, dishonourable, unprofessional or unbecoming of a registrant.*

**Analysis**

Having weighed the evidence and the arguments by both parties, the Panel finds that the preponderance of the evidence shows that the Dealer breached sections 40(2) 5, 42(10), 42 (19), 42 (22) and 42(25) of Regulation 333-08 as well as sections 7 and 9 of the Code of Ethics. The Panel reviewed the exhibits as well as the testimony and



submissions of the parties in rendering a decision in this case. The Panel will address the general arguments made by each party as well as the individual breaches laid out in the Notice of Complaint.

While the Dealer's representative submitted that the Dealer was only obligated to disclose information to purchasers that had been provided to him by another dealer, the Panel is not persuaded by this argument. The representative cited a quote from Hameed O/A ANA Auto Sales (February 2, 2011), in which the OMVIC Registrar testified that since no written disclosure had been provided by the applicant, the buyer-dealer would have been "justified in not providing disclosure to the eventual consumer-purchaser."

However, the Panel does not accept the submissions of the Dealer's representative that a Dealer need only pass along information to the consumer of which he is made aware by the auction-original dealer. The intent of the Act is clearly to protect consumers and dealers by providing full disclosure to all parties involved in these transactions. Furthermore, in a period in which computers and motor vehicle information are readily accessible to dealers, there is no justifiable reason as to why this Dealer cannot meet the disclosure obligations set out under the Regulations.

Moreover, the Dealer in this case was given multiple opportunities to correct his paperwork and comply with the Regulations prior to the Notice of Complaint being issued in January 2011. He was made fully aware of his obligations by an OMVIC inspector on two separate occasions. He was aware that the obligations to disclose accident history and *as is* condition were not optional.

The Panel further notes that the totality of the evidence paints a picture of a Dealer who has been given multiple opportunities to amend his business practices, but has chosen to disregard his obligations under the law. The Panel cannot disregard the preponderance of the evidence which paints a clear picture of a dealer who has consistently and repeatedly failed to meet the minimum standards of business practices in the profession. This Dealer cannot attempt to hide behind other parties in an attempt to evade his responsibilities as a dealer-registrant. The Dealer failed to comply with the regulations on numerous occasions dating back to 2005, up to and including 2010.

Moreover, the Panel notes that the facts in this case are distinguishable from the facts in the Hameed appeal before the License Appeal Tribunal. In that case, the Dealer's registration was being revoked. Moreover, the issue in that case was the Dealer's attempt to alter a document after the sale as well as his failure to inform

OMVIC as to his bankruptcy. It is also noteworthy that the Panel in that case did not accept the testimony of the Registrar regarding disclosure. In fact, the Panel found the Dealer to have misled the Panel and have a “disregard for veracity and honesty in business affairs.”

In this case, the Dealer had been notified on at least two separate occasions as to his disclosure obligations. The dealer signed the Inspection Findings reports from 2005 and 2007 and was keenly aware of his obligations as a registrant. The Inspection Report, dated September 7, 2005 stated as follows:

*[c]opy of Standards of Business Practice provided and discussed at length- Milan apologized on a number of occasions – he said he didn’t know about the Standards of Business Practice.,*

The Inspection Report, dated February 15, 2007, also noted as follows:

*I asked Milan if he still has a copy of the Standards of Business Practice – he said he does-it’s at home-. . . one was provided. I asked Milan what he had been doing to check the prior history of the vehicles offered for sale- he said he hasn’t been doing anything-we discussed ways to do that . . . .*

The Dealer cannot attempt to now argue that he was unaware of his obligation to conduct his own due diligence and provide material disclosure on his bills of sale to purchasers. Moreover, the Panel finds that pursuant to section 42 (25) of the Regulations, a dealer is obligated to provide material disclosure to all purchasers. The Panel does not accept the representative’s argument that a Dealer can operate without fulfilling his obligations under the Regulations and to the consumer-purchaser if he did not have direct knowledge about a motor vehicle.

Moreover, section 5 (22) of the Code of Ethics is a catch-all provision as testified to by Ms. Halbert, OMVIC’s Director of Compliance. The section, also quoted above, reads as follows:

*Any other fact about the vehicle that affects the structural or mechanical quality or performance of the vehicle and that, if disclosed, could reasonably be expected to influence the decision of a reasonable purchaser or lessee to buy r lease the vehicle.*

This paragraph is identical under section 42 (25) of Regulation 333-08. The Dealer’s representative submitted that section 5(22) should be read as a discretionary provision in the hands of a dealer. He argued that the wording of the section implies

that a dealer can use his own opinion to determine which facts are material. He suggested that the “if disclosed” wording within the section implies that a dealer has the ability to determine what facts are necessary to disclose to a purchaser.

