



**2000 LAT
Decisions**
(released April 1 to December 31, 2000)

**LICENCE
APPEAL
TRIBUNAL**

LICENCE APPEAL TRIBUNAL

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LICENCE APPEAL TRIBUNAL

2000 LAT DECISIONS
(released April 1 to December 31, 2000)

CITED 2000 L..A.T

- Contains full decisions and reasons given

Made available pursuant to the

Licence Appeal Tribunal Act, 1999,

Ministry of Consumer and Commercial Relations Act,
Revised Statutes of Ontario, 1990, Chapter M. 21

and the

Highway Traffic Act,
Revised Statutes of Ontario, 1990, Chapter H. 8

INCIDES

CHILD AND FAMILY SERVICES ACT

DAY NURSERIES ACT

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

GAMING CONTROL ACT

HIGHWAY TRAFFIC ACT

MOTOR VEHICLE DEALERS ACT

ONTARIO NEW HOME WARRANTIES PLAN ACT

REAL ESTATE AND BUSINESS BROKERS ACT

TRAVEL INDUSTRY ACT

SUPERIOR COURT OF JUSTICE DECISIONS AND ORDERS

The *Highway Traffic Act* decisions have been divided into six sections based on the type of appeal. The six sections and their letter code abbreviations are set out below.

SECTION CODES:

Abbreviation	Description
ADLS	Administrative Driver's Licence Suspension
CVIS	Commercial Vehicle Impoundment Suspension
CVOR	Commercial Vehicle Operator Registration
GARAGE/MVIS	Garage – Motor Vehicle Inspection Standards
MEDICAL	Licence Suspension or Downgrade for Medical Reasons
MVIA	Motor Vehicle Impoundment

A brief code has been added to many of the file names to help categorize the decision (for example, "EXHP" indicates the appeal ground of exceptional hardship). A table setting out the meaning of these codes is set out below. You can view the code table for each of the three sections (MVIA, ADLS and MEDICAL) by clicking on the section name in the index.

APPEAL/DECISION CODES

Type	Code	Description
ADLS	ADJ	Adjournment
	ALLERGY	Allergy
	ASTHMA	Asthma
	BELLP	Bell's Palsy
	CHEST	Chest Pain
	CLEFT	Cleft Palate
	COLD	Cold
	COUGH	Coughing & Breathing
	FIBMG	Fibromyalgia
	HDTR	Head Trauma
	NOMC	No Medical Condition
	PAND	Panic Disorder
	PULD	Pulmonary Disorder
	RESP	Respiratory Problem

Type	Code	Description
MEDICAL	ADJ	Adjournment
	ALCL	Alcohol
	ANEU	Aneurysm
	CARD	Cardiac
	DRUG	Drugs/Medication
	MDIS	Mental Disorder
	MINF	Myocardial Infection
	PERC	Perceptual Problems
	SEIZ	Seizure

Type	Code	Description
MVIA	ADJ	Adjournment
	DUDI	Due Diligence
	EXHP	Exceptional Hardship
	NUSP	Not Under Suspension
	STLN	Stolen
	TIME	Extension of time to file

LICENCE APPEAL TRIBUNAL

2000 LAT DECISIONS
(Released April 1st to December 31st, 2000)

KEY to "ORDER/RULING" and "FINAL OUTCOME" columns

Consent	Agreement reached by parties
Adjournment	Hearing moved to new date(s)
Order/Ruling	Decision on a procedural matter
Successful	Applicant Successful
Successful, in part	Applicant Successful, in part
Unsuccessful	Applicant Unsuccessful

CHILD AND FAMILY SERVICES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/RULING	FINAL OUTCOME
CFSA	ADAMS	Refuse to Renew	June 2, 2000	Consent	Successful
CFSA	<i>Canadian Wilderness Program</i>	Refuse to Renew	November 28, 2000	Order	
CFSA	<i>Canadian Wilderness Program</i>	Refuse to Renew	December 29, 2000	Order	
CFSA	<i>Danny's Place Support Services a.k.a. Onyeka Ventures</i>	Refuse to Renew	August 24, 2000	Adjournment	
CFSA	<i>Danny's Place Support Services a.k.a. Onyeka Ventures</i>	Refuse to Renew	September 26, 2000	Order	
CFSA	<i>PERSAUD, Isha, Operator Of Academy Preschool Day Nursery</i>	Refuse to Renew	September 7, 2000		Unsuccessful

DAY NURSERIES ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/RULING	FINAL OUTCOME
DNA	<i>PERSAUD, Isha, Operator Of Academy Preschool Day Nursery</i>	Refuse to Renew	September 7, 2000		Unsuccessful

FUNERAL DIRECTORS AND ESTABLISHMENTS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
FDEA	CARRICATO	To Issue a Licence Subject To Conditions	June 12, 2000		Successful, in Part
FDEA	KOLLAR	Complaint	June 28, 2000	Adjournment	
FDEA	KOLLAR	Complaint	August 4, 2000	Order	Unsuccessful
FDEA	SHERMAN	Complaint	June 15, 2000	Adjournment	
FDEA	SHERMAN	Complaint	August 2, 2000	Order	
FDEA	SHERMAN	Complaint	September 21		Successful
FDEA	SOPINKA	Complaint	July 11, 2000		Unsuccessful

GAMING CONTROL ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
GCA	BLOK	Revoke Registration	May 9, 2000	Consent	Successful

HIGHWAY TRAFFIC ACT

Highway Traffic Act – Administrative Driver's Licence Suspension (ADLS)

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ADLS	009-ALLERGY	Allergy	June 15, 2000		Unsuccessful
ADLS	024-RESP	Nasal Congestion	May 12, 2000		Unsuccessful
ADLS	031-PULD	Pulmonary Disorder	August 23, 2000		Unsuccessful
ADLS	036-NOMC	No Medical Condition	May 18, 2000		Unsuccessful
ADLS	039-RESP	Bronchitis	May 18, 2000		Unsuccessful
ADLS	040-PAND	Panic Disorder	May 17, 2000		Unsuccessful
ADLS	065-RESP	Respiratory Problem	June 22, 2000		Unsuccessful
ADLS	069-ADJ		June 27, 2000	Adjournment	
ADLS	069-NOMC	No Medical Condition	July 5, 2000		Unsuccessful
ADLS	082-RESP	Respiratory Problems	July 5, 2000		Successful
ADLS	090-ASTHMA	Asthma	June 13, 2000		Unsuccessful
ADLS	149-RESP	Respiratory Problems	August 8, 2000		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
ADLS	157-NOMC	No Medical Condition	August 23, 2000		Unsuccessful
ADLS	165-ASTHMA	Asthma	August 23, 2000		Unsuccessful
ADLS	187-NOMC	No Medical Condition	August 30, 2000		Unsuccessful
ADLS	195-NOMC	No Medical Condition	September 14, 2000		Unsuccessful
ADLS	206-PULD	Pulmonary Disorder	September 18, 2000		Unsuccessful
ADLS	218-CHEST	Chest Pain	April 27, 2000		Successful
ADLS	219-BELLP	Bell's Palsy	May 10, 2000		Unsuccessful
ADLS	256-NOMC	No Medical Condition	October 20, 2000		Unsuccessful
ADLS	264- ASTHMA	Asthma	October 18, 2000		Successful
ADLS	267-PAND	Panic Disorder	October 26, 2000		Unsuccessful
ADLS	268-ADJ		October 27, 2000	Adjournment	
ADLS	268-ASTHMA	Asthma	November 8, 2000		Unsuccessful
ADLS	280-NOMC	No Medical Condition	October 26, 2000		Unsuccessful
ADLS	285-CLEFT	Cleft Palate	November 21, 2000		Unsuccessful
ADLS	297- NOMC	No Medical Condition	November 22, 2000		Unsuccessful
ADLS	348-CHEST	Chest Pain	December 20, 2000		Unsuccessful
ADLS	356-NOMC	No Medical Condition	December 14, 2000		Unsuccessful

Highway Traffic Act – Commercial Vehicle Operator's Registration

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CARR	1226795 Ontario Limited and 1383546 Ontario Limited o/a Potato Land	Cancellation and Seizure Order: Safety	July 6, 2000	Adjournment	
CARR	880148 Ontario Limited d/b/a Mas Transport	Suspension and Seizure Order	June 8, 2000	Order	
CARR	Aman Enterprises (1989) Ltd.	Suspension and Seizure Order	August 29, 2000	Order	
CARR	Aman Enterprises (1989) Ltd.	Suspension and Seizure Order	November 8, 2000		Unsuccessful
CARR	Clunie Transport Ltd.	Refusal to Issue Licence/ CVOR	November 29, 2000	Adjournment	
CARR	Equipment Express Inc.	Suspension and Seizure Order	December 27, 2000		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
CARR	<i>Kelsey Trail Trucking Ltd.</i>	Suspension and Seizure Order	June 2, 2000		Unsuccessful
CARR	<i>R&S Transportation Inc./Harj-Min Carriers Inc.</i>	Suspension and Seizure Order	August 29, 2000	Order	
CARR	<i>R&S Transportation Inc./Harj-Min Carriers Inc.</i>	Suspension and Seizure Order	September 20, 2000	Order	
CARR	<i>R&S Transportation Inc./Harj-Min Carriers Inc.</i>	Suspension and Seizure Order	November 10, 2000	Adjournment	
CARR	<i>R&S Transportation Inc./Harj-Min Carriers Inc.</i>	Suspension and Seizure Order	December 15, 2000		Successful, in Part

Highway Traffic Act – Motor Vehicle Inspection Station (MVIS/GARAGE)

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIS/ GARAGE	<i>Checker Towing Inc</i>	Refuse Registration	December 8, 2000		Unsuccessful
MVIS/ GARAGE	<i>GORDON, Merrill Thomas and Merle's Auto Repairs</i>	Revoke Registrations	November 22, 2000	Adjournment	
MVIS/ GARAGE	<i>HAGE-AOUN, Charles and Chado's Auto Body Inc.</i>	Revoke Registrations	August 23, 2000	Order	
MVIS/ GARAGE	<i>PRESCOD, Winston Ross and 1006525 Ontario Ltd. d/b/a Flamborough Auto Wreckers</i>	To Revoke Registrations	October 10, 2000	Adjournment	
MVIS/ GARAGE	<i>PRESCOD, Winston Ross and 1006525 Ontario Ltd. d/b/a Flamborough Auto Wreckers</i>	Revoke Registrations	November 21, 2000	Adjournment	
MVIS/ GARAGE	<i>PRESCOD, Winston Ross and 1006525 Ontario Ltd. d/b/a Flamborough Auto Wreckers</i>	To Revoke Registrations	December 29, 2000		Unsuccessful
MVIS/ GARAGE	<i>Sherwood, Leonard and Cpg Automotive</i>	Revoke Registrations	November 30, 2000	Order	

Highway Traffic Act – Medical Suspension or Downgrade (MEDICAL)

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MEDICAL	<i>010-CARD</i>	Downgrade – Cardiac	May 30, 2000		Unsuccessful
MEDICAL	<i>037-ADJ</i>		May 31, 2000	Adjournment	
MEDICAL	<i>042-ALCL</i>	Alcohol	May 30, 2000		Successful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MEDICAL	054-SEIZ	Seizure	June 6, 2000		Unsuccessful
MEDICAL	059-MDIS	Mental Disorder	June 28, 2000		Unsuccessful
MEDICAL	081-ADJ		June 15, 2000	Adjournment	
MEDICAL	105-ADJ		June 29, 2000	Adjournment	
MEDICAL	105-ALCL	Alcohol	July 12, 2000		Successful
MEDICAL	114-ALCL	Alcohol	July 12, 2000		Successful
MEDICAL	128-SEIZ	Seizure	August 23, 2000		Successful
MEDICAL	159-ADJ		August 22, 2000	Adjournment	
MEDICAL	162-ANEU		August 18, 2000	Order	
MEDICAL	162-ANEU	Aneurysm	August 23, 2000		Successful
MEDICAL	172-ADJ		August 22, 2000	Adjournment	
MEDICAL	188-ALCL	Alcohol	September 11, 2000		Successful
MEDICAL	190-ALCL	Alcohol	April 5, 2000		Unsuccessful
MEDICAL	192-DRUG	Medication & Dorsal Column Stimulator	April 4, 2000		Successful
MEDICAL	195-ALCL	Alcohol	May 5, 2000		Unsuccessful
MEDICAL	196-SEIZ	Seizure	May 30, 2000		Successful
MEDICAL	197-ALCL	Alcohol	May 5, 2000		Unsuccessful
MEDICAL	199-CARD	Downgrade – Cardiac	September 27, 2000		Successful
MEDICAL	200-ALCL	Alcohol	May 2, 2000		Unsuccessful
MEDICAL	201-PERC	Perceptual	June 2, 2000		Unsuccessful
MEDICAL	202-SEIZ	Seizure	September 29, 2000		Unsuccessful
MEDICAL	212-SEIZ	Seizure	October 3, 2000		Unsuccessful
MEDICAL	225-SEIZ	Seizure	December 12, 2000		Successful
MEDICAL	226-SEIZ	Downgrade – Seizure	October 17, 2000		Unsuccessful
MEDICAL	253-SEIZ	Seizure	November 10, 2000		Unsuccessful
MEDICAL	254- SEIZ	Downgrade – Seizure	October 31, 2000		Unsuccessful
MEDICAL	275-MDIS	Mental Disorder	October 24, 2000		Successful
MEDICAL	281-ALCL	Alcohol	November 22, 2000		Successful
MEDICAL	286-ALCL	Alcohol	November 22, 2000		Successful
MEDICAL	301-SEIZ	Downgrade – Seizure	December 4, 2000		Successful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MEDICAL	315-ALCL	Alcohol	December 20, 2000		Successful
MEDICAL	320-ADJ		November 16, 2000	Adjournment	
MEDICAL	320-SEIZ	Seizure	December 28, 2000		Successful
MEDICAL	336- SEIZ	Seizure	December 21, 2000		Unsuccessful
MEDICAL	347-ADJ		December 15, 2000	Adjournment	
MEDICAL	357-ALCL	Alcohol	December 28, 2000		Successful

Highway Traffic Act – Motor Vehicle Impoundment Order (MVIA)

