APPEALS DECISION

IN THE MATTER OF AN APPEAL HEARING HELD PURSUANT TO THE MOTOR VEHICLE DEALERS ACT 2002, S.O. 2002, C.30, Sch. B

B E T W E E N :

REGISTRAR, *MOTOR VEHICLE DEALERS ACT, 2002*
("OMVIC")

Respondent

- AND -

PAL AUTO SALES INC. And HARPAL BADESHA

Appellants/Registrants

Date of Hearing: May 6, 2016

Date of Decision: September 29, 2016

Orders:

1. The appeal of the Appellants is denied.
2. The decision of the Discipline Committee dated November 30, 2015 is affirmed.

Reasons for Decision

Introduction

This matter proceeded before a Panel of the Appeals Committee pursuant to Section 17 of the *Motor Vehicle Dealers Act, 2002*.

OMVIC, the Respondent, was represented by Ms. Angela LaViola and Ms. Mory Di Yuan, an articling student. The Appellants were represented by Mr. Justin Jakubiak. The Panel consisted of Sherry Darvish (Chair), Larry Pringle (Vice-Chair), and Abolfazl Mohammadi-Rad (Vice-Chair). Mr. Aaron Dantowitz attended as Independent Legal Counsel to the Panel.

The Appellants appealed a decision of the Discipline Committee, dated November 30, 2015, (the "Decision") which found that the Appellants were in breach of subsections 42(19) and (20) of *Regulation 333/08* of the *Motor Vehicle Dealers Act, 2002* ("MVDA"), with respect to written disclosure of material facts concerning repair estimates of vehicles sold to members of the public. The Discipline Committee also found that the Appellants violated sections 7 and 9 of the Code of Ethics.

The Appellant, Pal Auto Sales Inc. (the "Dealer"), has been a dealer since September 2007. The Appellant, Harpal Badesh ("Badesha") has been a salesperson since September 2007. Badesha is the sole officer and director of the Dealer.

The Dealer sold nine vehicles without providing written disclosure of the repair estimate (among other omissions) for these vehicles, which repair estimates were known to the Dealer. The Discipline Committee found that the repair estimate was a material fact that the Dealer ought to have disclosed to the purchasers of the vehicles. The Discipline Committee concluded that failure to disclose the repair estimates was a breach of subsection 42(19) of MVDA and consequently breaches of sections 7 and 9 of the Code of Ethics.

This appeal is only with respect to the decision of the Discipline Committee as it pertains to the conclusions regarding subsection 42(19). Mr. Jakubiak indicated that the Appellants were not challenging the findings of fact made by the Discipline Committee, but only their conclusions. Mr. Jakubiak also confirmed that there was no appeal of the decision of the Discipline Committee regarding the findings and conclusions with respect to the breach of subsection 42(20).

Role of the Appeals Committee and Standard of Review

Both the Appellants and the Respondent agreed on the role of the Appeals Committee and the standard of review.

The role of the Appeals Committee is not to hear the evidence again or make new findings of fact. The role of the Appeals Committee is to examine the decision of the Discipline Committee to determine if it was reasonable.

The parties agreed that there are two standards of review: reasonableness and correctness.

As the Supreme Court of Canada has noted in *New Brunswick (Board of Management)* v. *Dunsmuir*, 2008 SCC 9, reasonableness is a deferential standard. A decision is reasonable so long as it falls within a range of possible, acceptable outcomes which are defensible in respect

to the facts and law. In *Ryan* v. *Law Society (New Brunswick)*, 2003 SCC 20, the Supreme Court stated that a decision must not be interfered with unless there is no line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived.

The parties also agreed that the correctness standard applies to breaches of procedural fairness and natural justice.

Position of the Appellants

The position of the Appellants was that the Panel of the Discipline Committee erred by concluding that disclosure of a repair estimate was a material fact and that since subsection 42(19) of the MVDA does not use the words "material fact", the Panel erred in its conclusion that the Appellants violated that subsection. On behalf of the Appellants, Mr. Jakubiak argued that the Panel's conclusion was akin to a finding that the Appellants breached subsection 42(25) of the MVDA, which was not explicitly plead by the Respondent in its pleadings: the Notice of Complaint and Notice of Further and Other Particulars.

Subsection 42(19) of the MVDA provides that 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.

Subsection 42(25) of the MVDA provides that 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.

Mr. Jakubiak submitted that the requirement to disclose a repair estimate falls squarely under subsection 42(25) as "any other fact". According to Mr. Jakubiak, disclosure of a repair estimate has no place under subsection 42(19) and such disclosure was not contemplated by subsection 42(19). According to Mr. Jakubiak, this is because subsection 42(19) only requires disclosure of "total costs" which can only be ascertained after a repair has been completed. Mr. Jakubiak submitted that based on this interpretation of subsection 42(19), a dealer is only obligated to disclose a repair costs of over $3,000 after repairs have been effected.

