# Consultation on Proposals relating to Modernizing the *Motor Vehicle Dealers Act, 2002*

**Submitted to:** Ministry of Public and Business Service Delivery

**Submitted by:** Ontario Bar Association

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ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

L'ASSOCIATION DU BARREAU DE L'ONTARIO
Une division de l'Association du Barreau canadien

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# Introduction

The Ontario Bar Association ("**OBA**") welcomes the opportunity to make a submission on the proposals relating to the modernization of the Ontario *Motor Vehicle Dealers Act, 2002* ("***MVDA***"), as described in the April 2024 consultation paper ("**Consultation Paper**"), "Modernizing the Motor Vehicle Dealers Act, 2002: Proposals to Enhance Consumer Protection, Reduce Burden, and Improve Regulatory Efficiency", which was released by the Ministry of Public and Business Service Delivery ("**Ministry**").

# Ontario Bar Association

Established in 1907, the OBA is the largest and most diverse volunteer lawyer association in Ontario, with close to 16,000 members, practicing in every area of law in every region of the province. Each year, through the work of our 40 practice sections, the OBA provides advice to assist legislators and other key decision-makers in the interests of both the profession and the public and we deliver over 325 in-person and online professional development programs to an audience of over 20,000 lawyers, judges, students, and professors.

This submission was prepared and reviewed by members of the OBA's Business Law, Franchise Law, Personal Property Security Law Committee, and other subject-matter experts. Members of these sections include barristers and solicitors in large, medium, and small firms, and in-house counsel across every region in Ontario. These members have deep experience and expertise in matters related to the selling, leasing and financing of motor vehicles from the perspectives of consumers, OEMs, dealers, captive finance companies and other financiers.

## Executive Summary of Comments & Recommendations

The following is a summary of our comments, which are more fully set out below:

- **Topic 1: Cooling-Off Period:** We support the proposal to introduce a cooling-off period into the MVDA. We recommend the cooling-off period be limited to consumer goods, that it be waivable in writing and solely at the consumer's option, except where the contract is negotiated or concluded outside the dealership (e.g. a consumer's home), that it applies prior to the consumer taking possession of the vehicle, and that the waiver be prominent, conspicuous, and effectively separate from the sale, lease or financing agreement.

- **Topic 2: Information Guide for Consumers:** We support the proposal to develop an information guide for consumers. The guide should be distributed in various public places, and that the content be kept as simple as possible.

- **Topic 3: Trade Outside the Place of Business:** We support including this in permissive rather than mandatory language, so it is subject to any contractual limitations between the dealer and OEM.

- **Topic 4: Limiting Add-On Goods and Services:** We support the first proposed option, which would prohibit charging consumers for add-ons not already affixed to the vehicle at the point of sale and were not requested by the consumer.

- **Topic 5: Limiting the Sale of "As-Is" Vehicles:** We support the second proposal, to replace the requirements for as-is vehicles with requirements for unfit vehicles. The requirement to disclose an estimated cost or range of costs for repairs should be replaced with a requirement to provide a list of repairs needed to make the vehicle "fit", without accompanying cost estimates.

- **Topic 6: Mandatory Continuing Education:** We support mandatory continuing education for salespeople who are required to take the Automotive Certification Course or for employees who otherwise interact with customers.

- **Topic 7: Requiring Prompt Payment of Unpaid Loan Amounts:** The proposal must include necessary flexibility to account for things outside of a dealer's control that delays payment. Consider a form of "reasonable excuse" exception.

- **Topic 8: Expanding Eligibility for the MVDCF:** We support expanding eligibility where a dealer has failed to pay an outstanding loan but recommend factoring in the "reasonable excuse" exception. We recommend the proposed eligibility criteria for "serious mechanical defects" use the term "unfit" vehicle from proposal 5.

- **Topic 9: Updating Contract Disclosures:** The threshold limit for disclosing repairs due to an incident should be harmonized across Canada to account for the fact that many national companies use a standard form contract for all provinces (except Quebec). Adequate time must be given to bring existing contracts and software into compliance before the provision comes into force. The updated CAMVAP disclosure proposal should be clearer that it only applies to certain manufacturers and should outline other dispute resolution options.

- **Topic 10: Contact Information for Advertisements:** We support modernizing contact information requirements and providing increased flexibility so long as there is sufficient information for a consumer to contact the registrant.

- **Topic 11: Expanding Scope and Powers of OMVIC's Discipline Committee:** We generally support the proposal to expand the Discipline Committee's scope, and support moving appeals to the License Appeal Tribunal. It will be important to ensure the LAT is sufficiently staffed for this additional role.