The Panel does not accept the Dealer’s reading of the regulations. The standards were created to protect purchasers from unscrupulous dealers. In addition, the standards were adopted to ensure a level playing field among dealers. The standards promote a minimum standard of business in the industry and protect both dealer-registrants as well as purchasers. The Panel finds that full disclosure is required and essential if the regulations are to fulfill the goals of ensuring a level playing field and providing consumers with disclosure to make informed decisions. The Panel is persuaded by the wording of the statute as well as the testimony of Ms. Halbert and Ms. Coellar that the Dealer is responsible under 5(22) and 42(25) for full disclosure of the accident history of a motor vehicle.

Moreover, even if one were to accept the reading of the Dealer’s representative, the Panel has determined that the Dealer in this case was aware of his obligation to disclose accident and car history based on the two prior inspections. Moreover, the Panel also finds, based on the testimony of both Ms. Coellar and Ms. Halbert, disclosure of the accident history and damage to a motor vehicle is standard within the Dealer industry. Mr. Todd similarly testified that he was informed by another dealer of the accident/damage history of the motor vehicle that he purchased for his son.

The Panel also finds as follows:

1. The Dealer was in violation of section 40(2) 5 and 42 (10) when he failed to disclose structural damage to the purchaser in the sale of the 2002 Ford Taurus. Regulation 42 (10) clearly states that a registrant is required to disclose to a purchaser “if there has been structural damage to the motor vehicle or any repairs, replacements or alterations to the structure of the vehicle, a statement to that effect.” This requirement is outlined in a long list of disclosure obligations which cover both used and new motor vehicles. The disclosure requirements are also outlined in the Code of Ethics pursuant to section 5. In addition, the Dealer violated section 40 (2) 5 of Regulation 333-08 by failing to have the purchaser initial the *as is* provision.

Not only was the Dealer aware of the structural damage from the auction report, but he was also specifically asked by the purchaser about damage to the fender.

2. The Dealer was in violation of section 42 (19) by failing to disclose to the purchaser of the Pontiac Sunfire the accident collision damage in the amount of \$4417.00 as listed in Exhibit 8A. The Dealer is also in violation of section 40(2)5 for failure to have the purchaser initial the *as is* provision.

The Panel is not persuaded by the argument of the Dealer's representative that this failure was a clerical oversight which caused no harm. The Panel also does not accept the submission of the representative that the dealer made a *bona fide* attempt to alert the purchaser to the *as is* provision by marking the spaces with an X.

As noted by the inspector on February 15, 2007, the Dealer sold nine vehicles, of which the inspector was aware, in which he failed to meet the requirements of disclosure under the *as is* provision. The Dealer was again provided a copy of the Standards of Business and the issue of compliance was discussed. The Dealer in this case is clearly a consistent and repeat offender under the regulations. Given that the Dealer had been informed numerous times as to the requirements of this particular provision, the Panel finds the Dealer in violation.

3. The Dealer is similarly in violation of 42 (25) by failing to disclose the accident history to the purchaser of the 1998 Cadillac Seville. The representative argued that the Dealer had no obligation to disclose damage under \$3000.00 to the vehicle and that the violation should be dismissed. While the Panel accepts that the Dealer need not make the consumer aware of the amount of damage incurred in these two collisions pursuant to section 42 (19), the Panel finds that the Dealer was required to disclose that the vehicle had been in two prior motor vehicle accidents on the bill of sale as a material fact under section 42(25).

The Panel dismisses the representative's argument to the Panel that this was a discretionary disclosure under section 5(22) of the Code of Ethics as noted above. The Panel accepts the definition of a material fact as provided by OMVIC's Director of Compliance. Ms. Halbert testified that a material fact is one which may impact the price of a motor vehicle or a purchaser's decision. The Panel finds that accident history is a material fact under the Regulations as it has a direct impact on a consumer's purchasing power and decision-making. In fact, this is the very goal of the Regulations.

4. The Dealer is in violation of section 42 (22) for failing to disclose to the purchaser on the bill of sale that the Volkswagen Golf had been registered out of province in Quebec prior to its sale in Ontario. The

Panel similarly dismisses the Dealer's argument that he was not required to provide this disclosure to the purchaser as he had not been made aware of this information by the auction-dealer.

In addition, the Panel finds the Dealer in violation of section 7 of the Code of Ethics for failing to ensure that all his documents were current and in compliance with the law. Moreover, the Panel finds the Dealer in violation of section 9 of the Code of Ethics for engaging in acts that can reasonably be regarded as disgraceful, dishonourable, unprofessional and unbecoming a registrant.

**PENALTY**

Accordingly, the Panel finds the Dealer in violation of the above-noted sections and imposes a \$6000 fine. The Panel also orders the Dealer to complete the OMVIC certification course, both due within 120 days of the release date of this decision.