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	1090498 ONTARIO INC.	Due Diligence & Exceptional Hardship	August 30, 2000		Unsuccessful
MVIA	1256796 Ontario Ltd.	Not Under Suspension	April 19, 2000		Unsuccessful
MVIA	1290943 Ontario Inc.	Exceptional Hardship	April 5, 2000		Unsuccessful
MVIA	147-STLN	Stolen	April 5, 2000		Unsuccessful
MVIA	150-EXHP	Exceptional Hardship	April 13, 2000		Unsuccessful
MVIA	224-DUDI	Due Diligence	September 25, 2000	Order	
MVIA	224-DUDI	Due Diligence	October 4, 2000		Unsuccessful
MVIA	295-EXHP	Exceptional Hardship	November 6, 2000	Order	
MVIA	295-EXHP	Exceptional Hardship	November 6, 2000		Unsuccessful
MVIA	ATTILA	Exceptional Hardship	June 21, 2000		Unsuccessful
MVIA	BARRE	Exceptional Hardship	October 27, 2000		Successful
MVIA	BEAUVAIS	Extension of time to file	October 12, 2000	Order	Unsuccessful
MVIA	BECK	Exceptional Hardship	October 16, 2000		Successful
MVIA	BEER	Exceptional Hardship	November 23, 2000		Unsuccessful
MVIA	BERES	Exceptional Hardship	October 20, 2000		Unsuccessful
MVIA	BISH	Exceptional Hardship	November 23, 2000		Successful
MVIA	BLAGA	Due Diligence & Exceptional Hardship	May 2, 2000		Unsuccessful
MVIA	BRUSSOLO	Due Diligence & Exceptional Hardship	July 13, 2000		Unsuccessful
MVIA	CARD	Exceptional Hardship	November 23, 2000		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	<i>Car-O-Line Auto's</i>	Not Under Suspension	June 28, 2000		Unsuccessful
MVIA	<i>CHARMAN</i>	Extension of time to file	May 1, 2000	Order	Unsuccessful
MVIA	<i>Chrysler Credit Canada Ltd.</i>	Extension of time to file	April 18, 2000	Order	Unsuccessful
MVIA	<i>Chrysler Credit Canada Ltd.</i>	Extension of time to file	April 26, 2000	Order	Unsuccessful
MVIA	<i>Chrysler Credit Canada Ltd.</i>	Ground not available	June 14, 2000	Order	
MVIA	<i>Chrysler Credit Canada Ltd.</i>	Due Diligence	July 11, 2000		Unsuccessful
MVIA	<i>Chrysler Credit Canada Ltd.</i>	Due Diligence	July 11, 2000		Unsuccessful
MVIA	<i>CLARK</i>	Exceptional Hardship	April 20, 2000		Unsuccessful
MVIA	<i>Consbec Inc.</i>	Due Diligence	May 29, 2000		Unsuccessful
MVIA	<i>Corvettemasters Ltd.</i>	Due Diligence	November 15, 2000		Unsuccessful
MVIA	<i>DARROCHE</i>	Exceptional Hardship	April 5, 2000		Unsuccessful
MVIA	<i>DAVIDSON</i>	Due Diligence & Exceptional Hardship	October 27, 2000		Unsuccessful
MVIA	<i>DESROCHERS</i>	Stolen	May 1, 2000	Consent	Successful
MVIA	<i>DOWNING</i>	Stolen & Exceptional Hardship	May 30, 2000		Unsuccessful
MVIA	<i>EMPEY</i>	Exceptional Hardship	November 6, 2000	Order	Unsuccessful
MVIA	<i>Enterprise Rent-A-Car Canada Limited</i>	Stolen	September 20, 2000	Consent	Successful
MVIA	<i>Enterprise Rent-A-Car Canada Limited</i>	Stolen & Due Diligence	November 9, 2000		Unsuccessful
MVIA	<i>Ford Credit Canada Leasing Limited</i>		October 12, 2000	Adjournment	
MVIA	<i>Ford Credit Canada Leasing Limited</i>	Ground not available	October 18, 2000	Order	Unsuccessful
MVIA	<i>Ford Credit Canada Ltd.</i>	Due Diligence	May 2, 2000		Unsuccessful
MVIA	<i>Francis Movers Ltd.</i>		August 31, 2000		Unsuccessful
MVIA	<i>General Motors Acceptance Corporation</i>		September 14, 2000	Adjournment	
MVIA	<i>General Motors Acceptance Corporation</i>	Extension of time to file	September 26, 2000		Unsuccessful
MVIA	<i>General Motors Acceptance Corporation of Canada Limited</i>	Extension of time to file	August 4, 2000		Unsuccessful
MVIA	<i>GIBSON</i>	Due Diligence & Exceptional Hardship	May 31, 2000		Unsuccessful
MVIA	<i>GMAC Leaseco Ltd.</i>	Exceptional Hardship	June 28, 2000	Order	Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	<i>GMAC Leaseco Ltd.</i>	Not Under Suspension	July 6, 2000		Unsuccessful
MVIA	<i>GOODE</i>	Stolen & Exceptional Hardship	June 19, 2000		Unsuccessful
MVIA	<i>HART</i>	Exceptional Hardship	November 10, 2000		Unsuccessful
MVIA	<i>HAYNES</i>	Exceptional Hardship	August 17, 2000		Successful
MVIA	<i>HISS</i>	Exceptional Hardship	December 18, 2000		Unsuccessful
MVIA	<i>HOLLAND</i>	Stolen	September 13, 2000		Unsuccessful
MVIA	<i>IKKERS</i>	Exceptional Hardship	May 2, 2000		Unsuccessful
MVIA	<i>JOHNSTONE</i>	Exceptional Hardship	December 4, 2000		Unsuccessful
MVIA	<i>KELLY</i>	Due Diligence & Exceptional Hardship	August 23, 2000		Unsuccessful
MVIA	<i>KENNEDY</i>	Due Diligence & Exceptional Hardship	December 15, 2000		Unsuccessful
MVIA	<i>KLEIST</i>	Stolen	August 3, 2000		Unsuccessful
MVIA	<i>Knj Corporation Canada</i>	Exceptional Hardship	September 20, 2000		Unsuccessful
MVIA	<i>LAURIN</i>		July 13, 2000	Order	Unsuccessful
MVIA	<i>LAWRENCE</i>	Due Diligence	October 12, 2000		Unsuccessful
MVIA	<i>LOUCKS</i>	Extension of time to file	May 1, 2000	Order	Unsuccessful
MVIA	<i>MADRUGA</i>	Due Diligence & Exceptional Hardship	October 31, 2000		Unsuccessful
MVIA	<i>MANN</i>	Stolen	July 18, 2001		Unsuccessful
MVIA	<i>MARAR</i>	Due Diligence & Exceptional Hardship	June 15, 2000		Unsuccessful
MVIA	<i>Mazda Canada Credit Inc.</i>	Due Diligence & Exceptional Hardship	May 15, 2000		Unsuccessful
MVIA	<i>McGONEGAL</i>	Exceptional Hardship	August 31, 2000		Successful
MVIA	<i>McGRAW</i>	Exceptional Hardship	November 7, 2000		Unsuccessful
MVIA	<i>McHUGH</i>	Exceptional Hardship	April 28, 2000		Unsuccessful
MVIA	<i>McILVENNA</i>	Due Diligence & Exceptional Hardship	July 24, 2000		Unsuccessful
MVIA	<i>McKENZIE</i>	Exceptional Hardship	November 9, 2000		Unsuccessful
MVIA	<i>MERLO</i>	Exceptional Hardship	October 4, 2000		Unsuccessful
MVIA	<i>MILLAR</i>	Exceptional Hardship	December 27, 2000		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME Or CODE	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVIA	<i>Murdoch Group Inc.</i>	Due Diligence	May 8, 2000		Unsuccessful
MVIA	NELSON	Exceptional Hardship	May 3, 2000		Unsuccessful
MVIA	<i>Newport Leasing Ltd.</i>	Due Diligence	April 25, 2000		Unsuccessful
MVIA	<i>Newport Leasing Ltd.</i>	Due Diligence	May 3, 2000		Unsuccessful
MVIA	PAQUETTE	Exceptional Hardship	October 6, 2000		Unsuccessful
MVIA	PIFFL	Exceptional Hardship	September 21, 2000		Unsuccessful
MVIA	PIGDEN	Due Diligence	December 28, 2000		Unsuccessful
MVIA	PITAWANIKWAT	Due Diligence	April 3, 2000		Successful
MVIA	RAMPERSAUD		September 19, 2000	Order	Unsuccessful
MVIA	RAZACK	Exceptional Hardship	December 4, 2000		Successful
MVIA	REFFLE	Exceptional Hardship	October 4, 2000		Unsuccessful
MVIA	ROSEN		July 14, 2000	Adjournment	
MVIA	SALOMON	Exceptional Hardship	May 2, 2000		Unsuccessful
MVIA	<i>Scotland Agromart Ltd.</i>	Exceptional Hardship	May 12, 2000	Consent	Successful
MVIA	SHARPE	Due Diligence	June 29, 2000		Unsuccessful
MVIA	SMITH	Due Diligence & Exceptional Hardship	October 2, 2000		Unsuccessful
MVIA	SPINKS	Exceptional Hardship	September 20, 2000		Unsuccessful
MVIA	STRYCKER	Exceptional Hardship	November 22, 2000		Unsuccessful
MVIA	SWITZER-DOWLING	Exceptional Hardship	July 5, 2000		Unsuccessful
MVIA	TAHERI	Exceptional Hardship	November 7, 2000		Unsuccessful
MVIA	THORKELSON	Exceptional Hardship	October 4, 2000		Unsuccessful
MVIA	<i>Toyota Credit Canada Inc.</i>		June 7, 2000	Order	
MVIA	<i>Toyota Credit Canada Inc.</i>	Due Diligence	June 14, 2000		Unsuccessful
MVIA	UGIAGBE	Exceptional Hardship	October 2, 2000		Unsuccessful
MVIA	VAJDA	Exceptional Hardship	October 6, 2000		Unsuccessful
MVIA	VEITENBERG	Due Diligence & Exceptional Hardship	August 23, 2000		Unsuccessful
MVIA	WILHELM	Exceptional Hardship	April 20, 2000		Unsuccessful
MVIA	ZAWADZKI	Stolen	September 29, 2000		Unsuccessful

MOTOR VEHICLE DEALERS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	1128570 Ontario Inc. o/a Northern Escape Tours	Claim	June 15, 2000		Unsuccessful
MVDA	1384706 Ontario Inc. o/a Perfect Auto Sale and George Fiddaoui and Frank Menhem Faual	Refuse/Revoke Registration	August 2, 2000		Unsuccessful
MVDA	1405093 Ontario Inc. o/a Pembroke Suzuki	Refuse Registration	June 1, 2000	Consent	Successful
MVDA	4X4 Headquarters Ltd. and 1190634 Ontario Ltd. o/A 4X4 Headquarters and 1351849 Ontario Ltd. and Danny Lovatsis and Norman Lovatsis and George Meanchos	Revoke Registrations	June 29, 2000		Successful, in part
MVDA	ABDUL-HUSSEIN, Youssef Akil o/a Express Fuels and Auto Sales	Refuse Registration	July 12, 2000	Consent	Successful
MVDA	ADAMS	Claim	October 3, 2000		Unsuccessful
MVDA	AMIRI	Refuse Registration	December 4, 2000		Unsuccessful
MVDA	BABES	Revoke Registration	September 26, 2000	Order	
MVDA	BARAK, Aron Ehud o/a Five Star Motors	Revoke Registration	December 7, 2000		Unsuccessful
MVDA	BEHNAMY	Refuse Registration	October 20, 2000	Adjournment	
MVDA	BERENDSE	Refuse Registration	December 1, 2000	Consent	Successful
MVDA	BERK, Alan and COUTURE, Clifford and 1236795 Ontario Inc. and Dealerplan Acceptance Corporation	Revoke Registrations	October 16, 2000		Successful, in Part
MVDA	BIUNNO	Refuse Registration	July 11, 2000		Unsuccessful
MVDA	BOILEAU	Refuse Registration	July 4, 2000	Consent	Successful
MVDA	BORG	Refuse Registration	August 25, 2000		Unsuccessful
MVDA	Burlington Auto & Lease Centre Inc. and John Alexander Sheresky and Andrew Howard Bailey	Refuse Registrations	April 18, 2000	Consent	Successful
MVDA	BYERS, John o/a Fleetwood Auto	Refuse Registration	December 15, 2000	Consent	Successful
MVDA	COLLINS	Refuse Registration	July 5, 2000		Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	CREED	Refuse Registration	April 17, 2000	Consent	Successful
MVDA	DARLING, Buddy and 1199813 Ontario Limited o/a B & J Auto Sales	Revoke/Refuse Registrations	November 15, 2000	Consent	Successful
MVDA	DHAWAN, Om Parkash o/a T & D Auto Sales	Refuse Registration	May 1, 2000	Adjournment	
MVDA	DHAWAN, Om Parkash o/a T & D Auto Sales	Refuse Registration	May 16, 2000	Consent	Successful
MVDA	EASTERBROOK, Basil and Easterbrook, Justin and 1159274 Ontario Ltd. o/a Thrifty Auto Sales	Revoke Registrations	August 25, 2000		Successful, in Part
MVDA	EASTERBROOK, Basil and Easterbrook, Justin and 1159274 Ontario Ltd. o/a Thrifty Auto Sales	Motion for Order to Stay	December 20, 2000		Successful
MVDA	EASTERBROOK, Wayne o/a Easterbrook Sales And Leasing	Refuse Registration	September 1, 2000	Consent	Successful
MVDA	EASTMAN	Refuse Registration	July 19, 2000	Consent	Successful
MVDA	EDIE	Refuse Registration	May 25, 2000	Consent	Successful
MVDA	EVANS, Michael Allen o/a M & G Auto	Refuse Registration	June 21, 2000	Consent	Successful
MVDA	FRANZE, Vincent and Franze Automotive Inc.	Revoke Registrations	December 5, 2000	Adjournment	
MVDA	FRANZE, Vincent and Franze Automotive Inc.	Revoke Registrations	December 15, 2000	Consent	Successful
MVDA	GALKOWSKI	Refuse Registration	April 26, 2000	Consent	Successful
MVDA	GILLESPIE	Refuse Registration	September 20, 2000	Consent	Successful
MVDA	HACHE	Refuse Registration	April 6, 2000	Consent	Successful
MVDA	HASSAN	Refuse Registration	October 6, 2000	Adjournment	
MVDA	HERITAGE	Refuse Registration	September 1, 2000	Consent	Successful
MVDA	HILES, Christopher Richard and 787498 Ontario Inc. o/a Lakeview Motor Sales and Service	Revoke Registrations	July 13, 2000		Unsuccessful
MVDA	HOPKINS	Refuse Registration	April 10, 2000	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	HUGHES	Refuse Registration	April 12, 2000	Adjournment	
MVDA	HUGHES	Refuse Registration	October 2, 2000	Consent	Successful
MVDA	IVKER	Refuse Registration	September 15, 2000	Consent	Successful
MVDA	IZZARD	Refuse Registration	May 16, 2000		Unsuccessful
MVDA	JAKOVLEV, Oleg o/a Carolta Auto Sales	Refuse Registration	May 16, 2000	Consent	Successful
MVDA	KHAROUBA	Refuse Registration	November 22, 2000	Consent	Successful
MVDA	LAGACE, Gaetan o/a Gater's Auto Refinishing and Auto Sales and 1302734 Ontario Inc.	Refuse/Revoke Registration	May 2, 2000	Order	
MVDA	LAGACE, Gaetan o/a Gater's Auto Refinishing and Auto Sales and 1302734 Ontario Inc.	Refuse/Revoke Registration	August 14, 2000		Successful in Part
MVDA	LALONDE	Refuse Registration	August 4, 2000	Consent	Successful
MVDA	LANGIS	Refuse Registration	December 29, 2000	Consent	Successful
MVDA	LEE	Refuse Registration	April 20, 2000	Consent	Successful
MVDA	LONG	Refuse Registration	August 23, 2000	Consent	Successful
MVDA	MacKAY, Edward Robert	Refuse Registration	May 10, 2000	Consent	Successful
MVDA	MAHADEO	Claim	August 2, 2000	Order	
MVDA	MAHESWARAN, Rehnu Vasanthakumar and 1375088 Ontario Inc. o/a H & Me Fine Cars	Refuse Registration	May 2, 2000	Consent	Successful
MVDA	MANOS	Refuse Registration	December 21, 2000	Consent	Successful
MVDA	MARSHALL	Refuse Registration	September 20, 2000	Consent	Successful
MVDA	MAYBEE	Revoke Registration	September 25, 2000	Adjournment	
MVDA	MAYBEE	Revoke Registration	November 6, 2000	Adjournment	
MVDA	McFEE	Refuse Registration	September 26, 2000	Consent	Successful
MVDA	McLELWAIN	Revoke Registration	June 13, 2000	Adjournment	
MVDA	McWHIRTER	Refuse Registration	November 20, 2000	Consent	Successful
MVDA	MEKONEN	Refuse Registration	May 19, 2000	Consent	Successful
MVDA	MELNYK	Refuse Registration	July 20, 2000	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	MOLINOLO	Refuse Registration	June 12, 2000	Consent	Successful
MVDA	MORINET, Todd James o/a KTS Auto Body	Revoke Registration	November 8, 2000	Consent	Successful
MVDA	MUISE	Refuse Registration	September 21, 2000	Consent	Successful
MVDA	NIGRO	Refuse Registration	June 12, 2000	Consent	Successful
MVDA	NOBLE, Dennis and The Coach Connection Inc.	Revoke Registrations	April 19, 2000		Successful
MVDA	NYITRA, Frank and 1002895 Ontario Limited o/a The Sidecar, Trailer Touring	Revoke Registration	July 10, 2000		Unsuccessful
MVDA	OLDFORD	Refuse Registration	June 14, 2000	Consent	Successful
MVDA	PADAYACHEE	Refuse Registration	June 5, 2000		Unsuccessful
MVDA	PLUNKETT	Refuse Registration	December 21, 2000	Consent	Successful
MVDA	POUNDER	Refuse Registration	July 11, 2000	Consent	Successful
MVDA	PUNZO, Emanuele and 1351849 Ontario Inc. o/a Dreamworx Auto Sales Inc.	Refuse Registrations	May 30, 2000	Consent	Successful
MVDA	RAHAL	Refuse Registration	June 16, 2000	Adjournment	
MVDA	RAHAL	Refuse Registration	September 28, 2000		Unsuccessful
MVDA	RAJENDRA	Refuse Registration	October 27, 2000	Consent	Successful
MVDA	Rich's Service Centre Ltd. O/a A Car Auto Brokers Leasing	Revoke Registration	May 25, 2000		Unsuccessful
MVDA	RUBIN, Larry o/a Affordable Auto Sales	Refuse Registration	November 27, 2000		Unsuccessful
MVDA	RUNNALLS	Claim	April 19, 2000	Adjournment	
MVDA	RUNNALLS	Claim	August 28, 2000		Unsuccessful
MVDA	RUSSELL	Refuse Registration	May 3, 2000	Consent	Successful
MVDA	S & L Auto Recyclers Inc. and Mervlyn Slattery and Steven Lennox	Revoke Registrations	September 19, 2000	Consent	Successful
MVDA	SAFA, Ali Reza Kateb and North York Auto Gallary Limited	Refuse Registrations	December 5, 2000	Order	
MVDA	SAFA, Ali Reza Kateb and North York Auto Gallary Limited	Refuse Registrations	December 18, 2000	Adjournment	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	SAFA, Reza Alizadeh and Mahmoud Alizadeh, and 1329331 Ontario Inc. o/a Syprus Sales	Refuse Registration	May 4, 2000	Consent	Successful
MVDA	SANDALJ, Marko and Sandal Capital Corp. o/a Goodwill Leasing	Revoke Registrations	April 3, 2000	Consent	Successful
MVDA	SANTOS	Refuse Registration	August 23, 2000	Consent	Successful
MVDA	SASSON, Juda o/a Saddon Motors	Revoke Registration	April 14, 2000		Unsuccessful
MVDA	SCARCELLA, George and 1238800 Ontario Inc. o/a Affordable Motors	Revoke Registrations	August 23, 2000		Unsuccessful
MVDA	SEAGER	Refuse Registration	July 14, 2000	Consent	Successful
MVDA	SELLENS	Refuse Registration	June 5, 2000	Consent	Successful
MVDA	SEMINARA	Refuse Registration	August 23, 2000	Consent	Successful
MVDA	SHAQIQ, Mohammad Amin o/a East & West Used Car Sales	Revoke Registration	July 6, 2000	Order	
MVDA	SHAQIQ, Mohammad Amin o/a East & West Used Car Sales	Revoke Registration	August 23, 2000	Adjournment	
MVDA	SHAQIQ, Mohammad Amin o/a East & West Used Car Sales	Revoke Registration	September 12, 2000		Unsuccessful
MVDA	SHEPHERD, Richard o/a Sun City R.V. Centre	Refuse Registration	May 3, 2000	Consent	Successful
MVDA	SINGH, A	Refuse Registration	April 28, 2000	Consent	Successful
MVDA	SKOWRON, Mirosław o/a Scorpio Auto Body & Used Cars Sales	Refuse Registration	November 15, 2000	Consent	Successful
MVDA	SLATER	Refuse Registration	May 29, 2000	Order	Successful
MVDA	SOMEN	Claim	May 4, 2000		Unsuccessful
MVDA	SORLEY	Revoke Registration	December 1, 2000		Successful
MVDA	SYLVAIN	Claim	October 18, 2000		Unsuccessful
MVDA	THARRENOS	Refuse Registration	August 23, 2000	Consent	Successful
MVDA	TIRANI, Mohamad o/a A 1 Tire Centre	Revoke Registration	June 14, 2000	Order	Unsuccessful
MVDA	UR Auto Sales and Manjit Rana and Amarjit Uppal	Revoke and Refuse Registrations	November 1, 2000	Consent	Successful
MVDA	Uranus Auto Sales Inc. And Noorallah Ahrari And Venus Auto Sales Inc. And Foroozan Vafaei	Revoke and Refuse Registrations	September 14, 2000		Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
MVDA	URBAN	Refuse Registration	August 24, 2000	Consent	Successful
MVDA	V.I.P. Impex Inc. o/a Major Motors and Ally Hemani, Applicants	Revoke Registrations	May 5, 2000	Consent	Successful
MVDA	VELLOZO	Claim	May 30, 2000		Unsuccessful
MVDA	WATT		July 18, 2000	Adjournment	
MVDA	WEISS	Refuse Registration	September 6, 2000		Successful
MVDA	WHITTON	Refuse Registration	July 25, 2000	Adjournment	
MVDA	WHITTON2	Refuse Registration	July 25, 2000	Adjournment (Amended)	
MVDA	WHITTON	Proposal Withdrawn	November 9, 2000	Order	Successful