- **Topic 12: Increasing Fines:** We support this proposal and recommend that the Discipline Committee's fines for corporations apply to curbsiders, in addition to the fines available under Provincial Offences Act proceedings.

- **Topic 13: Prohibiting Cross-Appointments:** We defer to other stakeholders.

- **Topic 14: Updating the MVDA to Capture EVs:** We recommend the MVDA be technologically neutral so it can capture new and emerging vehicles, with necessary specifics provided through regulations.

- **Additional Proposal:** We recommend amending sections 40 and 42 of the General Regulation under the MVDA to reduce red tape and administrative burdens which are unnecessary.

## Comments & Recommendations

### 1. Requiring a Cooling-Off Period on All Transactions

We support the general intent of a cooling-off period to provide consumers with the ability to cancel an agreement for what is often their second-most expensive purchase. Care must be taken, however, to balance protecting vulnerable consumers while not imposing overly burdensome obligations on non-consumer customers, like businesses. We provide the following comments and recommendations on the implementation of a cooling-off period.

**Limit Application of the Cooling-Off Period to Individuals where the purchased or leased motor vehicles will be "consumer goods"**

In our view, there is no good policy reason for extending the cooling-off period protection to businesses. We recommend that the cooling-off period should only apply to consumers. Instead of adding a new term of "consumer" to the *MVDA*, we recommend using the term of "consumer goods", which is a well-understood term under the *Ontario Personal Property Security Act* ("***PPSA***"). In other words, the cooling-off period would only apply if the vehicle

being sold, leased or financed would be a "consumer good", as defined in the *PPSA*, at the time of the sale, lease or financing.

**Waiving the Cooling-Off Period**

In our view, consumers who are eligible for the cooling-off period should have the option to waive the cooling-off period in writing if they so desire, just like B.C. consumer lessees can waive the one-day cooling-off period for a lease transaction. However, care must be taken to ensure that consumers in vulnerable circumstances are adequately protected from being subject to undue pressure to waive the cooling-off period. For example, if a transaction is negotiated and concluded at the consumer's residence, there are concerns with permitting consumers to waive the cooling-off period. Consumers could be subject to aggressive salespeople and could have a harder time "walking away" than if they concluded the transaction at a dealership and had the option of leaving.

The "direct agreement" provisions under the *Consumer Protection Act, 2002* ("***CPA, 2002***") may provide some useful guidance on how the Ministry could deal with this issue. Under section 20(1) of the *CPA, 2002*, a "direct agreement" is defined as being a consumer agreement that is negotiated or concluded in person at a place other than the supplier's place of business or at a marketplace, an auction, trade fair, agricultural fair or exhibition. The Ministry may want to consider adopting this phrasing in determining when a consumer would be unable to waive the cooling-off period. If the sale, lease or financing agreement would constitute a "direct agreement", then consumers would not be able to waive the cooling-off period.

In our view, consumers should be able to sign a waiver contemporaneously with the contract, except where the agreement in question is a "direct agreement". One possible exception to this rule would be where the applicable contract is concluded at the consumer's residence, but the consumer picks up the vehicle from the dealership. In that

scenario, a consumer should be able to waive the cooling-off period when the consumer takes possession of the vehicle at the dealer's premises.

The Ministry should also consider how these rules would apply to online sales/leases, and whether there needs to be specific rules to address that new reality. The *CPA, 2002* exempted numerous provisions from applying to contracts under the MVDA. The regulations under the new Ontario *Consumer Protection Act, 2023* (not yet in force) ("***CPA, 2023***") have not yet been released, so care should be given to the application of the *CPA, 2023* and its regulations to contracts subject to the *MVDA* to ensure that the *CPA, 2023* and the *MVDA* do not conflict. The *CPA, 2002* provisions on remote agreements and internet agreements may be informative for drafting specific rules for online sales/leases.

**Pre-Possession Condition**

We support the "prior to possession" condition to avoid complications. There are a lot of transaction costs that would be hard to unwind after a vehicle is delivered, such as transferring registration, insurance, licensing, and more. There is also the issue that once a vehicle is taken off the lot, the vehicle may no longer be considered "new", which could prove costly to the dealer. The pre-possession condition avoids these issues entirely. We recommend providing clarity for when the cooling-off period would commence, which should likely run from the time that the vehicle is ready to be delivered.