Mr. Jakubiak submitted that disclosure of a repair estimate could only fall under subsection 42(25). Since subsection 42(25) was not plead by the Respondent, it was not open to the Discipline Committee in making a finding akin to a breach of subsection 42(25). Mr. Jakubiak argued that the Discipline Committee breached procedural fairness by denying the Appellants notice and the opportunity to present evidence and make submissions on subsection 42(25). On this point, Mr. Jakubiak submitted that a correctness standard of review is applicable.

Mr. Jakubiak also submitted that subsection 42(19) was not clearly drafted and it was ambiguous. However, he submitted that it is not open to this Panel of the Appeals Committee to provide an interpretation of subsection 42(19). Mr. Jakubiak submitted that his interpretation of subsection 42(19) was supported by Mr. James Hamilton, legal services director at the UCDA. Mr. Jakubiak submitted that Mr. Hamilton has also interpreted subsection 42(19) to exclude disclosure of repair estimates. In this regard, Mr. Jakubiak relied on an excerpt from Mr. Hamilton's testimony at the initial hearing where he stated that he did not like the word "estimate" in the context of what should be disclosed on a bill of sale.

Mr. Jakubiak further submitted that the Respondent's pleadings regarding sections 7 and 9 of the Code of Ethics were deficient.

Findings of the Appeals Committee

We found that the position of the Appellants had no merit and Mr. Jakubiak's submissions were not persuasive.

With regard to Mr. Jakubiak's argument that this Panel of the Appeals Committee is not permitted to interpret subsection 42(19), we disagree with this overly simplistic characterization of our role in this appeal. Given that the crux of the Appellants' position turns on how the Discipline Committee interpreted subsection 42(19), this Panel must consider the interpretation of subsection 42(19) in order to determine if the Appellants' position has any merit. Otherwise, how is this Panel supposed to consider the Appellants' position if it is not permitted to determine whether the interpretation given to subsection 42(19) by the Discipline Committee was reasonable. Thus, we disagree with Mr. Jakubiak's submission on this point. This submission was in keeping with a theme advanced by the Appellants that attempted to artificially restrict the role of decision makers in a hearing and in an appeal.

With regard to the submission that Mr. Hamilton's interpretation of subsection 42(19) governs, we find this submission has no merit. Mr. Jakubiak analogized that Mr. Hamilton's interpretation of subsection 42(19) was akin to a secondary evidentiary source such as former Supreme Court Justice Sopinka's book on Evidence. While Mr. Hamilton is a legal services director at the UCDA and he is entitled to his own interpretation of subsection 42(19), his view of this statutory provision is neither binding on the industry nor on any panel of the Discipline Committee, or on this Appeals Committee Panel. In our view, Justice Sopinka's book on Evidence and one individual's interpretation of a statutory provision are not comparable and while the former may be given some weight depending on the case, the latter cannot be given any weight.

We do not accept the Appellants' position that the Decision made conclusions expressly or impliedly regarding subsection 42(25). Nowhere in the Decision is there any reference made to subsection 42(25) or to the terms of that provision. Mr. Jakubiak agreed that there was no explicit reference to subsection 42(25) in the Decision. However, he submitted that the Discipline Committee's conclusions implied a breach of subsection 42(25). When asked where in the Decision was subsection 42(25) implied, Mr. Jakubiak referred to three paragraphs beginning at the bottom of page 25 and continuing to the top of page 26 of the Decision (reproduced below). Mr. Jakubiak also said that the numerous references to the words "material facts" throughout the Decision implied that subsection 42(25) had been invoked.

> [page 25]
> There was a certain theme in the evidence presented about the issue of the requirement to disclose repair damage of $3,000 (Regulation 333/08, section 42(19)). In order to comply with 42(19) of Regulation 333/08, the dealer [page 26] must indicate in writing on the bill of sale if the total cost of repairs exceeded $3,000. Additionally, the dealer must indicate [in] writing on the bill of sale the total amount of repair, if it was known to them.
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> Section 7 of the Code of Ethics requires Registrants to ensure that all documents are current and comply with the law. In this case, while Badesha made some effort to provide disclosure using UCDA Trade-In Disclosure form (Exhibit #10), because the bills of sale did not indicate it formed part of the contract, these documents were not considered by the Panel to form part of the bills of sale. In any event, there were