ONTARIO NEW HOME WARRANTY PLAN ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	627416 Ontario Limited o/a Rosedale Homes	Refuse to Renew Registration	June 20, 2000	Order	
NHWP	ADAMS	Claim	April 20, 2000		Successful, in Part
NHWP	BALFOUR	Claim	June 29, 2000		Unsuccessful
NHWP	BHUP	Claim	June 6, 2000	Adjournment	
NHWP	Brylin Construction Ltd.	Refuse to Renew Registration	August 23, 2000		Unsuccessful
NHWP	CECILE	Claim	June 29, 2000	Order	
NHWP	COLLA KU	Claim	August 9, 2000	Adjournment	
NHWP	COLLA KU	Claim	October 20, 2000		Unsuccessful
NHWP	CORNALE	Claim	November 8, 2000	Adjournment	
NHWP	CORNALE	Claim	November 23, 2000	Order	
NHWP	Country Lane Homes Ltd.	Refuse to Renew Registration	May 8, 2000	Order	Unsuccessful
NHWP	DEMOSTHENOUS	Claim	May 16, 2000	Order	
NHWP	FRATTAROLI	Claim	December 15, 2000	Adjournment	
NHWP	FREEMAN	Claim	November 28, 2000	Adjournment	
NHWP	GIRLATO	Claim	September 19, 2000	Adjournment	
NHWP	GIRLATO	Claim	September 26, 2000	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	<i>GUDERSKI</i>	Claim	July 10, 2000		Successful, in Part
NHWP	<i>HYRSKI</i>	Claim	September 25, 2000	Adjournment	
NHWP	<i>HYRSKI</i>	Claim	November 8, 2000		Unsuccessful
NHWP	<i>Irvin Homes Ltd.</i>	Refuse to Renew Registration	August 3, 2000		Successful, in Part
NHWP	<i>JOHNSTON</i>	Claim	November 21, 2000	Adjournment	
NHWP	<i>KENT</i>	Claim	May 29, 2000	Adjournment	
NHWP	<i>KENT</i>	Claim	August 24, 2000	Adjournment	
NHWP	<i>KENT</i>	Claim	September 28, 2000	Adjournment	
NHWP	<i>KETER</i>	Claim	December 18, 2000	Order	
NHWP	<i>KUMPULAINEN</i>	Claim	May 17, 2000	Order	Unsuccessful
NHWP	<i>LATHER</i>	Claim	July 11, 2000	Adjournment	
NHWP	<i>LATHER</i>	Claim	August 24, 2000	Consent	Successful
NHWP	<i>LAZARUS and ROTH</i>	Claim	August 28, 2000		Successful, in Part
NHWP	<i>Lexcar Inc.</i>	Refuse to Renew Registration	August 28, 2000	Adjournment	
NHWP	<i>MAGEAU</i>	Claim	July 6, 2000		Unsuccessful
NHWP	<i>MAIOLO</i>	Claim	December 18, 2000	Order	
NHWP	<i>MANZ</i>	Extension of time to file	November 9, 2000		Unsuccessful
NHWP	<i>MARCHI</i>	Claim	June 2, 2000	Adjournment	
NHWP	<i>MARCHI</i>	Claim	August 29, 2000	Adjournment	
NHWP	<i>MARCHI</i>	Claim	December 20, 2000		Successful, in Part
NHWP	<i>MASOUD</i>	Claim	September 25, 2000	Adjournment	
NHWP	<i>MASOUD</i>	Claim	December 6, 2000		Successful, in Part
NHWP	<i>McCABE</i>	Claim	April 3, 2000	Order	
NHWP	<i>McCLELLAND</i>	Claim	July 6, 2000	Adjournment	
NHWP	<i>McCLELLAND</i>	Claim	October 25, 2000	Consent	Successful
NHWP	<i>McLAREN</i>	Claim	December 29, 2000	Adjournment	
NHWP	<i>MEHTA</i>	Claim	June 6, 2000	Adjournment	
NHWP	<i>MEHTA</i>	Claim	July 19, 2000	Order	
NHWP	<i>MEHTA</i>	Claim	November 16, 2000	Adjournment	

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	<i>Metropolitan Toronto Condominium Corporation No. 1223</i>	Claim	October 25, 2000	Order	
NHWP	<i>Milecs Design Built Homes</i>	Refuse to Renew Registration	December 15, 2000	Consent	Successful
NHWP	<i>MISSIOS</i>	Claim	May 19, 2000		Unsuccessful
NHWP	<i>MOSKOVITCH</i>	Claim	June 28, 2000	Order	
NHWP	<i>MOSKOVITCH</i>	Claim	September 11, 2000	Order	
NHWP	<i>MOSKOVITCH</i>	Claim	September 19, 2000	Consent	Successful
NHWP	<i>PERELGUT</i>	Claim	July 13, 2000	Adjournment	
NHWP	<i>PERELGUT</i>	Claim	October 25, 2000	Order	
NHWP	<i>POWELL</i>	Claim	June 29, 2000	Order	
NHWP	<i>REID</i>	Claim	April 6, 2000	Consent	Successful, in Part
NHWP	<i>REID</i>	Claim	October 18, 2000		Unsuccessful
NHWP	<i>RIZZUTO</i>	Claim	July 19, 2000		Unsuccessful
NHWP	<i>Rob Piroli Construction Inc.</i>	Refuse to Renew Registration	November 15, 2000	Order	Successful
NHWP	<i>Rosedale Homes (1996) Inc.</i>	Refuse to Renew Registration	June 20, 2000	Order	
NHWP	<i>RYN</i>	Claim	May 1, 2000	Consent	Successful
NHWP	<i>SADOWSKI</i>	Claim	December 1, 2000	Order	Unsuccessful
NHWP	<i>SANJARI</i>	Claim	September 25, 2000		Unsuccessful
NHWP	<i>SANKREACHA</i>	Claim	November 2, 2000	Consent	Successful
NHWP	<i>SARKADI and SARAMO</i>	Claim	September 11, 2000	Adjournment	
NHWP	<i>SARKADI and SARAMO</i>	Claim	November 22, 2000	Adjournment	
NHWP	<i>SHAH</i>	Claim	April 25, 2000		Unsuccessful
NHWP	<i>SILVERMAN</i>	Claim	June 12, 2000	Adjournment	
NHWP	<i>SILVERMAN</i>	Claim	September 5, 2000	Adjournment	
NHWP	<i>Skyview General Contracting Ltd. o/a Skyview Homes</i>	Revoke Registration	April 12, 2000	Adjournment	
NHWP	<i>Skyview General Contracting Ltd. o/a Skyview Homes</i>	Revoke Registration	May 26, 2000	Consent	Successful
NHWP	<i>STEVENS</i>	Claim	June 15, 2000	Adjournment	
NHWP	<i>STEVENS</i>	Claim	July 13, 2000	Order	Unsuccessful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
NHWP	STEVENS	Claim	August 4, 2000	Amended Order	Unsuccessful
NHWP	STRACHAN	Claim	October 6, 2000		Successful, in part
NHWP	THORNE	Claim	June 27, 2000		Successful, in part
NHWP	Tri-Star Construction Management Ltd.	Refuse to Renew Registration	July 19, 2000		Unsuccessful
NHWP	VALKANAS	Claim	May 16, 2000	Consent	Successful
NHWP	VIS-VEERMAN	Claim	July 26, 2000	Adjournment	
NHWP	VIS-VEERMAN	Claim	September 8, 2000		Unsuccessful
NHWP	WHITE	Claim	May 2, 2000	Order	
NHWP	WHITHAM	Claim	April 17, 2000		Unsuccessful
NHWP	WILLIAMS and MAXAM	Claim	November 8, 2000	Order	
NHWP	Willmarc Properties Limited	Refuse to Renew Registration	December 4, 2000	Consent	Successful

REAL ESTATE AND BUSINESS BROKERS ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
REBBA	BANKUTI	Refuse Registration	June 20, 2000		Unsuccessful
REBBA	BORBOROS	Refuse Registration	June 16, 2000		Unsuccessful
REBBA	McFADDEN	Revoke Registration	September 8, 2000	Adjournment	
REBBA	McFADDEN	Revoke Registration	October 2, 2000	Order	
REBBA	McFADDEN	Revoke Registration	November 1, 2000	Adjournment	
REBBA	OHRSTROM-COELHO	Refuse Registration	September 26, 2000	Order	
REBBA	OHRSTROM-COELHO	Refuse Registration	November 15, 2000	Adjournment	
REBBA	REID	Revoke Registration	October 19, 2000	Order	
REBBA	REID	Revoke Registration	November 9, 2000	Order	
REBBA	SAUNDERS	Revoke Registration	April 28, 2000	Consent	Successful
REBBA	SCHUSTER, Karl S. and Schuster Realty Inc.	Refuse to Renew Registrations	July 7, 2000	Order	
REBBA	SCHUSTER, Karl S. and Schuster Realty Inc.	Refuse to Renew Registrations	September 18, 2000	Consent	Successful

TRAVEL INDUSTRY ACT

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
TIA	1078370 Ontario Inc. o/a Canatours and 1078371 Ontario Inc. o/a Dale Tours International	Revoke Registrations	October 25, 2000	Adjournment	
TIA	1078370 Ontario Inc. o/a Canatours	Revoke Registration	December 5, 2000	Consent	Successful
TIA	1078381 Ontario Inc. o/a Dale Tours International	Revoke Registration	December 5, 2000	Consent	Successful
TIA	1296347 Ontario Ltd. o/a Bargain Travel Holidays	Revoke Registration	June 9, 2000	Adjournment	
TIA	1296347 Ontario Ltd. o/a Bargain Travel Holidays	Revoke Registration	July 27, 2000	Adjournment	
TIA	1296347 Ontario Ltd. o/a Bargain Travel Holidays	Revoke Registration	August 8, 2000		Unsuccessful
TIA	1296347 Ontario Ltd. o/a Bargain Travel Holidays	Revoke Registration	August 22, 2000	Order	
TIA	Abbey Travel Service Ltd.	Revoke Registration	July 10, 2000	Consent	Successful
TIA	Alpha Club Travel	Claim	October 20, 2000	Adjournment	
TIA	GHEBRE-MEDHIN	Claim	September 20, 2000		Unsuccessful
TIA	Golfplus Vacations Inc.	Revoke Registration	December 21, 2000	Consent	Successful
TIA	Hespeler Travel Ltd. o/a Hespeler Travel	Revoke Registration	December 1, 2000	Order	Unsuccessful
TIA	Impact Travel Group Inc.	Revoke Registration	December 21, 2000	Consent	Successful
TIA	JACKSON, Donald G. o/a Stouffville Travel Centre	Revoke Registration	September 14, 2000	Consent	Successful
TIA	KOTSARIDAS, Catharine and CHATZITHEOFANOU, Anastasios o/a Royal Tours	Revoke Registrations	September 14, 2000	Order	Unsuccessful
TIA	McDONALD, Lisa Rosa o/a Cruise Holidays On Lakeshore	Revoke Registration	September 18, 2000	Consent	Successful
TIA	McINDOE	Claim	July 27, 2000		Successful
TIA	Natureways Canada Tours Inc. o/a Natureways Canada Tours Inc.	Revoke Registration	September 19, 2000	Consent	Successful
TIA	Orav Travel Inc.	Revoke Registration	September 27, 2000	Adjournment	
TIA	Orav Travel Inc.	Revoke Registration	October 10, 2000	Consent	Successful

TYPE OF APPEAL	APPLICANT(S) NAME	SUBJECT MATTER	DECISION RELEASED	ORDER/ RULING	FINAL OUTCOME
TIA	SOGA	Claim	July 27, 2000		Successful
TIA	<i>Travel Travel Inc. o/a The Standby Club</i>	Revoke Registration	May 10, 2000	Consent	Successful
TIA	<i>Travel World International Inc.</i>	Revoke Registration	October 25, 2000	Consent	Successful
TIA	<i>Universal Tours</i>	Revoke Registration	June 9, 2000	Adjournment	
TIA	<i>Universal Tours and Travel Inc.</i>	Revoke Registration	July 10, 2000	Consent	Successful

SUPERIOR COURT OF JUSTICE DECISIONS AND ORDERS

Vito Auciello and Commercial Registration Appeal Tribunal, Registrar – Real Estate and Business Brokers Act, Real Estate Council Of Ontario and Ministry of Consumer and Commercial Relations

John Edmunds and Diana Linklater and Ontario New Home Warranty Program

Elgin Condominium Corporation No. 4 and Ontario New Home Warranty Program

Registrar Of Gaming Control and Andrew Ferrusi

Joseph Florio and Ontario New Home Warranty Program and 753907 Ontario Inc.

