

# USED CAR DEALERS ASSOCIATION OF ONTARIO

## MEDIATION

### 1. Dealership Complaints: Case Study

John buys a six year old car for \$6,000. Ten days after the purchase, the transmission begins to slip. John thinks the dealer should pay to have it fixed. The dealer says, "You bought it 'as is', there's nothing I can do for you".

John is outraged. The cost of repairing the transmission will easily run upwards of \$1,000. In its present condition, the car can't be driven. John needs his car for work, it's the only transportation he has.

Right now, John has nothing good to say about the dealer. He thinks the dealer sold him a defective vehicle. Surely, for \$6,000, he can expect it to last longer than ten days!

For his part, the dealer didn't know the transmission was on its last legs. It seemed fine when he took it on trade. John struck a hard bargain and brought the dealer as low as he could go on the selling price. The dealer told John that for this price he could not give him any warranty on the car. John would be buying it "As Is". Not expecting any problems like this so soon, John agreed.

What options does John have? He needs to have the transmission fixed. It would seem that John's choices are limited. He could pay for the repairs and then go after the dealer in small claims court, but even if John eventually obtains a judgment, and there's no guarantee that he will, it could take a year to come to trial. In the meantime, John is out the thousand dollars it will take to fix the transmission.

His impression of all dealers is pretty poor at present.

### 2. Industry Sponsored Mediation

There is an alternative for consumers to explore before resorting to the courts. The Used Car Dealers Association of Ontario (UCDA), is a non-profit organization made up of almost five thousand registered motor vehicle dealers in Ontario. The UCDA's mission is to enhance the image of the industry. One of the cornerstones the UCDA builds upon is Mediation.

Started by two highly qualified lawyers, the UCDA offers, at no charge, a mediation service through which consumers, who are unable to resolve problems with a dealer relating to the purchase or lease of a vehicle, may seek assistance

in resolving the dispute, quickly, amicably and without resorting to litigation. The dealer does not even have to be a UCDA member!

Aside from the fact that there is no cost to a consumer to participate in a UCDA sponsored mediation, one of the major characteristics of UCDA mediations that distinguish them from most other mediation services, is the lack of formality involved. Consumers don't have to make a written request for mediation. Most mediations are initiated by a simple telephone call or email and usually a copy of the consumer's bill of sale and other supporting documents.

UCDA mediations tend to deal with disputes revolving around smaller amounts of money than other mediations; generally matters, which if litigated, would fall within the jurisdiction of small claims court. Unlike more structured mediations, in which both parties formally agree in advance to use a mediator, those in which the UCDA is involved are generally triggered by a direct complaint made against a dealer by a consumer.

This lack of formality allows mediations to proceed almost instantly; generally the same day that the consumer contacts the UCDA. The key is that most mediations are conducted over the telephone. There is no need for a formal meeting, no appointments are required, no notices need to be sent. As long as the dealer is willing to talk to the UCDA mediator (and almost all are), the mediation can proceed.

### **3. Mediation is not Arbitration**

Mediation is voluntary ... participation in it does not stop either party, if no resolution is found, from pursuing legal action. On the other hand, parties who participate in an arbitration, are bound by the process as the arbiter, like a judge in court, will ultimately impose a decision binding on all parties once and for all, unless, of course, a route of appeal is provided for.

Also, like a judge, the arbiter will hear evidence from all sides to the dispute, allow the parties to actively challenge each other's position and then, working with the facts of the dispute as presented, apply relevant law to arrive at a decision or "judgment". An arbitration looks, and ultimately for the parties, feels very much like what would happen in a court of law. Usually, an arbiter is chosen because he or she has some particular expertise in the area of dispute. It is common that parties to an arbitration would be represented by legal counsel.

An arbitration is intended to be a little less formal than a traditional lawsuit and it tends to offer greater speed and less cost than a lawsuit. However, because of the need for formal presentation of evidence, both documentary and possibly even from witnesses, it is far more formal, costly and time consuming than mediation.