> many instances where this document failed to meet disclosure obligations. All material facts must be disclosed to the consumer on the bill of sale. The Panel found that at no time was the IMPACT repair estimate disclosed to the consumer or written on either the Pal Auto bill of sale or the UCDA Trade-In Disclosure form.
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> Section 9 of the Code of Ethics deals with professionalism. It requires a registrant to refrain from engaging in any act, or omission that would be disgraceful, dishonourable, unprofessional or unbecoming of a registrant. It requires a registrant to act with honesty, integrity and fairness and use their best efforts to prevent error, misrepresentation, fraud or any other unethical practice. The simple act of withholding the knowledge that a vehicle sustained substantial damage, as indicated in the IMPACT repair estimates, certainly contravenes this section of the Code of Ethics. In addition, at times, the Panel felt the consumers were misled with respect to their warranties being in effect. Although the Registrants obtained warranty information, Ms. Patel gave evidence that often the dealers do not get an update of the status of the warranty immediately. Given the Registrants' knowledge that vehicles had been declared a total loss and the fact that the IMPACT bill of sale indicated the warranty had been cancelled, the Registrants should have passed on the information to the consumer.

It is clear and not in dispute that the Discipline Committee found that disclosure of a repair estimate was a material fact. However, use of the words "material fact" does not mean, in our view, that the Discipline Committee made an error in its interpretation of subsection 42(19), as suggested by Mr. Jakubiak. The words, "material fact", were used throughout the Decision to generically mean a significant, critical, or important fact or information that should have been disclosed to the purchasers of the vehicles in question. This is evidenced by the finding in the Decision that the dealer "withheld critical information from consumers about his vehicles". Use of the words "material fact" does not mean that the Discipline Committee found that the Appellants were in breach of subsection 42(25) either expressly or impliedly. The words were used to denote that all important, significant, or critical facts or information about a vehicle ought to be disclosed.

In fact, we note that the words "material fact" do not appear anywhere in subsection 42(25). Rather, subsection 42(25) talks about "other facts". Thus, even on a strict reading of the words used in subsection 42(25), Mr. Jakubiak's argument fails. In our view, Mr. Jakubiak's argument attempted to constrict the Discipline Committee's ability to use certain words in the English language to simply explain that the Appellants cannot omit important, significant, or critical information from a consumer.

Mr. Jakubiak submitted that subsection 42(19) does not contemplate disclosure of a repair estimate and such an estimate would be encapsulated by the "any other fact" disclosure requirement under subsection 42(25). We disagree with Mr. Jakubiak's argument on this point. Subsection 42(19) provides for the disclosure of repair costs. Repair costs are the only item mentioned in subsection 42(19). On the other hand, subsection 42(25) refers to "any other facts" generically. It is a general catch all provision designed to ensure that any other fact not itemized in the 24 other subsections of section 42, are disclosed. We agree with counsel for the Respondent, Ms. La Viola, that subsection 42(25) was meant to catch disclosure of other facts that might affect a consumer's decision to acquire a vehicle. For example, 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. In our view, Ms. La Viola's submission is persuasive and reasonable. Subsection 42(19) is the

provision that discusses repair costs and it is reasonable that anything having to do with repair costs, including repair estimates, would fall under the ambit of that subsection, not the general catch all provision found in subsection 42(25).

Further support for our view comes from the fact that subsection 42(19) was drafted to include two parts, separated by the word "and". Subsection 42(19) provides for disclosure of two things. In the first part, it states that if the total costs of repairs to fix damage exceed $3,000, a statement to that effect is required. However, it goes on to specify in the second part that if the dealer knew of the total costs, a statement of the total costs is required. The provision clearly states that if the dealer does not know the cost of repairs but believes it to be over $3,000, then it is sufficient for the dealer to inform the customer that the repairs are over $3,000. However, the second part explicitly provides that if a dealer knows the total costs, such costs must be disclosed. It is not a strict either/or requirement meaning that the obligation to disclose ends by simply providing a statement that repairs are over $3,000. If a dealer has knowledge of the total costs, then that knowledge must be passed onto the consumer. The purpose of the provision is to ensure that a consumer is aware of how much will be required to fix damage to a car and to ensure that a dealer's knowledge about such repair cost is passed on to the consumer.