Michel R. Goulet and Ontario New Home Warranty Program and Richcraft Homes Ltd.

Ontario New Home Warranty Program and Donna G. Gourlay

Jacobs Sales & Service et al.v.Registrar of Motor Vehicle Dealers and Salesmen

Krzysztof Mazur and Registrar of The Consumer Reporting Agencies Under Section 14(1)(2) to the Consumer Reporting Act

NEWPORT LEASING LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING, Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Kirsten Hughes, Agent for and Representative of
Newport Leasing Ltd.

DATE OF HEARING: April 26, 2000

DECISION RELEASED: May 3, 2000 Hamilton

REASONS FOR DECISION

A hearing was held on April 26, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Mike Hughes (the "Applicant")
Motor Vehicle: 1996 Chev Van, Plate #866 8A7 (the "vehicle")
Date of Appeal: April 7, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 26, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

In response, the Applicant produced an order dated April 25, 2000, signed on behalf of the Licence Appeal Tribunal by Mr. Stuart Cork, Member.

This order was based upon a Motion, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's ground of appeal of exceptional hardship as a ground to be heard at a hearing to take place on April 26, 2000. On reading the exhibits and hearing submissions, the Tribunal found that the ground of exceptional hardship [section 50.2 (3) (d)] upon which the Applicant relied on the appeal did not apply by virtue of section 50.2 (4), as a previous order to impound under section 55.1 had been made with respect to another vehicle then owned by the Applicant.

The ground of exceptional hardship was dismissed, and did not form part of the hearing of April 26, 2000.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The owner appeals based on section 50.2(c) and (d).

- (c) Under the first ground the owner submits that he exercised due diligence by pulling motor vehicle records for all of its drivers including Ian McMillan. On December 8, 1999 the driver in question showed as licenced.

In support of the motor vehicle record check please find enclosed a letter from our insurance agent dated March 20, 1999.

- (b) It is submitted that under s.22(2) the board may consider subsections (a) (b) (c) as the owner will demonstrate that subsection (3) is satisfied. The resulting hardship is upon the owner of the vehicle and several other employees, that make us a crew, and would use that vehicle which is impounded.

Mrs. Kirsten Hughes began by informing the Tribunal that she was involved in running the business.

Mr. Ian McMillan, was the driver whose driver's licence was under suspension when he was pulled over by the police on the 28th of March 2000, at which time the vehicle was impounded. He had been hired by the Company in mid-April 1999. Mrs. Hughes advised the Tribunal that her husband interviewed prospective employees. She was unable to state if her husband asked the Applicants to show their driver's licences at the time of the interview.

It was not company practice to check the validity of employees' driver's licences until the company's insurance was due for renewal. In this case, the renewal date was December 8, 1999. Mrs. Hughes was sure that it was company practice to provide the insurance company with all employees' driver's licence numbers. The insurance company then checked the validity of all licences prior to renewing the Insurance Policy.

The Tribunal was provided with the copy of a letter dated March 30, 2000, signed by Nina Welch of W.R. McCallum Insurance Limited, which states that at the time Mr. McMillan's record was pulled on December 8, 1999, his driver's licence was valid. There was no reason for the insurance company to inform Mr. Hughes of any concerns regarding McMillan's driving record.

Mr. McMillan was driving for three and a half months before the incident occurred. The Applicant did not find it unreasonable to presume that the driver continued to have a valid driver's licence. Her question to the representative for the Registrar was that if the onus was on the company to be sure that all drivers had valid licences, how often should a company check the drivers' records to demonstrate due diligence?

The Applicant informed the Tribunal that the company was at its busiest between March and September. Things became very quiet during the autumn and stopped altogether during the winter. She emphasised that at the start of each season the staff were asked whether their driver's licences were in good standing.

The Applicant also expressed grave misgivings about the impoundment of the vehicle

for 90 days. The vehicle was leased, and she had no control whatsoever over the actions of any of Newport Leasing's other lessees. She was very upset that her company was being penalized for actions that were entirely out of her control, and accordingly requested that if the Tribunal did not find that her company had exercised due diligence, then a reduction of the impoundment order from 90 days to 45 days should be considered.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Ian McMillan.

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of ability impaired, suspension no. 0045070 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until 17 March 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor

vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the

relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The only issue to be considered in this appeal is that of due diligence. The grounds of appeal under section 50.2 (3)(c) of the Act requires that the Applicant show the Tribunal that Newport Leasing Ltd. exercised due diligence in attempting to determine that Mr. McMillan's driver's licence was not suspended at the time of the impoundment of the Applicant's vehicle.

The agent for the Applicant did demonstrate that the company owned by the lessee had made an effort to confirm the validity of the driving licence. The company did receive a letter from the insurance company stating that the driver's licence was valid on December 8 1999. The Applicant also advised that the company asks every employee whether their driver's licences are valid at the start of every season. However, it is clear that the company relied on the insurance company to verify Mr. McMillan's driver's licence. The grounds of appeal under section 50.2 (3)(c) of the Act requires that it is the responsibility of the owner to exercise due diligence. This responsibility cannot be delegated to a third party.

The Tribunal, therefore, finds that the Applicant has failed to establish that due diligence was exercised as required by the Act.

With respect to the Applicant's plea to reduce the period of the impoundment from 90 days to 45 days, it must be pointed out that the Tribunal has no jurisdiction under the law to make such a ruling on humanitarian grounds. Section 50.2 (5) of the Act states, "the Tribunal may confirm or set aside the order to impound," and here the Act's requirements to stipulate a 90 day suspension are not in dispute.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

Malcolm Fealing, Presiding Member

RELEASED: *April 25, 2000*

GALKOWSKI

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MARIUSZ GALKOWSKI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 13th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MARIUSZ GALKOWSKI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Mariusz Galkowski, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 26th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

And To: Licence Appeal Tribunal
1 St Clair Ave West
12th Floor
Toronto ON M4V 1K6

From: Mariusz Galkowski
626 Galloway Cres.
Mississauga ON L5C 3W1

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Mariusz Galkowski (herein after the "Salesperson") and the Registrar, *Motor Vehicle Dealers Act*, (herein after the Registrar, MVDA,) waive the requirement of a hearing and consent to an Order of the Commercial Registration Appeal Tribunal (herein after the "Consent Order") based on the following terms and conditions:

1. The Salesperson agrees, if he is charged in the future, under any law, to immediately notify the Registrar, Motor Vehicle Dealer's Act, of the charges laid against him.
2. The Salesperson agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Salesperson acknowledges that should he be convicted under any law, his registration will automatically be revoked.
4. The Salesperson agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership.
5. The Salesperson agrees not to be the final signatory on any sales contracts on behalf of the dealer.
6. The Salesperson agrees not to transfer his registration as a salesperson under the Motor Vehicle Dealers Act to another dealer without having obtained prior written consent of the Registrar to effect this transfer.
7. The Salesperson agrees that his registration will be automatically revoked if he provides any false or misleading information on any document or statement provided to the Registrar either orally or in writing.
8. The Salesperson agrees to provide a copy of this order to his employer.
9. The Salesperson acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the

future related to his financial circumstances and his honesty and integrity.

10. The Salesperson hereby acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action against him, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that might be alleged to have occurred in the past or that may occur in the future.
11. The Salesperson acknowledges that should he breach any of the terms and conditions contained in this order, in whole or in part, the Registrar is directed to, and shall carry out the proposal to revoke, and the Salesperson's registration will automatically be revoked.
12. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Mississauga, this day of April 2000.

(Signature) Mariusz Galkowski

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.
Date:

SINGH, A

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ANGREZ SINGH

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 18th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ANGREZ SINGH

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Angrez Sign, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 28th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Angrez Singh
6023 Tillsdown Drive
Mississauga ON L5N 4M5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Angrez Singh (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, Motor Vehicle Dealer's Act, in writing of the charges against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer of the charges against him and to immediately give said notification, in writing to the Registrar.
3. The Applicant agrees, if he is convicted in the future, under any law, that his registration will automatically be revoked.
4. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
5. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
6. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
7. The Applicant agrees to give full disclosure of any information provided to the Registrar either verbally or in writing.
8. The Applicant agrees that he will only sell motor vehicles on behalf of the Dealer at the Dealer's registered premise or at a wholesale auction
9. The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
10. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.

11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.
14. The Applicant agrees to provide a copy of this order to his employer.
15. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of 2000.

(Signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

1290943 ONTARIO INC.

Appeal under section 50.2 of the Highway Traffic

**Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"),
from the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL:	MALCOLM FEALING Presiding member	
APPEARANCES:	KIM BEINTEMA Representative for the Registrar of Motor Vehicles 1290943 ONTARIO INC., Applicant ARNOLD J. MANS, Representative for the Applicant	
DATE OF HEARING:	March 30, 2000	
DECISION RELEASED:	April 5, 2000	Toronto

REASONS FOR DECISION

A hearing was held on March 30, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	1290943 Ontario Inc. (the “Applicant”)
Motor Vehicle:	1990 Ford COF (the “vehicle”)
Date of Appeal:	March 13, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the “Board”) (which as of April 1, 2000 is known as Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Board on March 30, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Board (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

FIRST AS PART OWNER OF 1290943 ONT. INC. I SEND ALL OF OUR EMPLOYEES DRIVERS # TO OUR INS. COMPANY WHO IN TURN CHECKS THE DRIVER'S RECORD AND REPORTS BACK TO US SINCE NOTHING CAME BACK ON ANY OF OUR DRIVERS WE ASSUMED THAT THEY HAD CHECKED AND EVERYTHING WAS FINE. ALSO SINCE OUR RATES STAYED THE SAME. WE ASSUMED THAT THEY HAD CHECKED AND EVERYTHING WAS FINE.

SECOND NOW BECAUSE OF THE STUPIDTY OF OUR DRIVER WHO HAS BECAUSE OF THIS BEEN FIRED THERE ARE 5 EMPLOYEES WHO WILL HAVE TO BE LAID OFF TEMPORORLY BECAUSE WE HAVE NO CREW CAB PICK UP TO TRANSPORT THEM FROM JOB TO JOB. WHAT IRKS ME IS THAT THE DRIVER IS NOT ARRESTED BUT SENT ON HIS WAY YET ONE OF FORMING PICK UPS IS TAKEN FOR UP TO 45 DAYS CAUSING HARDSHIP FOR 5 EMPLOYEES WHO ARE NO WAY RESPONSIBLE FOR THE ACTION OF ONE IRRESPONSIBLE EMPLOYEE.

Mr. Arnold Mans, co-owner of 1290943 Ontario Inc. provided the following evidence.

When an individual is employed by the company, he is required to fill out a personal tax credit. This document, along with the individual's driver's licence number is then forwarded to the Company's Insurance company which checks the prospective employees driving record. Mr. Mans advised that the insurance company never advised him that there was a problem with the driving record of Robert A Smith, the gentleman who was driving the automobile, a Ford Marquee, plate number 937 OER on the 7th day of March 2000, the day on which the automobile was impounded.

Mr. Mans also admitted that he, personally, never made an effort to verify the status of Mr. Robert A. Smith's driving record.

With regard to the vehicle in question, Mr. Mans advised that that this was no ordinary automobile. The vehicle was customized with a 'form release' costing approximately \$6,000.00. This form release is used to spray a soapy liquid on the wooden frames surrounding an excavated basement prior to pouring concrete. The liquid spray prevents the concrete sticking to the wood and is essential to this kind of work. At present the company owns four such trucks, including the one that has been impounded. Mr. Mans testified that the company is fully booked and that his crews pour four house-basements per day. Each truck is normally fully utilized for the entire day.

For the last three weeks, he has been able to use the remaining three trucks to fulfil his contractual obligations because the work has been concentrated in the Hamilton area. However, beginning next week, the trucks will be required in such diverse places as 400 and Finch, Toronto, etc. and therefore he will be unable to fulfil his obligations.

If the truck is not returned business will be lost. He now has a contract to pour fifteen basements within the next three weeks, and he is quite certain that if the builder has to give this work to his competitors, he will not only lose the immediate business, but he will also lose continuing business from the contractors. There are only so many contractors in the Hamilton area, and competition for work among concrete pouring companies is fierce. When asked whether he could get help from other companies, he admitted that he did work closely with some of the companies, and that they helped each other out occasionally. However, with fifteen basements to be poured within the next three weeks he would not be able to get sufficient help.

His main concern, he stated over and over again was not for himself but for the five crew- members who normally work with the impounded vehicle. He could, as owner, juggle the crews in order that each person could work four days per week, but he went on at length to explain that he had tried this in the past and that it had not worked. He was adamant that he would not try it again.

The laid off staff would experience exceptional hardship he believed because he might lose some of the builders from whom he received regular business, and because the work was specialized. The crew would not very easily obtain alternative employment.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Robert Smith;

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 31, 2000.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been

made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or

- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

Issue of due diligence

The evidence established that the owner of the motor vehicle relied solely on the Insurance Company for verification that Mr. Robert Smith's driver's licence was not suspended. The grounds of appeal under section 50.2(3)(c) of the Act require that the Applicant, in this case, 1290943 Ontario Inc., exercise due diligence in attempting to determine that Mr. Smith's driver's licence was not suspended at the time of the impoundment of the Applicant's motor vehicle. While giving evidence on behalf of the company, Mr. Mans admitted that he relied solely on the insurance company to verify Mr. Smith's records and that neither he nor his partner made any effort to verify the validity of the driver's licence.

The company could only state that it presumed that there was no problem with Mr. Smith's driver's licence because the insurance company did not make any comments about it, and because they did not increase their insurance premiums. The insurance company never provided written evidence to show that the driver's licence was in good standing. The Board finds that it is not the responsibility of a third party, such as an Applicant's insurance company, to perform the task of due diligence for the owner.

The Applicant has therefore failed to establish that he exercised due diligence as required by the Act.

Issue of exceptional hardship

In determining whether exceptional hardship will result from an order to impound under

section 55.1 of the Act, under Regulation 574, subsection 22(2), the Board shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

However, under Regulation 574, subsection 22(3), the Board may consider the criteria set out in clauses (2) (b) (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact will be a person ordinarily transported by the motor vehicle; and,
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2) (b) (c) or (d).