#### **4. Mediation Styles**

Because of the informality of UCDA mediations, it's difficult to compare the UCDA's service to more formal mediations. Mainstream mediation styles have been characterized as ranging from a judicial style evaluation to a more facilitative style.

A judicial or evaluative style mediator will evaluate the parties' legal positions and attempt to resolve the dispute based on the mediator's perception of the parties' legal rights. The mediator approaches the problem in a fashion similar to the way a judge would.

A facilitative style mediator, tends to avoid analyzing the merits of the parties' positions. A facilitative mediator tries to assist the parties to develop proposals to resolve the dispute based on sometimes vague social or business principles, often far removed from the law.

UCDA mediation strategy could be categorized as falling somewhere between the facilitative and evaluative characterizations. However, it's not fair to say that it sits neatly within a range between the two extremes. A UCDA mediation is at the same time both result oriented, and mindful of maintaining each side's self-respect, while promoting the image of the industry at all times. The UCDA mediation approach is really quite unique!

The UCDA mediator, is free to explore various options. The main concern of the UCDA mediator is not who has the strongest legal position, though this is certainly a consideration where one party's argument seems to be without merit. The approach taken by a UCDA mediator, at least to some extent, will be affected by the flexibility shown in the positions of the parties, their willingness to compromise and their desire to reach a settlement.

UCDA mediations are not conducted with a "resolve at all costs" mentality, either. Resolving the issue is the ultimate goal, but not if resolution is achieved by ignoring or substantially tearing down the legal rights of one of the parties. A resolution is sought which will maintain and hopefully improve the image of the industry in the eyes of the consumer while at the same time allowing the dealer to maintain an element of self-respect and a sense that the relationship with the consumer may be maintained.

If it becomes apparent to the mediator that no progress is being made towards a resolution, and that there is little hope of making any progress, the mediator will back away, but advise both parties that his services remain available, should there be a change of circumstances. When to back away will be a judgment call on the mediator's part.

The disappointment and frustration of giving up must be balanced with the possible damage that may be done by pursuing a settlement too far. Attempting to push a party against his or her will towards settlement, often makes the situation worse. It could also cause resentment to be directed towards the UCDA, on the part of the consumer or the dealer. This would be an unacceptable result.

Remembering that the goal of the UCDA is to encourage the parties to enter into a mutually agreeable resolution that will serve to enhance the image of the industry. A forceful approach, against either the consumer or the dealer, does not fit into this philosophy.

The UCDA does not take up the consumer's cause and act as an advocate against the dealer's position, nor does it act for the dealer in this sense. This cannot be the role of a neutral mediator.

Following is a summary of how a typical UCDA mediation would proceed.

## **FIRST CONTACT**

First contact from a consumer is generally by telephone or email.

The consumer is asked by the mediator to explain the details of their concern. The mediator records all information about the complaint and about such things as:

- the year, make and model of vehicle;
- the purchase price;
- the time since purchase;
- the distance travelled;
- contact names and phone number for the dealer; and
- any other information such as repair costs, representations allegedly made by the dealer or salespeople, amount of taxes paid, deposit issues etc.

Our role as mediator is explained to the consumer. We explain that the mediator is not acting as the consumer's advocate, but as a neutral third party in order to help facilitate a speedy resolution to the problem before it gets worse.

The consumer is asked to indicate what they are hoping for to resolve the dispute. If easily accessible, the consumer is asked to provide (generally by fax) a copy of the bill of sale and other relevant documents such as a Safety Standards Certificate, repair invoices, warranty documents, service records, and etc.

## **CONTACTING THE DEALER**

Once the mediator has a clear understanding of the issue(s) involved, and any relevant documentation, contact will be made with the dealer by the UCDA.