**General Recommendations for the Waiver**

Regardless of the approach taken, there are some general requirements we recommend including if a cooling-off period is incorporated into the *MVDA*. The waiver should be prominent, conspicuous, and effectively separate from the sale, lease or financing agreement. However, if the waiver of the cooling-off period and the consumer's signature of such waiver appears in a separate box on the sale, lease or financing agreement, then this additional signature by the consumer should be deemed to satisfy the proposed "separate" requirement. The waiver should include information on a consumer's rights,

including their right to refuse waiving the cooling-off period, in addition to prescribed language on a consumer's rights similar to what is provided for in "direct agreements". Incorporating this language as part of the waiver requirements would increase transparency and consumer confidence at the relevant time.

### 2. Requiring an Information Guide for Consumers

We support this proposal and take the general view that the more information provided to the consumer the better. To that end, the Ministry should consider distributing this information in other public places, like libraries and Service Ontario centers. It should also be available in multiple languages.

The content of the guide should be kept as simple as possible. Explanations should be in layperson language, common terms should be defined without assuming that people truly understand them (e.g. lease, interest, cooling-off period, etc.), and it should explain a consumer's rights to rescind or cancel the agreement. The Ministry could also consider proposing a summary disclosure that acts as a cover sheet to the information guide if there is consensus in the industry as to the information that should be included.

We agree with the Consultation Paper that there should be no requirement on registrants to explain the contents of the information guide. The *MVDA* should explicitly state that registrants cannot rely on providing this information guide as a shield to misleading consumers.

### 3. Allowing Trade Outside the Place of Business

We support including this proposal in permissive rather than mandatory language. The *MVDA* should empower registrants to conduct trades outside of their place of business, subject to any contractual limitations that may exist between such registrants and their Original Equipment Manufacturer ("**OEM**"). We note that many OEM-dealer contracts currently include restrictions in this regard.

Existing *CPA, 2002* regulations currently exempt numerous provisions from applying in the *MVDA* context. For example, consumers are given an unconditional cooling-off period for "direct agreements", while no such cooling-off period is given to consumers for remote or internet agreements. We support maintaining those exemptions if the sale, lease or financing agreement constitutes an internet or remote agreement. While regulations for the *CPA, 2023* are yet to be released, the Ministry should ensure that the *MVDA* and the *CPA, 2023* do not conflict.

### 4. Limiting Add-On Goods and Services in a Motor Vehicle Sale

We support the first proposed option, which would generally prohibit dealers from charging consumers for add-ons not already affixed to the vehicle at the point of sale and were not requested by the consumer, as opposed to including a list in regulations of goods and services dealers cannot add to the contract.

The language "not already affixed to the motor vehicle" is an important distinction between things already included by the OEM, and things added after-the-fact by dealers. This avoids scenarios where the supply does not meet the requirements (for example, a consumer wanting a base model when none are available in the supply chain). The further language "not requested by the consumer" is also important to provide consumers with the option to choose any additional goods or services they want included. So long as a consumer is properly informed and there is a meeting of the minds, they should have the freedom to decide what to include.

### 5. Limiting the Sale of "As-Is" Vehicles

Three proposals were provided for consideration, which were (1) prohibiting the sale of as-is vehicles, except to wrecking yard, (2) replacing the requirements for "as-is" vehicles with requirements for "unfit" vehicles, or (3) requiring "as-is" vehicles to include the price of repairs and prohibiting the sale of safety certification.

We support the second proposal to replace the requirement for "as-is" vehicles with the requirements for "unfit" vehicles. The term "unfit" vehicle is clearer on its face; namely, that the vehicle cannot be driven on public roads until a safety standards certificate is issued. Furthermore, "unfit" vehicles are already defined in the *Highway Traffic Act*, as opposed to "as-is" vehicles, which the Consultation Paper notes is a concept unique to Ontario. This option would also avoid the unnecessary waste in option 1 of sending "unfit" vehicles to wrecking yards, which would put an undue constraint on an asset that could have purposes outside of driving on public roads, like using it on private land.

The requirement for dealers to disclose an estimated cost or range of costs for repairs needed for the "unfit" vehicle to pass a safety inspection is not advisable for a few key reasons. It would be burdensome for some dealers, particularly small dealers without an in-house mechanic. It opens up arguments about inaccurate estimates, recognizing that there is no objective figure, and that different mechanics would provide different estimates for the same work. Lastly, it is unnecessary if a consumer intends to use the vehicle for other purposes that do not require a safety certification, like use on private land. The cost of obtaining a mechanics estimate would likely be passed on to the consumer, adding additional cost to an expensive purchase. If this requirement is maintained, a better middle-ground would be to provide a list of repairs to make the vehicle "fit" without accompanying cost estimates. This would at least avoid disputes about inaccurate estimates.