Mr. Mans' evidence, in the Board's opinion, clearly indicated that with respect to volume of work that was to be done, there was no alternative to the impounded vehicle. It was not possible to either go out and rent a similar vehicle, or have the use of a vehicle belonging to one of the other concrete pourers in the business.

He was at pains to stress that the loss would be upon the five crew members who were ordinarily transported by the motor vehicle. It was of no use going to the site without the vehicle because it was integral to the pouring of the concrete. They would have to be laid off. He also demonstrated, in the Board's opinion that the impact of the loss would be upon persons other than the person whose driving while his driver's licence was under suspension resulted in the order to impound the motor vehicle.

However, Mr. Mans did not prove exceptional hardship, because,

- a. for the past three weeks, he has been able to fulfill his obligations. He has been able to use three trucks to do the work of four. His staff have only been inconvenienced because they have had to drive to work in their own cars.
- b. He was unable to provide evidence that he would surely lose work from the contractors. He thought this might happen, but he had no proof.

- c. He also had no proof that the five crew members who would be laid off would suffer exceptional hardship. It is true that they may have to apply for Employment Insurance, by he could not say that they would not obtain adequate employment rather quickly. He admitted that there was little unemployment in the Hamilton area at present.

On the basis of this the Board finds that 1290943 Ontario Inc. has failed to prove exceptional hardship.

DECISION

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: *April 5, 2000*

1256795 ONTARIO LTD.

1256795 ONTARIO LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: STUART CORK, Presiding member
NORMAN MEALING, Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

1256796 ONTARIO LTD., Applicant

ROY TRAFFORD, Representing the Applicant

DATE OF HEARING: April 17, 2000

DECISION RELEASED: April 19, 2000 Toronto

REASONS FOR DECISION

A hearing was held on April 17, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: 1256795 Ontario Ltd. (the "Applicant")
Motor Vehicle: 1988 Chev Van, Plate # AFKH 951 (the "vehicle")
Date of Appeal: March 29, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the driver's licence was not under suspension as provided in section 50.2(3)(b) of the Act.

This matter came before this Board on April 17, 2000 and proceeded as an electronic hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing. The Respondent submitted copies of their submissions bearing original certification seals.

All documents were entered into evidence with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Board (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

WE ARE A CAR & TRUCK RENTAL COMPANY
THIS TRUCK WAS RENTED TO MARISA SEGOTA DR. LIC #S2231-51906-26016
02/10/16 AS THE SOLE DRIVER FOR DELIVERY PURPOSES, SHE STARTED

RENTING IT ON OCT 04/99 & CAME IN ALONE & RENEWED HER CONTRACT EVERY MONTH SHE HAS ALWAYS BEEN THE ONLY AUTH. DRIVER ON THE CONTRACT & THE INSURANCE. THIS VAN DOES NOT BELONG TO MARISA SEGOTA OR ROMEO SEGOTA

Mr. Trafford testified that Mr. Romeo Segota, the driver of the impounded vehicle, was the husband of the person who rented the vehicle from the Applicant. The Applicant had a one month rental agreement with Mrs. Maria Segota which specifically indicated that she was the intended driver of the vehicle, and that no one else other than her was to drive it. Mrs. Segota was found to have a valid driver's licence by the Applicant at the time of signing the rental agreement.

Mr. Trafford further testified that the Applicant had no knowledge of Mr. Segota. The Applicant does not dispute the fact that Mr. Segota was the driver of the vehicle at the time of the impoundment and that Mr. Segota's driver's licence was then under suspension.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Romeo J. Segota;

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 17, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(b).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized Snow Vehicles Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section,

is thereupon suspended

42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 736 of the *Criminal Code* (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the

regulations; or

- (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

APPLICATION OF LAW TO FACTS:

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

The Applicant has appealed the impoundment order on the grounds that the driver's licence of the driver of the vehicle at the time of the impoundment was not under suspension, in accordance with Section 50.2(3)(c). In order for the Applicant to meet the onus under this section, the Applicant must establish that Mr. Segota's driver's licence was not under suspension at the time of the impoundment.

The undisputed evidence heard at this hearing was that Mr. Segota was the driver of the vehicle at the time of the impoundment, and that his driver's licence was then under suspension.

The Applicant has argued before the Board that the driver's licence of the intended driver of the vehicle, Mrs. Segota, whom the vehicle had been rented to, was not under suspension at the time of the impoundment. Though this fact was not in dispute, the Board finds that this evidence is not relevant, as the Board is precluded from considering other factors not arising from or directly related to the specific criteria under Section 50.2(3)(c).

The Board therefore finds that there is no evidence before it that would support the Applicant's ground of appeal that the driver's licence of the vehicle at the time of the impoundment was not then under suspension.

DECISION:

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Norman Mealing, Member

RELEASED: April 19, 2000

192-DRUG

MED/00/192

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF
HEARING: March 21, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Suspension Appeal Board (which as of April 1, 2000 is known as Licence Appeal Tribunal) by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – dated February 14, 2000
- b) Exhibit # 3 Ministry of Transportation - Report of Examination of Visual Functions – received March 20, 2000

By the Respondent:

- a) Exhibit # 2 Ministry of Transportation submissions – tabs 1 – 21
- received February 18, 2000

PRELIMINARY MATTERS

The respondent submitted a "File Summary".

The Applicant's agent submitted a copy of the Report of Evaluation of Visual Functions dated "00 03 20". As the Respondent did not proffer an objection, the Report of Evaluation of Visual Functions was entered, in evidence, on consent, and filed as Exhibit # 3.

FACTS

The Applicant is appealing the suspension of his driving privileges effective "98 12 26" as per Exhibit # 1.

The Applicant came to the attention of the Ministry as a result of an unsolicited letter, dated October 2, 1998. Physician # 1, a Medical Consultant with the Workplace Safety & Insurance Board, informs the Ministry of Transportation (the "Ministry") that the Applicant *"... underwent insertion of a dorsal column stimulator and takes the following medications:*

"Dilaudid 8 mg tablets one two to tablets every four hours, Tylenol # 3 eight to ten per day.

In view of the medication and in particular the use of the dorsal column stimulator I do not consider it safe for him to operate a motor vehicle..." (Exhibit # 3 Tab 1).

On February 12, 1999, Physician # 2 writing under the letterhead of the Medical Centre, suggests Physician # 1's conclusions were reached *"...in the course of a 15 minute assessment..."* Physician # 2 goes on to refute Physician # 1's findings by asserting: *"...the Dilaudid and the Tylenol 3, ... have been prescribed by me on a regular basis for some time, the information contained in the last paragraph of the letter is inaccurate..."* (Exhibit # 3 Tab 4).

Physician # 2 further advises the Ministry that the Applicant *"... no longer uses the dorsal column stimulator"* (Exhibit # 3 Tab 4).

A Director of Sales & Marketing of Medtronic of Canada Ltd., in a letter dated January 18, 1999, indicates that: *"... there are thousands of patients around the world that have Medtronic's Spinal Cord Stimulation systems implanted that have been able to return to many of their normal activities, including driving motor vehicles. The only information Medtronic provides in its manuals regarding the use of its Spinal Cord Stimulation systems is that such systems should be shut off while operating motor vehicles. Patients can easily turn their systems off... in the Applicant's case with an external transmitter. To the best of its knowledge Medtronic is not aware of any patient that has been deprived of driving privileges by a state or federal motor vehicle licensing agency because of the implantation of one of our neurostimulation devices..."* (Exhibit # 3 Tab 7).

MEDICAL ADVISORY COMMITTEE CASE STUDY dated April 12, 1999 recommends *"OK WITH A DRIVING ASSESSMENT - IF OK PER SUB. ABUSE.....REQUEST*

ASSESSMENT FROM AN ADDICTION SPECIALIST INCLUDING ANY ABUSE OF PAIN - MEDICATION... (Exhibit # 2 Tab 8).

By letter dated April 19, 1999, the Ministry advised the Applicant that in order *"...to determine whether you can safely operate a Class 'AB' vehicle we require an up-to-date detailed assessment from an addiction specialist including reference to any abuse of pain medication..."* (Exhibit # 2 Tab 9).

Physician # 2 writes to the Ministry on behalf of the Applicant. In a submission made on May 3, 1999, Physician # 2 encloses a consultation letter from Physician # 3 (Exhibit # 2 Tab 10).

In a report dated June 30, 1999, Physician # 3 asserts: *"... I talked to him at length about the use of medications. I do think he is using his medication wisely... I do not think that this man is addicted to medications. I think that he in fact does have chronic nonmalignant pain..."* (Exhibit # 2 Tab 11).

The Applicant was prescribed the following medication by Physician # 3: *"Codeine Contin 50-100 mg q. 12 h (Rx 50 mg x 100), Neurontin 400 mg q. 12 h (Rx 30) and Nitrazepam 20 mg q.h.s., p.r.n. (Rx 10 mg tablets x 20)"* (Exhibit # 2 Tab 11).

By letter dated July 12, 1999 the Ministry advised the Applicant that in order *"...to determine whether you can safely operate a Class 'AB' vehicle we require a satisfactory driving evaluation from a rehabilitation centre. An appointment can be arranged through your family physician..."* (Exhibit # 2 Tab 12).

Physician # 3's letter addressed to the Ministry on July 28, 1999 emphasizes that the Applicant *"... is taking his medication wisely and ...is capable of driving... and ...a psychological assessment would not be required for the purposes of driving..."* (Exhibit # 2 Tab 13).

MEDICAL ADVISORY COMMITTEE CASE STUDY dated September 30, 1999 reconfirms the need for *"...a...driving assessment..."* (Exhibit # 2 Tab 14).

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS dated *"November 10, 1999"*, completed by Driver Improvement Counsellor #1, details the Applicant's history as explained by the Applicant. The Applicant discloses that he has had *"... a column stimulator implanted in 1996 to take away the pain in his legs...had accident in 1977, injuring his back and requiring surgery... had continual pain in his right leg since the accident...sees family doctor every Monday.... Physician # 3... three times this year"* (Exhibit # 2 Tab 16).

At the hearing and without objection from the Ministry's representative....

Exhibit # 2 Tab 17 is a Ministry of Transportation Report Examination of Visual Functions form dated *"99 11 25"* signed by Physician # 4.

By letter dated March 1, 2000, the Ministry advised the Applicant that he *"...no longer meets the standard for a classified licence.... licence is being downgraded to a class "G". Please note that any consideration for re-instatement will be given to a class "G" licence only..."*. Before consideration of reinstatement of a class AB licence the Ministry

requires a new examination by an “...*optometrist or ophthalmologist that confirms visual acuity meets the legislated standard of no less than 20/30 in the better eye and 20/50 in the weaker eye and a horizontal reading of 120 degrees in each eye*” (Exhibit # 2 Tab 20).

At the hearing and without objection from the Ministry’s representative, the Applicant introduced a new eye examination report showing without corrective lenses, the Applicant’s eyes both showed 20/100 for visual acuity by Snellen Rating and with corrective lenses 20/20 for the left eye and 20/50 for the right eye. The Applicant also had a horizontal visual field of 120 degrees in each eye.

Exhibit # 2 Tab 21, a Ministry of Transportation driving Record for the Applicant since 1969 indicates no offences.

At the hearing, the Respondent, relied on and reiterated the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 21, and on the text of the written summations.

The Applicant was represented by the Agent. During examination in chief by his Agent and cross-examination by the Respondent, the Applicant testified that it has been approximately one year since he has used the spinal stimulator. He continues to take the Neurontin and Tylenol 3, but he is not addicted to this medication.

The reason that the Applicant has not obtained an assessment from an addiction specialist is that he found the cost prohibitive. He will agree to see someone if the \$800.00 cost is incurred by someone else, as he cannot afford it himself. Further, the Applicant attested that he has been told by “...*three doctors that no assessment is needed...*”.

The Applicant spent seven years in service with the Toronto Transit Commission (“TTC”) and last drove for the TTC in 1996. The TTC has a strict policy and all employees must undergo regular medical examinations.

Before driving for the TTC, the Applicant was a truck driver for 12 years, driving between Canada and the US. During this time and later with the TTC, the Applicant never had any tickets or any accidents. His employers have never complained about his ability to drive.

ISSUES

Should the decision of the Registrar to suspend the Applicant’s licence be confirmed, modified or set aside?

LAW

Regulation 340/94, Section 14 states:

14. *An applicant for or a holder of a driver’s licence must not,*

- (a) *suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and*
- (b) *be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.*

Regulation 340/94 section 17 states:

17(1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E, or F driver's licence are that the applicant or holder,

....

- (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
- (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.

Section 47(1) states:

- 47. (1) Subject to section 47.1, the Registrar may suspend or cancel,
 - (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
 on the grounds of,
 - (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50. (1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.

(2) The Board may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

Section 47(1) unquestionably empowers the Registrar to “...suspend or cancel” a driver’s licence for “any...sufficient reason...”. The Registrar originally suspended the Applicant’s driver’s licence, upon receipt, in October of 1998, of an unsolicited letter from Physician # 1, a Medical Consultant with the Workplace Safety & Insurance Board. Physician # 1 informs the Ministry of her concerns about the Applicant’s ability to “...operate a motor vehicle...” due to the Applicant’s use of “... a dorsal column stimulator...” and his medication intake: “Dilaudid 8 mg tablets one two to tablets every four hours, Tylenol # 3 eight to ten per day” (Exhibit # 3 Tab 1).

The Board finds that the Ministry acted properly and in accordance with the Regulation, at the time of the suspension.

The Board notes that in support of its continued denial to reinstate the Applicant’s driving privileges, the Registrar has required the Applicant to satisfy several different demands.

In the Letter of December 4 advising the Applicant of the suspension, the Registrar suggests that “...we will be pleased to reconsider your case upon receipt of a satisfactory medical report...” (Exhibit # 3 Tab 2).

The Applicant complied by requesting his physician, Physician # 2 to write a letter to the Registrar. In his letter dated February 12, Physician # 2 confirms that the Applicant “... no longer uses the dorsal column stimulator ...I would ask you to reconsider ... and review the decision to remove the Applicant’s licence...” (Exhibit # 3 Tab 4)

Not finding the information sufficient, a “Driver Review & Control Analyst” requests: “... a detailed assessment from a specialist in chronic pain referencing... current status and treatment...” (Exhibit # 3 Tab 5).

As requested, a detailed assessment from Physician # 3 was submitted. (Exhibit # 3 Tab 6).

Upon review of Physician # 3’s report, the Medical Advisory Committee assumed the Applicant has a substance abuse and requested an “... ASSESSMENT FROM AN ADDICTION SPECIALIST...” (Exhibit # 3 Tab 8).

In a letter dated May 3, 1999, Physician # 2 encloses a letter from Physician # 3 stating that “...I believe that this may obviate the necessity of going through a formal consultation on the subject of addiction...” (Exhibit # 3 Tab 10).

In a report received by the Ministry on July 08, 1999, Physician # 3 responded to the Ministry’s concern of substance abuse by confirming that he does not “... think that this man is addicted to medications ...” (Exhibit # 2 Tab 11).

In response to a subsequent request from L. Walker, Analyst, Driver Review Control , Physician # 3 reiterated and reinforced his position by providing the Ministry with a second letter dated July 28, wherein he asserted that the Applicant “... is taking his medication wisely and ... is capable of driving... and ...a psychological assessment would not be required for the purposes of driving....” (Exhibit # 2 Tab 13).

It is evident, from reviewing the preceding testimony, that the Applicant has the unswerving support of his physicians. Both Physician # 2 and Physician # 3 have submitted several reports to the Ministry assuring that they have no doubts that the Applicant is able to safely operate a motor vehicle.

To substantiate his position, the Applicant has also provided a letter from the manufacturer of the spinal stimulator, Medtronic of Canada Ltd. A Director declares that: *"patients.... that have Medtronic's Spinal Cord Stimulation systems implanted have been able to return to many of their normal activities, including driving motor vehicles"*. The only caveat is that the stimulator be turned off during driving. The Applicant testified that he was aware of this restriction (Exhibit # 2 Tab 7).