The Discipline Committee read the words "total costs" in subsection 42(19) to include repair estimates. In our view, this was a reasonable interpretation of "total costs" and in keeping with the consumer protection objective of the MVDA to protect consumers' interest and provide a level playing field for businesses. The Discipline Committee gave subsection 42(19) a broad and liberal interpretation. We find that the Discipline Committee made no error in the manner in which it interpreted subsection 42(19). The Discipline Committee's conclusion that repair estimates ought to be disclosed under subsection 42(19) was not only reasonable but it was also correct. Ms. La Viola aptly submitted that the purpose of the MVDA, as evidenced by parliamentary debates at the time of its introduction in 2002, was to strengthen disclosure rules so that consumers had clear and complete information to make informed decisions, and to improve consumer confidence in the marketplace. The parliamentary debates quoted by Ms. La Viola indicated that the disclosure rules were put in place, in part, to prevent the sale of cars that had been written off by insurance agencies or mistreated cars that a legitimate dealer would not sell.

With the purpose of the MVDA in mind, if a dealer is aware of the repair estimate of a particular damaged vehicle, then it is reasonable to expect that the repair estimate is information that a consumer would want to know prior to acquiring that vehicle. In our view, this is the purpose of subsection 42(19) and it is expressly contemplated in the provision by the requirement of a dealer to not only notify a consumer if the total cost of damage repair exceeds $3,000 but to also go one step further and to specify that cost if it is known to the dealer. The "total costs" includes the repair estimate, as appropriately concluded by the Discipline Committee in the Decision. When subsection 42(19) is read with the lens of consumer protection, as is the purpose of the MVDA as a whole, the conclusions reached by the Discipline Committee are reasonable. We note that in this particular case, not only did the Appellants fail to disclose the repair estimates, but they also failed to disclose the actual repair costs. The Decision clearly finds that in several instances the Appellants failed to disclose both the actual repair amount and the repair estimate.

The interpretation given to subsection 42(19) by the Discipline Committee was in line with the generally accepted principle, codified by statute, that an Act shall be interpreted as being remedial and shall be given such fair, large, and liberal interpretation as best ensures the attainment of its objects (*Legislation Act*, S.O. 2006, s 64).

Mr. Jakubiak's contention that subsection 42(19) only requires disclosure of repair costs after a repair has been actually effected is not sensible because if this was the case, no consumer of an unrepaired vehicle would have the benefit of knowing how much damage a vehicle had sustained prior to acquiring it. This does not advance the purpose of consumer protection of the MVDA. On the contrary, subsection 42(19) includes the disclosure of repair estimates when known, because the first part of the provision requires at least a minimum disclosure in the form of a statement that total costs of repairs exceed $3,000, even when the actual costs are not known.

The position of the Appellants was that the Discipline Committee Panel arrived at a conclusion that was not contemplated in the Notice of Complaint and the Notice of Further and Other Particulars, and this was a breach of procedural fairness. As explained above, this position was based on the submission that the Discipline Committee's conclusions regarding subsection 42(19) had nothing to do with that subsection, but the conclusions were essentially findings pertaining to subsection 42(25), which was not plead by the Respondent. As such, Mr. Jakubiak submitted that the Decision lacked sufficiency of reasons regarding the breaches of subsection 42(19) and consequently, sections 7 and 9 of the Code of Ethics.

For the reasons stated above, this Panel has rejected the position of the Appellants. The Panel finds that the Decision provided sufficient reasons to support the conclusions reached regarding the breaches of subsection 42(19) and consequently the breaches of sections 7 and 9 of the Code of Ethics. The conclusions of the Discipline Committee and the broad and liberal interpretation given to subsection 42(19) were reasonable. There was nothing express or implied in the Decision regarding subsection 42(25). Use of the words "material fact" to express that the finding that the Appellants failed to disclose significant, critical, or important facts or information to the consumers in question did not take this case outside the ambit of subsection 42(19) and bring it within the ambit of subsection 42(25). In fact, all of section 42, which is comprised of 25 subsections, each of which outlines important information that must be disclosed, can be said to consist of "material facts". Use of those words by the Discipline Committee was not an error of fact or law or mixed fact and law. Nor did use of those words constitute a breach of procedural fairness.

The Notice of Complaint and the Notice of Further and Other Particulars were clear in outlining the complaints against the Appellants. The Notice of Complaint indicated on several occasions that the Appellants failed to disclose "material facts". The Notice of Complaint then went on to provide particulars of the omitted material facts in each case with regard to each vehicle in question. The Notice of Complaint and the Notice of Further and Other Particulars were also clear in outlining the alleged breaches of sections 7 and 9 of the Code of Ethics as they related to the Appellants' failure to provide the stated disclosures.

Therefore, on the basis of the foregoing reasons, the Appellants' appeal is denied. The findings and conclusions of the Discipline Committee in its Decision are affirmed.

Ontario Motor Vehicle Industry Council
Appeals Panel

Sherry Darvish, Chair
Larry Pringle, Vice Chair
Abolfazl Mohammadi-Rad, Vice Chair