The reason for the call (i.e. “we have received a call from Harry Higgins regarding... and we would like to see if we can help resolve the matter”) is explained to the dealer immediately. The UCDA’s role as mediator, as opposed to an advocate, is explained to the dealer, before any of the details of the dispute are broached.

## **ACTUAL MEDIATION**

The facts, as alleged by the consumer, are relayed to the dealer. The dealer is invited to give his side of the story. A mediator has to be a good listener to be effective.

Part of the initial conversation will include relaying the consumer’s desired remedy to the dealer who is asked to respond by accepting the offer or making a counter offer. If applicable, other options may also be addressed by the mediator at this point.

Areas of common ground between the two positions are explored in an effort to bring the parties closer together.

Legal aspects of the dispute may be canvassed with each party, but the giving of legal advice must be avoided in order that the mediation remains neutral.

Sometimes, the negative concerns of not resolving the matter may be canvassed with the dealer, but care must be taken so as not to appear to be making threats on behalf of the consumer. The dealer should be left to make a decision independently based on this information.

Though most successful mediations find resolution through suggestions made by each party and the willingness of each party to give and take, there are times when the mediator may want to suggest some possible solutions to the parties, especially if the mediation does not seem to be moving forward easily.

Generally, information provided by one party is made available to the other, unless the party providing the information requests that it not be shared. However, care is taken not to antagonize either party by relaying irrelevant accusations, insults, threats or other negative information provided by one party. This will likely only make matters worse, rather than help lead to a settlement.

The mediator should be open to using virtually any offer or suggestion made by one party as a building block towards achieving resolution.

If the parties reach agreement on any portion of the dispute, this can be emphasized over the remaining issue(s) to show the parties they are capable of resolving the problem.

Most successful mediations see resolution within a day or two (some in a few minutes). As long as the parties are willing to talk and progress is being made, the mediation can continue.

If no progress has been made and, in the judgment of the mediator, the parties are unwilling or unable to reach a resolution, mediation efforts should be stopped. Further efforts may be seen as intrusive and lead to further animosity between the parties and towards the mediator.

## **SUCCESSFUL RESOLUTION**

Few successful mediations involve one party obtaining everything they desire. Usually, there will have to be compromise on the part of both parties in order to obtain resolution.

If the parties have agreed on an acceptable resolution, the mediator should verbally confirm with each the terms of the agreement.

This verbal confirmation should be followed up by a confirmation letter to each party outlining the terms agreed upon as understood by the mediator.

The parties should be invited to contact the mediator if they do not agree with the contents of the letter, or if any further assistance is required.

If one or both of the parties would like assistance preparing a release of claim, the mediator may do so, but will indicate to each party that they are free to obtain independent legal advice and obtain approval for the wording of the release before it's finally signed.

## **NO RESOLUTION**

If no resolution is achieved, the mediator will send a letter to each party indicating the facts as relayed by each party, what is desired by each party, the points (if any) the parties have agreed upon and those issues remaining in dispute along with the positions of the parties on those issues.

If a consumer asks the mediator for suggestions as to what steps to take, the mediator will indicate, with no encouragement or dissuasion, that litigation is an option. No legal advice is provided, however. The protection provided by the Motor Vehicle Dealers Compensation Fund may also be explained to the customer if it applies to the particular situation.

Even if a mediation is ultimately unsuccessful, a good mediation should leave the parties believing that all that could have been done, has been done. It is hoped that a reasonable consumer will understand why the dealer may not be unwilling to agree to the consumer's wishes and that the dealer will appreciate where the consumer is coming from. Even if only limited ground is made up in the mediation, it may lay the seeds for a settlement down the road, even as far as at trial.

#### **5. How Do I Obtain Mediation from the UCDA?**

The UCDA encourages consumers to first try to resolve dealer complaints with the seller directly, as often a problem is the result of a miscommunication.

To speak to our mediation team and begin the mediation process, call 1-800-268-2598 or 416 231-2600 locally or email at [web@ucda.ca](mailto:web@ucda.ca).