The Board notes in the second last paragraph of page four of the Respondent's File Summary: *"... the Ministry of Transportation may only consider the Applicant for a class "G" driver's licence upon receipt of a satisfactory driving assessment from rehabilitation centre. This is a result of the vision standards found in section 17(j) of Regulation 340/94..."*

Section 17 (j) of Regulation 340/94 applies to:

"...an applicant.... of a Class A, B,C,D,E, OR F driver's licence..."

The Board notes, that after launching the Appeal, received by the Board on February 18, 2000, the Applicant was informed by the Ministry, by letter dated March 1, 2000 that his 'AB' driver's licence was being *"...downgraded ...for records purposes only, to a class 'G' licence..."*. This action apparently taken as a result of a Report of Examination of Visual Functions received by the Ministry on *"DEC 01 1999"*.

The new eye examination report filed by the Applicant at the hearing indicated that without corrective lenses, the left and right eyes showed 20/100 for both eyes for visual acuity by Snellen Rating. With corrective lenses, the left eye was 20/20 and the right eye was 20/50 by Snellen Rating. The minimum requirement under section 17(j) of Regulation 340/94 is 20/30 in the better eye and 20/50 in the weaker eye, with or without corrective lenses. The Applicant met this qualification with corrective lenses.

The Registrar also relied on Section 14 of Regulation 340/94.

The applicable clause of Section 14 states that:

"An applicant for a holder of a driver's licence must not,

- a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely..."

After evaluation of the evidence in its entirety, the Board accepts Physician # 2 and Physician # 3's opinions about the ability of the Applicant to safely operate a motor vehicle in spite of his medical condition with respect to clause 14 of Regulation 340/94.

The Applicant meets the qualification for a holder of a Class A, B licence under section 17(j) under Regulation 340/94 on the basis of the medical report the Applicant filed at the hearing. The Applicant's impeccable driving record further substantiates this finding.

The Board finds that the Respondent has not proven that the Applicant is currently suffering from a medical condition, which is likely to significantly interfere with his ability to drive a motor vehicle as described by section 14(a) or that he fails to meet the requirements of section 17(j) of Regulation 340/94 of the HTA.

DECISION

Upon the application by the Applicant to appeal the decision dated December 26, 1998 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Board, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE BOARD pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside and the Applicant's driver's licence be reinstated.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: April 4, 2000

PETER ADAMS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: BRIAN METSON, Counsel, representing the Applicant

LUCY McSWEENEY, Counsel, representing the Ontario
New Home Warranty Program

*ALLAN BRUNO ZUTAUTAS, agent, representing the Added Party,
Craftsman Homes & Cottages Limited*

DATE OF HEARING: February 14, 15, 16, 17 and 18, 2000 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as Licence Appeal Tribunal) (the "Tribunal") from a written decision of the Ontario New Home Warranty Program (the "Program") dated July 22, 1999 in which decision the Program denied the claim of the Applicant, Peter Adams ("Adams").

BACKGROUND:

The decision of the Program which is now appealed by Adams states as follows:

DECISION

IT IS THE DECISION OF THE ONTARIO NEW HOME WARRANTY PROGRAM
that your claim for compensation is denied, for the reasons set out below.

FACTS

1. In the spring of 1993, you entered into an arrangement with Craftsman Homes and Cottages Ltd. and Craftsman Construction Services Ltd. (collectively referred to as "Craftsman"), whereby Craftsman undertook to supply work and services relating to the construction of a home on your property. The arrangement was partly in writing and partly oral. The arrangement included a Sales Contract signed and dated May 11, 1993 for a pre-fabricated home package and site erection services and supervision services at a price of \$40,276.00. At the time of the Sales Contract, it appears that you verbally agreed to purchase additional material and services. There is no written contract for the

additional items, but they are referred to in a 3 page, hand-written document dated May 11) 1993 entitled "Total Cost Review". This document suggests that you purchased a foundation package for \$5,000 and optional home package for \$9,399.00, bringing the total of the 'home construction costs' to \$54,675.00, including GST.

2. The "Total Cost Review" also appears to contain an estimate for 'Finishing Allowances' in the amount of "approx. \$25,000 + or -- GST". It is not clear whether there was any firm agreement by you to purchase those services from Craftsman.
3. The "Total Cost Review" also contains a summary of "Land and Associated Costs", totaling \$74,000. This includes \$58,000 for the cost of the land, which was not part of the arrangement with Craftsman and was not paid to Craftsman. The balance, being \$16,000, includes what appear to be estimates for engineering and development fees, driveway rough-in, septic system, water, tree removal and water pipe. It appears that Craftsman was to arrange for these items on your behalf and act as a conduit for payment.
4. On May 20, 1993, Craftsman enrolled the home with ONHWP.
5. During the course of construction, you requested numerous changes, many of which are not documented. The changes appear to include increased square footage, siding upgrades, and window upgrades.
6. It appears, in the summer of 1993, you directly hired or contracted with a number of suppliers and trades, including the cabinet supplier, the hardwood and ceramics suppliers, and the fireplace and chimney supplier.
7. You allege that, by September 16, 1993, you advised Craftsman that it was close to the numbers agreed to for the whole project. You also allege that there had been an overpayment of \$5,650, which was to be applied to future items, such as front windows.
8. On December 18, 1993, Craftsman ceased construction. There is a dispute as to the reason for the cessation. Craftsman claims you fired him. You claim that you merely refused to pay him any additional money, and told him to finish construction with what you had already paid. At that time, the exterior of the home had been completed with the exception of the installation of a door to the crawl space, some vinyl siding to the exterior, certain windows and screens. The septic system had been installed and a driveway had been roughed in. As to the interior, the insulation and vapour barrier had been installed; the drywall was in place and one coat of compound had been applied, the casings, baseboards and door jambs had yet to be installed, plumbing had been roughed in, but no plumbing fixtures had been installed, - electrical wiring had been roughed in and receptacles installed, but no electrical heaters had been installed; and the floors were bare plywood.
9. In January of 1994, Craftsman asked ONHWP to cancel the enrolment because you were completing construction of the home and thus acting as your own builder.
10. You claim that, prior to the termination of construction, you paid a total of \$98,274.57. Of this sum, you paid \$59,608.60 (including the 'overpayment' of \$5,650.00) to Craftsman and \$38,665.97 to other suppliers of services or materials. You also claim that, after the termination of Craftsman, you paid either \$6,147.83 (according to your "Brief of Damages") or \$7,696.67 (according to your "Calculation of Damages"). You are also claiming various amounts for non-completion costs, such as lien payments, hydro costs, and firewood.
11. You completed the home without notifying ONHWP that you were doing so. Consequently, ONHWP had no opportunity to conduct an inspection of the premises.
12. After leaving the site, Craftsman filed a lien on the property and commenced an action against you under the Construction Lien Act. You defended and counter-claimed. By order dated July 25, 1996, the court dismissed Craftsman's action and granted summary judgment on your counterclaim against Craftsman for \$35,588.13, plus pre-judgment and post-judgment interest. It is not known whether you attempted to collect on the judgment, and if so, whether you were successful.
13. Bolsover Sand and Gravel Limited ("Bolsover") filed a lien and commenced an action against you, for payment of \$16,098.16 worth of materials and services to the site. Bolsover later obtained judgment against you in the amount \$9,261.66, which is the holdback that you were required to maintain under the Construction Lien Act. You have not produced any evidence that you paid this amount.
14. You were also sued by Deardon, Stanton and Stringmen ("Deardon"), apparently for engineering fees for services rendered in designing the septic system. You have not provided the pleadings or any judgment in that action. You have produced a cheque payable to Deardon dated May 9, 1997 in the amount of \$2,598.74. It is not clear whether this payment was made under a judgment or a settlement.
15. In August 1994, 014FIWP contacted you and Craftsman regarding the cancellation of the enrolment.

You and Craftsman's principal attended a meeting with ONHWP on September 8, 1994 to discuss the matter and to review certain documents. You did not provide written notice of claim to ONHWP. Nevertheless, on October 18, 1994, ONHWP issued a Decision Letter stating that the Act did not apply to your home, since Craftsman did not fall within the definition of 'vendor' or 'builder' in the Act. You then requested a hearing before the Commercial Registration Appeal Tribunal (hereinafter referred to as the "Tribunal").

16. In 1997, the Tribunal held a hearing to determine whether the Act applies to your home. You and ONHWP agreed that the Tribunal would address solely this threshold question. If the Tribunal held that the Act applied, you and ONHWP would attempt to settle the claim for financial loss. If the parties could not settle the claim, then ONHWP would issue a decision letter under Section 16 of the Act, which you could appeal to the Tribunal.
17. By Reasons for Decision and Order dated March 23, 1998, the Tribunal held that Craftsman was a "builder" as defined in the Act and that the Act applied to the home.
18. You subsequently submitted a "Brief of Damages" to ONHWP for both breach of contract and completion costs. You have also submitted a document entitled "Adam Calculation of Damages".

REASONS

1. It is not clear whether you are claiming under section 14(l)(a) or (b) of the Act. Hence, we have assessed the claim under both subsections. These subsections provide as follows:
14. (1) Where
 - (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Financial Loss Claim under Section 14(l)(b)

2. In order to qualify under subsection (b), you must show at least that:
 - A contract was entered into with a vendor for the provision of a completed home.
 - The vendor failed to complete the home through no fault of yours.
 - Payments were made in accordance with the terms and conditions of the purchase agreement.
 - You paid more for the total construction of the home than you would have paid if the vendor had completed the home pursuant to the contract.
3. You have not established that Craftsman failed to perform the contract within the meaning of section 14(1)(a). We have conflicting information as to whether you told Craftsman to stop work. It is clear that Craftsman was willing to continue work if you continued to pay him, but that you refused to make any further payments to Craftsman for future work and materials. You claim that this was because Craftsman had exceeded what you expected to pay. However, there was no firm contract price for the entire home. The only firm amount was \$54,675.00, which included the shell package, the foundation and the labour package. The amount for the foundation was subsequently increased due to site conditions. The figure provided for the finishing is described as an "allowance", which means that if the costs exceeded the allowance, you would be required to pay the difference. This is reinforced by the word "approx." before the figure. The figure given under the heading "Land and Associated Costs" likewise appears to be an estimate. Some of the individual figures were subsequently increased due to municipal requirements and site conditions. There is nothing in the documents or in the conduct of the parties to prove that this was a fixed price contract. Since there was no firm contract price, you have not established that there was a cost overrun. Even if there was such a cost overrun, it does not appear that it would be of such a magnitude to constitute a fundamental breach of contract so as to entitle you to terminate the contract.
4. Alternatively, even if Craftsman did fail to perform the contract, you have failed to establish that

the amounts claimed by you constitute a financial loss resulting from Craftsman's non-performance.

5. ONHWP's position with respect to each of the items in your Calculation of Damages, annexed as schedule "A" hereto, is as follows:

AMOUNT	DESCRIPTION	REASON FOR DISALLOWANCE
\$5,650.00	Overpayment	*The contract did not require this payment. *This payment was not caused by the alleged failure to perform the contract. The payment was made as the result of a mutual error by both parties, which preceded the termination of construction by several months.
\$1,328.00	Cash advance	*There is no evidence that such a payment was in fact made to Mr. Zutautis. You have provided a promissory note, but no evidence that you actually advanced those monies to Mr. Zutatis. Instead, it appears that this amount was paid to the window supplier *Even if you did in fact advance cash to Mr. Zutautis, it was not required by the contract and hence was not caused by the alleged failure of Craftsman to perform the contract to build the home. Rather, it is the result of the breach of the separate loan agreement between you and Mr. Zutautis.
\$15,749.28	Bolsover Judgment	*This payment was not made as a result of the alleged failure to perform the contract for the home. It was made as the result of your non compliance with the holdback provisions of the Construction Lien Act. *Alternatively, you failed to mitigate this loss by complying with the holdback requirements under the Construction Lien Act.
\$2,598.74	Dearden and Stanton	*We have not been provided with a copy of the judgment, so we are unable to verify its existence or its content. *The payment was not the result of the alleged failure to perform the contract for the home. It appears that your payment was in relation to the invoices dated June 25, 1993 and October 26, 1993 from the engineering firm. The invoices are addressed to you rather than Craftsman. It also appears from a letter dated October 26, 1993 that the engineers reported directly to you rather than to Craftsman. Accordingly, it appears that there was a direct contract or retainer between you and the engineering firm. *Alternatively, even if there was no contract between you and the engineering firm, it appears that the engineering firm did render the services described in the invoices. Hence, you received the benefit of those services.
\$1,000.00	Extra Hydro	*You have not provided any evidence that the contract between you and Craftsman required the latter to reimburse you for hydro use. Alternatively, you have not provided any evidence that you actually incurred such costs.
\$420.00	Firewood	*You have not provided any evidence that the contract between you and Craftsman required the latter to reimburse you for firewood. Further, you have not provided any evidence that

\$105.94	Heating timer	this loss, if any, was caused by Craftsman's alleged failure to perform the contract to build the home. Alternatively, you have not provided any documentation to substantiate the amount. *You have not provided any evidence that the contract between you and Craftsman required the latter to reimburse you for the timer. *Further, you have not provided any evidence that this loss, if any, was caused by Craftsman's alleged failure to perform the contract to build the home.
\$3,103.54	Siding	*You have provided an invoice from "Boss", but you have not provided a cancelled cheque, receipt or other evidence of payment of the invoice.
\$500.00	Sanding	*You have provided a cheque payable to "Bin Break", but you have not provided any contract, invoice, work order or other document that describes the services and/or materials provided.
\$400.00	Stairs	*You have not provided any documentation to substantiate this claim or the amount of the claim.
\$751.00	Screens and storm door	*You did not actually install these items, since you changed the plans regarding these items. You did provide an estimate of what these items would have costs if they had been installed in accordance with the Craftsman contract. However, you have not established that this estimate exceeds what it would have cost you if Craftsman had completed the home.
\$400.00	Insulation + drywall	*You have not provided any documentation to substantiate this claim or the amount of the claim. Alternatively, you have not shown that this amount exceeded what it would have cost you if Craftsman had completed the home.
\$400.00	Clean up	*You have not provided any documentation to substantiate this claim or the amount of the claim.
\$2,142.13	Electrical	*The electrical work was one of the items included in the Finishing Allowance of "approx. \$25,000 + or - GST", so there was no firm price. Consequently, you have not established that you paid more for this item than you would have paid if Craftsman had completed the home.

6. You completed the home without prior notice to ONHWP and thus deprived ONHWP of the opportunity inspect the home.
7. In the alternative, even if you were able to establish the completion costs claimed by you, and that they exceeded the total payable under the Craftsman contract, the maximum allowable would be the greater of \$5,000.00 or 2% of the contract price, pursuant to s.6(6) of O.Reg. 892. Since there was no contract price, the only available limit would be \$5,000.

Breach of Warranty Claim under section 14(1)(b)

8. In order to make a claim under subsection (b), you must establish, at a minimum, that
 - The warranties commenced.
 - You provided written notice of each item in your claim within the applicable warranty period.
 - The vendor breached one of the warranties set out in section 13 (1) of the Act or in Regulation 892.
 - You suffered damages as the result of the breach(es) of warranty.

9. You have not established that you have a cause of action for breach of warranty against Craftsman. The warranties commence upon the date on which the vendor completes the home for the owner's possession, pursuant to section 13(3) of the Act. Craftsman did not complete the home for your possession, since you terminated your arrangement with Craftsman. Hence, you are not eligible to make a claim under this subsection.
10. Alternatively, even if the warranties did commence and were breached by Craftsman, the items claimed by you are not valid, for the same reasons set out in paragraphs 5, 6 and 7 above.

LEGISLATION APPLICABLE TO THIS MATTER:

At the hearing of this matter, Adams through his counsel confirmed that his claim was based on section 14(1)(a) of the Ontario New Home Warranties Plan Act (the "Act") and not on section 14(1)(b) of the Act.