### 6. Requiring Mandatory Continuing Education for Registrants

We support this requirement applying to salespersons who are currently required under the *MVDA* to take the initial registration course (the Automotive Certification Course) or for employees who otherwise interact with consumers. Continuing education will be most important following amendments to the *MVDA* or related legislation.

### 7. Requiring Prompt Payment of Unpaid Loan Amounts

The proposal to impose on a dealer a 5-business day time period by which an outstanding loan must be paid after a contract is concluded should not be unconditional; there could be a number of reasons outside the control of a dealer that explain why a dealer has failed to promptly make this payment. Legitimate reasons for a dealer's delay include a delay in receiving payments from the OEM, the holder of a lien on the trade-in not responding promptly, contested facts, necessary investigations and steps to correct errors. Requiring dealers to make payment within 5 business days may work as a general rule, but this rule should take into account that delays may occur due to factors outside of the dealer's control. We recommend that the Ministry consider including a form of "reasonable excuse" exception, similar to what is provided under various sections of the *PPSA* where a secured party is required to act within a specified period (see, e.g., PPSA, ss. 18(5), 46(7) and 56(4)).

If a reasonable excuse exception is accepted by the Ministry, then this exception must be reflected if the failure to pay an outstanding loan on a trade-in vehicle is added as a new eligibility criterion for compensation from the Motor Vehicle Dealers Compensation Fund, as contemplated in the 8th proposal below.

### 8. Expanding Eligibility for the Motor Vehicle Dealers Compensation Fund

The two new eligibility criteria for the Motor Vehicle Dealers Compensation Fund ("**MVDCF**") are (a) where a dealer has failed to pay any agreed to outstanding loan on a vehicle trade-in, and (b) where a dealer has sold a motor vehicle that has serious mechanical defects identified by the Ministry of Transportation.

We touched upon the first additional eligibility criteria in our above comments to the 7th proposal. We support expanding eligibility where a dealer has failed to pay an outstanding loan, but recommend that this eligibility criteria reflect the "reasonable excuse" exception for delays that were caused by factors outside of a dealer's control. For the second

additional eligibility criteria, we recommend avoiding new terms like "serious mechanical defects identified by the Ministry of Transportation" and instead using the "unfit" vehicle term from the 5th proposal. Dealers would be permitted to sell "unfit" vehicles so long as that status is made clear to the consumer, along with some level of disclosure on what repairs would be required to make the vehicle "fit". For the reasons given above under the 5th proposal, we recommend providing a list of repairs required to obtain a safety certificate, without the necessity of providing cost estimates for such repairs.

## 9. Updating Contract Disclosures

**Increasing the Threshold for the Value of Repairs**

The proposal to update disclosure requirements on repairs previously done on a vehicle due to an incident by increasing the threshold from "greater than $3,000" to "greater than $5,000" makes sense due to inflation and new costly technology included in vehicles, but there are practical considerations to take into account.

In practice, many national companies have two forms of contracts: one for use in Quebec and a second form for use in the rest of Canada. This is done for simplicity and to ensure compliance. The result is that the standard form contract that national companies use in all Canadian jurisdictions outside Quebec will often refer to the lowest dollar amount required for disclosure. As an example, the current "greater than $3,000" threshold is often replaced with the B.C. amount of $2,000 to allow the standard contract to be used across all provinces and territories (excluding Quebec). Efforts should be made to harmonize the thresholds with other provinces, as the proposed increase may otherwise have a more limited impact.

More importantly, if these new disclosures are enacted, adequate time must be given to bring existing contracts and the software used by financial institutions, dealers and others, into compliance before the provision comes into force. Updating contracts and software will take considerable time and expense. These are often multi-party contracts that involve

numerous stakeholders, which will require extensive discussions and the buy-in of all parties to effect these and other disclosure changes.

**Updating the CAMVAP Disclosures**

The proposal to replace the disclosures regarding CAMVAP, which currently vary depending on whether the manufacturer participates in the program, with a single general statement, can be improved. We think it should be made clearer that CAMVAP only applies to certain manufacturers beyond the passing reference to "participating manufacturers". We also think that consumers may be misled into thinking that they are left without recourse if the relevant manufacturer does not participate in CAMVAP, or if they do, thinking that this is their first or only form of recourse. The Ministry should consider adding information about other ways that disputes can be resolved, such as directly with the dealer (many of whom have robust internal dispute resolution mechanisms), through small claims court, or otherwise. This updated information should also be included in the easy to understand Information Guide for Consumers recommended in the 2nd proposal so consumers better understand their rights and remedies prior to making the vehicle transaction.