Section 14(1)(a) of the Act states as follows:

14.(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Section 6 of Regulation 892 to the Act which deals with the limits of liability of the guarantee fund states as follows:

6(1) A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June 1988, is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

6(7) Liability in respect of the cost of completion of a home is limited to 2 percent of the sale price of the home or \$5,000, whichever is the greater. R.R.O. 1990, Reg. 892, s.6(5-7).

THE EVIDENCE:

The only persons to testify at the hearing before the Tribunal were Adams, Jim Fortune of the Program and Allan Bruno Zutautas who represented Craftsman Custom Homes & Cottages Limited and Craftsman Construction Services Inc.

Adams purchased land being Lot 4 on Plan 1294 in Orilla Township, Ontario for the sum of \$58,000.00., and wished to have a home constructed on the lot. Adams had been introduced to Allan Bruno Zutautas ("Zutautas") by a real estate agent and discussions ensued between Adams and Zutautas with a view to having a residential home constructed on the lot.

Prior to entering into a contract in regard to the construction of the home, Adams and Craftsman Homes & Cottages Limited executed a written document titled DEPOSIT FORM which had been prepared by Craftsman on its letterhead (Exhibit 4, Tab 1). The

date of the execution of this form was February 13, 1993. This form was addressed to Adams and read as follows:

1. At this time, a deposit made out to Craftsman Homes & Cottages Ltd. is required to proceed with Architectural Drawings and to obtain Building Permits. Our standard Deposit Fee for this service is \$3,750.00 and will be deducted from your shell package price when ready to proceed.
2. Upon receipt of this deposit and a copy of the survey of the existing land to be built on, Craftsman will do the following:
 - (a) Obtain Health Unit Approvals (when required)
 - (b) Provide a plot plan
 - (c) Prepare working drawings to obtain Building Permits

NOTE: Applicable fee for permits, land development by City, Town or Municipality, health unit approvals and survey are a normal part of any construction project. These costs plus any special engineering requirements (if required by any of these authorities) are payable by the customer, directly to the appropriate areas when fees are known.

On February 13, 1993, Adams paid the sum of \$3,750.00 as required by the Deposit Form.

On May 11, 1993, Adams and Craftsman, represented by Zutautas, entered into a written "SALES CONTRACT". In that contract, Adams agreed to purchase from Craftsman materials and site erection services in respect of a 1680 square foot home with slate vinyl siding.

Accordingly to the Sales Contract, the price of the home was as follows:

PACKAGE PRICE (materials)	\$30,912.00
ADDITIONS: 1) Loft area up to 576 sq. ft.	2,016.00
2) Roofed and screened Porch Area 288 sq. ft.	<u>4,896.00</u>
	37,824.00
Plus G.S.T.	<u>2,452.00</u>
	40,276.00
RECEIVED DEPOSIT	3,750.00
MANUFACTURING DEPOSIT	<u>13,291.00</u>
BALANCE	<u>23,235.00</u>
 SITE ERECTION	 6,000.00
GOLD SEAL PACKAGE	2,784.00
G.S.T.	<u>615.00</u>
	\$9,399.00

The total payable under the Sales Contract was \$49,675.00. The Gold Seal Package was essentially for site erection services and supervision services by Craftsman from the beginning until the end of the contract. This supervision included Zutautas finding the trades and supplies of materials for Adams if and when required.

On May 11, 1993, Adams paid the "manufacturing deposit" of \$13,291.00 referred to in the Sales Contract.

On that date, Zutautas also presented Adams with three pages of handwritten notes in the handwriting of Zutautas. These three pages accompanied the Sales Contract but do not bear the signature of either party to the Sales Contract.

Page 1 of the three pages of notes reads as follows:

TOTAL COST REVIEW

LAND AND ASSOCIATED COSTS

1)	\$58,000
2)	\$2,000 Engineering fee
3)	\$4,000 Development fee
4)& 5)	\$8,000 Rough in Drive/Fill/Septic System
6)	\$1,000 Water (aprox. 1000)
7)	<u>\$1,000</u> Tree removal/water pipe
	\$74,000.00

Page 2 of the notes reads as follows:

HOME CONSTRUCTION COSTS

1)	Foundation	\$5,000.00	all taxes in
2)	Home Package	\$40,276.00	all taxes in
3)	Home Package		all taxes in
	Labour	<u>\$9399.00</u>	all taxes in
		\$54, 675.00	

FINISHING ALLOWANCES

1)	Heating/Electrical
2)	Plumbing as per plan
3)	Insulation/Drywall R 28 Walls/R40 Ceilings/R28 Floor
4)	Paint
5)	Trim-Clear Pine Trim
6)	Flooring- Hardwood/Ceramics/Carpet
7)	Cabinets
8)	Fireplace with gold door & inside pipe

Approx. \$25,000 + or - 7% G.S.T.

The third page of the notes reads as follows:

\$150.00	Septic Inspection
\$150.00	Engineer Inspection
\$150.00	Engineer Inspection
\$1,500.00	Engineering fee
\$500.00	Tree Removal
\$5, 000.00	Foundation Package

\$13,291.00

\$20,741.00

-\$16,250.00

To Come \$4,491.00

Page two above indicates that additional to all amounts mentioned in the Sales Contract, Adams also purchased from Craftsman, a foundation package for the home for \$5,000.00. When the \$5,000.00 for the foundation package was added to the total cost under the Sales Contract, the home's construction costs came to \$54,675.00.

The cost of the land upon which the home was to be constructed was \$58,000.00, which Adams paid to the Vendor of the land and does not figure in the construction costs of the home itself. The difference between the \$58,000.00 and \$74,000.00 under "Land & Associated Costs" (page 1 above) namely, \$16,000 was an estimate for engineering and development fees, including rough in for the home's drive way, the provision of fill, the provision of a septic system as well as the cost of bringing water from the river to the home and tree removal from the building site.

The evidence relating to the various claims made by Adams against the Program are dealt with hereunder in the same order as the program dealt with those claims in its decision letter.

Claim 1- Overpayment of \$5,650.00

The evidence of Adams is as follows:

The Sales Contract of May 11, 1993 signed by him and Zutautas on behalf of Craftsman sets out a total construction cost of \$49,675.00. Adams paid two deposits under that Sales Contract. A \$3,750.00 deposit was paid prior to the Sales Contract being signed. This payment was made on February 13, 1993 pursuant to the signing of the deposit form of that date (Exhibit 4, Tab 1), and quoted earlier in this decision. Additionally, on May 11, 1993, Adams paid \$13,291.00 being a "manufacturing deposit" in terms of the Sales Contract (Exhibit 4, Tab 3).

\$9,399.00 was paid to Craftsman on June 25, 1993. This was for site erection services, Gold Seal Package and G.S.T. all in terms of the Sales Contract.

Adams claims to have paid certain sums of money to Craftsman in addition to the \$3,750.00 deposit and the \$9,399.00 payment. These additional payments totalled \$46,459.60. Adams also claims he paid \$38,665.97 to suppliers of building materials until Craftsman's departure from the building site in December 1993. As at the date of Craftsman leaving the building site, Adams therefore claims he had paid the sum of \$92,274.57. Subsequent to Craftsman leaving the site, Adams claims he paid a further \$15,473.54 to suppliers of materials and services.

Craftsman paid suppliers of materials for the home as well as suppliers of services necessary for the home. On or about September 16, 1993, Zutautas prepared a typewritten list of suppliers and what Craftsman had paid to such suppliers to that date. This list was titled "Peter Adams Review - September 16, 1993" (Exhibit 4, Tab 7). In that review, it appears that there had been an erroneous overpayment by Adams to Craftsman of some \$5,650.00. Zutautas proposes in that review of September 16, 1993 that credit will be given by Craftsman to Adams for:

Paint material & labour	\$1,750.00
Carpet material & labour	\$1,748.00

Porch indoor/outdoor carpet/ Material & labour	\$350.00
Fireplace material & labour	<u>\$2,961.43</u>
	\$6,809.43
Less credit	<u><u>-\$5,650.00</u></u>
	<u>\$1,159.43</u>

Both Adams and Zutautas agree that there was an overpayment of \$5650.00 and that the balance of that overpayment would be applied as above. This arrangement was arrived at during a meeting between Adams and Zutautas on September 16, 1993.

Thereafter, Zutautas prepared a further typewritten document titled "Cheques Breakdown - October 1993" which was given to Adams by Zutautas on December 11, 1993 (Exhibit 4, Tab 8). This document contains an entry which reads as follows:

October 26, 1993 Barrle Windows re upgraded pkg.
windows & porch storm wind/door \$5,295.75
+ \$471.22 + paint M + L \$1,750 + 2,097.96 carpet
and home porch = Total \$9,614.93 less \$5,650
pkg. Over. Balance Received \$3,966.97

Adams contended that by paying \$3,966.97 he would obtain the items listed in the above quoted entry totaling \$9,614.93.

Adams further stated that the sum of \$3,966.97 was paid by him by his cheque # 027 dated October 26, 1993 (Exhibit 4, Tab 15) to Barrie Windows while the other items listed were deleted. The windows for which Barrie Windows was paid related to enlarged windows for the west elevation of the home. The original plan of the homes west elevation of March 1993 (Exhibit 25) reflects smaller windows prior to Adams deciding to have them enlarged. Adams claims that the decision to enlarge these windows was made and communicated to Zutautas prior to the May 11, 1993 signing of the Sales Contract. The enlarged windows were delivered to the home for installation after Craftsman had left the building site on December 18, 1993.

Jim Fortune, a warranty representative of the Program, gave evidence respecting:

Adam's claim relating to the sum of \$5,650.00. Fortune stated that what should have been paid by Adams in terms of the Sales Contract was \$49,675.00 whereas at a certain point in time, Adams had paid in excess of that figure by some \$5,650.00. This, he stated, was due to an error but did not amount to a failure to perform the contract. Fortune stated that the sum of \$5,650.00 was to be applied to future work to be performed by Craftsman and such future work was set forth in the September 1993 typewritten document created by Zutautas (Exhibit 4, Tab 7). The \$5,650.00 was to be dealt with as stated in the September 1993 document as follows:

Credit Paint M & L	\$1,750.00
Credit Carpet M & L	\$1,748.00
Credit Porch Indoor/Outdoor Carpet M & L	\$350.00
Credit Fireplace M & L	<u>\$2,961.43</u>
	\$6,809.43

Less overpayment	<u>-\$5,650.00</u>
Leaving balance due	\$1,159.43

Zutautas in his testimony conceded being the author of both documents of September 16, 1993 (Exhibit 4, Tab 7) and of October 1993 (Exhibit 4, Tab 8).

Claim 2 - Cash Advance \$1,328.00

At the time that counsel for Adams and the Program made their final submissions to the Tribunal, Counsel for the Program advised that Adams was withdrawing the above claim and this was confirmed by Adams Counsel. Accordingly, this claim will not be dealt with in this decision.

Claim 3 - Bolsover Judgment \$15,749.28

The evidence regarding this claim is that Adams paid \$7,000.00 to Craftsman. This payment was in anticipation of work to be done in connection with the home namely, the supply and installation of a septic system on the lot, the rough driveway from the entrance to the lot as well as for the provision of fill from the \$7,000.00. Craftsman was to pay for the work anticipated to be done as above. Bolsover Sand and Gravel Ltd. ("Bolsover") was retained to do this work. After doing the work Bolsover rendered an invoice to Adams for \$16,098.63 made up as follows:

Septic to Health Board - Engineering Co. specs as per quote	\$6,000.00
Roughing in of driveway as per quote	\$2,000.00
Foundation material	\$2,709.50
Extra fill	\$2,745.00
Tree Removal (No P.S.T. charge)	\$ <u>585.00</u>
	\$14,039.50
G.S.T.	\$ 982.77
P.S.T. (\$13,454.50)	<u>\$1,076.36</u>
	<u>\$16,098.63</u>

Neither Adams nor Craftsman paid the Bolsover invoice of \$7,000.00. Bolsover had a lien registered against the title to the land where the home was being constructed. In January 1994, Bolsover sued Adams for the sum of \$16,098.63 and in default of payment thereof claimed that the land be ordered sold and the proceeds of the sale of the land be applied towards payment of its claim. Bolsover's claim came before Mr. Justice MacKinnon at Barrie, Ontario, and after presiding over the trial judgement was granted in favour of Bolsover on September 20, 1996.

In his written reasons for judgement (Exhibit 4, Tab 17), Mr. Justice MacKinnon analysed the evidence given before him at trial and made the following findings:

- (a) The Sales Contract of May 11, 1993 is ambiguous on its face and as a result the Court was entitled to consider or look at other documentation as between Adams and Craftsman at or about May 11, 1993 when the Sales Contract was signed.
- (b) The three pages attached to the Sales Contract were to be taken into account in determining the relationship between Adams and Craftsman.

- (c) The contract between Adams and Craftsman constituted not only the items and figures as set out in the one page sales contract document, but also constituted the items and figures as set out in the handwritten documents of May 11, 1993.
- (d) The amount of the hold back was the sum of \$98,266.57, less the overpayment of \$5,650.00 for a net hold back of \$92,616.57. The hold back then was 10% of that net amount pursuant to section 30 of the Construction Lien Act, namely \$9,261.66. The judgment was accordingly for \$9,261.66 plus pre-judgment interest of \$1,261.11 together with party and party costs in the amount of \$5,226.51 for a total sum of \$15,749.28.

Adams in his evidence before the Tribunal stated he saw no reason to pay the Bolsover invoice when he received it as he had already paid \$7,000.00 to Craftsman.

The evidence of Fortune for the Program was to the effect that had Adams held back 10% of the contract price, Adams could have applied such hold back to satisfying the lien and thereby mitigate the loss. He also contended that there is no obligation on Craftsman to pay the costs awarded to Bolsover in its court action against Adams nor is there any obligation to pay the award of interest. Fortune emphasized that Bolsover did not construct the foundation but only prepared (cleared) the site for the foundation and put in the septic system.

Zutautas evidence was to the effect that he conceded that \$7,000.00 had been paid by Adams to Craftsman in anticipation of Bolsover's services and that at no stage was this sum paid by Craftsman to Bolsover. Prior to Bolsover invoicing Adams for its work, Craftsman had already utilized the \$7,000.00 for "other aspects" of the home. The other aspects to which Adams referred were for extras supplied by Craftsman outside of the contract's requirements, such as electrical work and supplies, the enlarging of the walls of the home as well as the bathroom.

Zutautas stated that due to conditions that were found to prevail upon the lot, the Simcoe County Health Unit would not permit a septic system on the lot unless an engineer first inspected the lot and satisfied the Unit that the Unit should issue a septic system approval. This required that an engineer prepare engineering drawings, access from the road to the home be roughed in and elevations be brought to engineering specifications. These requirements would cost \$9,600.00. The cost of the septic system would be \$7,000.00 over and above the \$9,600.00. The \$7,000.00 cost of the septic system was paid to Craftsman by Adams on August 23, 1993 (see Exhibit 4, Tab 8). Zutautas referred the Tribunal to the Deposit Form (Exhibit 4, Tab 1) which Adams had signed and in particular to the "note" that appeared towards the bottom of that form. This Deposit Form is referred to earlier in this decision. Zutautas stated that Adams was well aware that \$7,000.00 would not be all he would be required to pay and, having regard to the contents of the Deposit Form, he knew that other expenditures were likely.

Claim 4 - Dearden & Stanton Judgment \$2,598.74

Adams testified that on May 11, 1993, when he met with Zutautas and signed the Sales Contract, he paid Craftsman the sums of \$300.00 for the initial engineering inspection fee and \$1,500.00 for engineering drawings. Dearden, Stanton and Strongman Limited, ("Dearden") Surveyors and Consulting engineers were retained to supply a tile bed design and the service inspection.