## 10. Adding Flexibility for the Contact Information Included in Advertisements

We support the proposal to modernize the contact information requirements for advertisements, particularly given the significant non-compliance with the current outdated rules. So long as there is sufficient information included for a consumer to contact the registrant including their registered name, there should be flexibility on the type of information required (cell phone or landline, website, email address, or business address).

## 11. Expanding the Scope and Powers of OMVIC's Discipline Committee

We understand that OMVIC may be revamped after the Auditor General's follow-up report of the 2021 Value for Money audit, and we are unsure whether this process is complete. We generally support the proposal to expand the scope of OMVIC's Discipline Committee and

moving appeals from OMVIC's Appeals Committee to the Licence Appeal Tribunal ("**LAT**"), and defer to other stakeholders with more experience with the Discipline Committee on suggested enhancements. It will be important to ensure that the LAT is sufficiently staffed for the additional role it is proposed to take to avoid backlogs faced by other tribunals.

### 12. Increasing Fines that OMVIC's Discipline Committee May Levy

We support this proposal. For curbsiders who are convicted of failing to comply with the *MVDA*, we recommend that the *MVDA* be amended to explicitly provide that all curbsiders, whether acting as an individual or a corporation, be subject to the $250,000 maximum fine under section 32(3) of the *MVDA*, in addition to fines available under Provincial Offences Act proceedings. For many curbsiders, they often operate as a quasi-business and, therefore, the higher fines for businesses should apply to them. It may also be necessary to have a separate set of fines for curbsiders, given the profits these unlicensed actors make outside of the regulatory regime.

### 13. Prohibiting Cross-Appointments Between OMVIC's Board of Directors and the Board of Trustees for Motor Vehicle Dealers Compensation Fund

We defer to other stakeholders with more relevant information and experience to respond to this 13th proposal.

### 14. Updates to the Motor Vehicle Dealers Act to Capture Terms Distinct to Electric Vehicles

The MVDA was drafted before the emergence of EVs and includes language more appropriate for ICE vehicles. We recommend that the Act be technologically generic so that it can capture new and emerging vehicles, with necessary specifics provided through regulations. Consider using general terms like "propulsion system components" to account for the development of alternative vehicles (e.g. hydrogen-powered vehicles).

## Other Comments/Recommendations

### 15. Amending Sections 40 and 42 of the General Regulation under the *MVDA*

Section 1 of the *MVDA* defines the "trade" of a motor vehicle very broadly, and lists a sale and a lease as a "trade". Section 30 of the *MVDA* mandates certain regulated disclosures be made by a licensed dealer to each customer.

When a customer, as lessee, enters into a vehicle lease with a dealer, as lessor, the lessor (dealer) gives the lessee (customer) the mandatory disclosures about the new or used vehicle being leased. The lessee is in possession and control of the leased vehicle over the term of the lease. If a lessee exercises a purchase option under the lease (whether during the lease term or at the scheduled end of the lease term), there is a sale of the leased vehicle by the lessor to the lessee. A lease agreement with a purchase option contemplates two "trades" of the vehicle in question: the first trade being the lease of the vehicle and the second trade being the sale by the lessor to the lessee. Each trade has separate disclosure requirements, separate remittances on taxes, and changes in vehicle registration with the Ministry of Transportation.

The mandatory disclosures for the sale of a used vehicle are set out in sections 40 and 42 of the General Regulation to the *MVDA*, which requires a licensed dealer to give the purchaser (who is not a licensed dealer) a mandatory list of information including the used vehicle's prior history and present condition disclosures on every "trade" of a vehicle. The lessor (which has usually never seen the subject leased vehicle) asks the lessee to complete a condition report on the leased vehicle, which condition report is then attached to the lessor's bill of sale to meet the mandatory used vehicle sale disclosure requirements that the *MVDA* imposes on the lessor, as a seller.

In effect, lessees are providing themselves with the required used vehicle information disclosure. This process adds indirect administrative costs to the lessee's purchase of the leased vehicle without providing the lessee with any new information or protection. The

exercise of a purchase option could be done entirely online when the lessee wants to exercise the option, but getting the vehicle condition report from a lessee so that the lessor can provide the lessee, as buyer, with the required used vehicle sales disclosures is a pointless and unnecessary step in this process.

We recommend amending sections 40 and 42 of the General Regulation to the *MVDA* to provide that a sale of the used leased vehicle to the lessee when the lessee exercises the option to purchase, is excluded from the provision of the mandatory disclosures for used vehicle sales. We also recommend excluding this scenario from the cooling-off period, if proposal 1 should be adopted by the Ministry.

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*The OBA would be pleased to meet with the Ministry to discuss our comments and recommendations further and answer any questions that you may have on our submission.*