On June 25, 1993 Dearden invoiced Adams \$1,900.00 for the tile bed design plus an additional \$200.00 for location of property bars to allow preliminary building location. These two amounts with G.S.T of \$147.00 totalled \$2,247.00 (Exhibit 5, Tab 2). On September 7, 1993 the sum of \$768.00 was paid to Dearden by way of Adams' cheque submitted by Craftsman in reduction of the invoiced amount. On October 26, 1993 a further invoice from Dearden was addressed to Adams for tile bed inspection, grade control and as - built preparation in a total sum of \$575.13 inclusive of G.S.T. (Exhibit 5, Tab 2). No other sums were paid in reduction of these invoices. By claim made in the Small Claims Court, Dearden sued Adams for \$2,822.13 being the principal amounts claimed in both invoices. Dearden also claimed interest due on the overdue amounts plus post-judgment interest and costs. This amount was paid by Adams to Dearden by cheque on May 9, 1997.

In his evidence, Fortune stated that he had not seen any contract that Adams had entered into with Dearden. However, he drew the Tribunal's attention to the Deposit Form signed by Adams with particular reference to the note that appears on that form (Exhibit 4, Tab 1). He contended that Adams is liable for payment of this claim by virtue of the Deposit Form he signed. He also contended that Adams was ordered by Court to pay the amount claimed by Dearden and Adams in fact paid Dearden \$2,598.74 by cheque on May 9, 1997 (Exhibit 3, Tab 15).

Fortune also stated that the Sales Contract makes no provision for a septic system. He pointed out that the two invoices of Dearden were addressed to Adams and not Craftsman and that this reinforces his view that Adams dealt directly with Dearden and retained them to do the work. Fortune also noted that the only direct payment made to Dearden aside from the cheque for \$2,598.74 was made by Adams when he paid Dearden \$768.00 on August 23, 1993 (Exhibit 3, Tab 10).

Zutautas testified that Craftsman obtained engineering services for its customers. In this instance, they obtained the services of Dearden for Adams. Zutautas pointed to a document he created dated August 14, 1993 (Exhibit 4, Tab 5). In that document, which was addressed to Adams by Craftsman, it stated the "projected" cost of the "initial engineering fee". The inspection of land is projected to cost \$300.00 which sum Adams has paid. The actual cost was \$321.00 leaving a balance due to be paid by Adams of \$21.00. On that same document "Engineered Drawings" are stated as "projected and paid for" at \$1,500-\$1,900 with the "actual" cost being \$2,247.00 leaving a balance of \$747.00 due by Adams. This sum of \$747.00 together with the sum of \$21.00 totalling \$768.00 was paid by Adams to Dearden by cheque dated August 23, 1993 (Exhibit 3, Tab 10, cheque # 139).

Zutautas also stated that by cheque # 009, dated June 9, 1993, Adams paid Craftsman \$4,491.00 for various land associated costs, namely, health unit inspection fee, tree removal, post and beam foundation draw, ONHWP registration and hydro to neighbour.

Zutautas conceded that the payment by Adams to Craftsman of the initial engineering fee was not paid over to Dearden.

Claim 5 - Extra Hydro \$1,000.00

During final submissions by the parties' respective Counsel, the Program's Counsel informed the Tribunal that Adams was withdrawing this claim and this was confirmed by Adams' Counsel. Accordingly, such claim will not be dealt with in this decision.

Claim 6 - Firewood \$420.00

Adams contended that hydro was utilized in the construction of his home. The hydro utilized came from Adams' neighbour's property. Cords of wood were given to the neighbour in settlement of the neighbour's cost of hydro consumed in the construction of the home. The cords of wood given to the neighbour came from trees that were on Adams' property and were cut down when clearing the site.

According to the brief of Damages (Exhibit 6, Tab B) three bushcords of firewood at \$140.00 each for a total of \$420.00 make up the damages Adam claims.

The evidence of Fortune was that there was no mention in the Sales Contract or in the three pages that accompanied the Sales Contract of firewood. The contract did not address this aspect at all. Furthermore, he contended that there was no way of ascertaining how the wood came to be on the neighbours land. In addition there had been no measurement of wood involved and there was therefore no quantity of wood proven nor its value and how value was arrived at.

Claim 7 - Heating Timer \$105.94

Adams in his testimony stated he had purchased a thermostat and then gave it to Zutautas' son on December 18, 1993 while the son was working on site. After Zutautas left the site, Adams did not see the thermostat again. Adams claims Zutautas has removed the timer without permission. The cost of the thermostat was \$105.94.

During the hearing, Counsel for Adams amended the amount of Adams' claim. The amount was reduced to \$99.30 inclusive of tax. In support of the latter amount, Adams referred to a photocopy of an invoice of November 21, 1993 issued by Aikenhead's Home Improvement Warehouse (Exhibit 6, Schedule "F"). Adams claimed he purchased the timer from Aikenhead's under the above invoice.

The position of Zutautas when he testified was that he knows nothing of the thermostat and its whereabouts. He does not know if it was given to his son.

Zutautas referred to the quotation received by Craftsman from a Barrie electrical firm. This quotation (Exhibit 3, Tab M) contains specifications regarding the electrical aspect of the home. The information contained in the quotation emanated from Adams. Adams gave this information to Zutautas who in turn submitted the information to the Barrie electrical firm, to enable that firm to quote. The quotation submitted by that firm does not reflect a timer or thermostat as a component of the proposed electrical system. The quotation contained a proposed labour and material cost of \$4,333.50 inclusive of G.S.T. Zutautas claimed that a cheque for \$4,350.00 was paid by Adams to Craftsman in respect of the quotation.

The evidence of Fortune for the Program was that the timer (thermostat) was not part of the contract between Craftsman and Adams. He contended that while the timer may be an electrical component, it was not addressed in the contract.

Claim 8 - Siding \$3,103.54

Adams testified that the siding on the home was incomplete when Craftsman left the site. After Craftsman's departure, Adams had in a contractor complete the siding on the home. The cost to complete the siding was \$3,103.54 and was done by Rick Mayes of Boss Eavestrough. Adams referred to a quotation from Boss Eavestrough (Exhibit 6, Schedule "A") which reads as follows:

Repair, Supply & Install Siding -----	\$1332.00
Install Vented Soffit -----	\$ 542.00
Supply & Install Fascia -----	\$ 496.48
Supply & Install Non-Vented Soffit -----	\$ 82.50
Supply & Install Capping -----	\$ 650.56

Fortune in his evidence stated that there is no document to indicate that Adams was invoiced for \$3,103.54, the amount claimed. There is no documentation to indicate that Adams paid the sum of \$3,103.54. The Boss Eavestrough document was only a quotation. The Sales Contract (Exhibit 4, Tab 3) indicates the "type of siding" to be supplied and fitted. It was to be "slate vinyl siding". There is no reference to soffit and fascia to be supplied or installed.

Fortune referred to copies of photographs of the home that reflect that siding is missing and appears incomplete. He testified that soffit and fascia is not a requirement in terms of the Ontario Building Code and the contract itself does not make reference to soffit and fascia but only makes reference to siding.

Zutautas in his evidence stated that when Craftsman left the site, the vinyl siding had not been completely installed. However, all the vinyl siding for the home's completion had been delivered to the site and was stored in the crawl space under the home awaiting installation. Craftsman had also supplied the soffit and fascia materials that also were stored on site awaiting installation. The siding was awaiting installation of the windows, which had not been delivered by the manufacturer when Craftsman left the site.

Claim 9 - Sanding \$500.00

Adams testified that he paid "Bill Break" \$500.00 for finishing the drywall in the home. This drywall had not been completed at the time Craftsman left the site. When Craftsman left the site, Adams claims the drywall had been taped but not painted and that it required to be better prepared for painting. He did testify that the paint had been purchased and was on site at the home. In addition to the \$500.00 paid to "Bill Break", Adams contends he paid a further \$90.00 for "additional installation" and this payment was by way a Visa credit card. Adams produced a paid cheque payable to "Bill Break" dated January 21, 1994. (Exhibit 20)

Fortune contended in his testimony that according to both Adams and Zutautas when Craftsman left the site on December 18, 1993, the drywall was in place, taped and one coat of compound (or mud as he referred to it) had been applied. A second coat of compound was required as well as sanding of the drywall. Although the contract did not call for the provision of drywall and taping, both were provided. Insofar as "Bill Break"

was concerned, the Program had been furnished with no contract between Break and Adams nor with an invoice from Break for the \$500.00. Fortune was told by Adams that the \$500.00 was for completing the drywall. Fortune stated that when he initially enquired as to the status of the home as at December 1993, when Craftsman left the site, he was not informed that the drywall and insulation were incomplete. This was brought to his notice only later.

Zutautas in his testimony stated that Craftsman was to finish and paint the drywall. He conceded that the drywall had not been sanded at the time he left the site which would take about an hour to do. Painting of the drywall was also required. The drywall had, however, been taped when Craftsman left the site.

Claim 10 - Stairs \$400.00

Adams claims that after Craftsman left the site in December 1993, he completed certain items of construction that had not been completed by Craftsman. When it left the site, one of the items not completed was the stairs on the porch of the home.

The evidence of Fortune was that there was nothing in the Sales Contract or the documents that accompanied that contract that required stairs to be constructed from the porch of the home. He pointed to the Sales Contract and stated that it only made reference to "Roofed & screened porch area - 288 square feet".

Fortune stated that Adams had not furnished him with any invoice or documents to substantiate this claim. He also stated that the Ontario Building Code requires only "a" door to be provided to a home as an exit, and such would be typically be the home's front door.

Claim 11 - Screens and Storm door \$751.00

Adams in his testimony identified this area of complaint as relating to the porch of the home. Adams contended that Craftsman did not complete the construction of the front porch of the home and did not construct the steps or stairs from the porch to the exterior. Adams completed what was left incomplete by Craftsman at a cost to himself of \$400.00 in materials. He had no receipts for the materials.

Adams testified that the Sales Contract called for a "roofed and screened porch area 288 square feet" for a material cost of \$4,896.00. He further stated that Zutautas obtained a quotation from Mariposa Glass & Mirror for \$784.79 being the total price including G.S.T. for screen porch plus door (Exhibit 6, Schedule "B"). He further stated that the roof and floor of the porch were completed by Craftsman but the screens and door to the porch area were incomplete. He pointed to a copy of a photograph taken when Craftsman left the site (Exhibit 4, Tab 16 top photograph on second page). In referring to this copy of a photograph, Adams contended that it reflected no porch door and no screens had been installed on the porch. Adams also referred to a copy of a photograph (bottom of the fifth page of Exhibit 4, Tab 16) which indicated porch windows covered in transparent plastic sheeting.

The evidence of Fortune was that the photographs suggested that no screens were in place. Fortune referred in his testimony to the Mariposa Glass & Mirror quotation and stated that that document is an estimate only. He stated that the items referred to in the

Mariposa document had not been installed and that had Craftsman been allowed to complete work, it would not have cost \$784.00.

In his testimony, Zutautas stated that Adams wanted screens for the windows on the porch. Craftsman was going to trim the screen materials to fit the window openings. The trimming of the window screens was to be provided as part of the shell package Craftsman was to provide. However, Adams changed his mind regarding screens to be fitted and chose instead to have glass in place of such screens. The difference in cost would be about \$100.00 plus G.S.T.

The porch was to be 288 square feet and was quoted at \$17.00 per square foot for a total of \$4,896.00. For this sum, Adams was to receive a post and beam foundation to the porch, the subfloor and walls, roof, roof trusses, sheeting, shingles and labour.

Zutautas stated further that in regard to the Mariposa document (Exhibit 6, Schedule "B") the total price on that document referred to the cost of a storm door and screens and that the shell package did not include either storm door or screens. He stated that subsequent to December 18, 1993, Craftsman did install the windows. This, he claimed, is evidenced by referring to the copy of photograph showing an installed window in an aluminum frame (Exhibit 4, 1st page of Tab 16, top copy photograph). At that time vinyl siding needed to be installed around the window. The vinyl siding was stored on site as were the fascias and soffits.

Claim 12 - Insulation & Drywall \$400.00

At the hearing, Counsel for Adams abandoned this claim except for \$80.00. This \$80.00 is referred to in Exhibit 6, Table B under "additional drywall, insulation, and vapour barrier installation".

Adams in his testimony stated that as at December 17, 1993, the insulation of the floor in the crawl space beneath the home was not complete. In addition, the insulation of the ceiling and exterior walls was incomplete.

Fortune testified that there was no documentation to support Adam's claim. There was no invoice or account to support Adams' claim nor was there documentation as to who was to install the insulation. When Fortune became involved in the matter and enquired of Adams in regard to the home's insulation, he was not told it was incomplete and this aspect was only raised later.

Zutautas in his evidence pointed to a copy of a photograph of the interior of the home (Exhibit 4, Tab 16, second page top photograph) which shows insulation in place. The photograph to which Zutautas referred was taken when he left the site.

Claim 13 - Clean Up \$400.00

Adams in his testimony referred to having filled over 100 garbage bags in order to clean up the site. He gave no other details. In his Counsel's Brief of Damages (Exhibit 6, Tab B) it is stated that this claim for \$400.00 was a "cash transaction" with a citation "see Schedule "C" ". Schedule "C" contains a number of copies of photographs principally of the exterior aspect of the home.

In his evidence, Fortune referred to the aforementioned copies of photographs and that from such photographs he could not observe a "clean up". He further testified that the Sales Contract makes no reference to a clean up being part of such contract and that there are no documents that have been furnished by Adams to substantiate his claim.

Claim 14 - Electrical \$2,142.13

In his evidence, Adams stated that he paid Craftsman \$4,350.00 for electricals. Adams referred to page 2 of the May 11, 1993 (Exhibit 3, Tab 5, second page) document in Zutautas' handwriting under the heading of "Finishing allowances" which included under that heading "electrical".

He stated that the status of the electrical aspect of the home as at December 17, 1993 was:

- electrical wiring had been brought from the street to the home
- switches had been installed in the home
- circuit breaker box had been installed
- metal boxes had been placed in the walls
- four baseboard electric heaters were installed and working. The four heaters were not new but were "construction heaters"
- he had expected to be supplied and installed a total of 8 new baseboard electric heaters whereas only the above 4 construction baseboard heaters were supplied
- no light fixtures had been installed
- no switch plates had been installed

On December 30, 1993 subsequent to Craftsman's departure, Adams purchased 6 electrical baseboard heaters from Aikenhead's Home Improvement Warehouse for use in the home (Exhibit 6, Page 21). Adams also employed the services of an electrical contractor to supply materials and labour regarding unfinished electrical work. In addition, Adams made purchases of further materials from Aikenhead's. The total of the electrical contractors charges and the materials purchased from Aikenhead's totalled \$2,219.97 (Exhibit 6, Tab D).

Adams contended that he had already paid Craftsman \$4,350.00 in respect of electrical work to be done in the home. This payment was in respect of the quotation received from the Barrie electrical firm (Exhibit 3, Tab M). The quotation referred to stated as follows:

We hereby submit specifications and estimates for:

One dwelling. Price included a 200 amp service, stove microwave receptacle, dishwasher line, bath fans were required, 1 outside plug, 2 smoke detectors, chime kit, hood fan (white or almond), standard plugs, switches and project light fixtures, baseboard heating, hot water tank hookup, and whirl pool tub. General contractor is responsible for the trenching from the road to the meterbase. Hydro permit is include in the price.

NOTE: G.S.T. IS NOT INCLUDED IN THE PRICE

We Propose hereby to furnish material and labour - complete in accordance with the above specifications for the sum of.

\$4,050.00.

+ G.S.T. \$ 283.50

Payment to be made as follows:

\$4,333.50

\$2,650.00 upon completion of roughin and service

\$1,400.00 upon completion of dwelling

Details of electrical work and materials necessary for the preparation of the above quotation was discussed by Adams with Zutautas. Zutautas then obtained the above quotation and Adams paid an agreed \$4,350.00 in respect of that quotation to Craftsman by way of a cheque.

Fortune for the Program contended that as as December 1993, when Craftsman departed from the site, certain electrical work had been done, such as; bringing hydro to the home from the street, installing a 200 amp electrical panel box, installing some current breakers and feeding wires to various parts of the home, and roughing in the system.

Fortune stated further that there was no contract between Adams and Craftsman describing the scope of electrical work to be done. Therefore, it is not clear what items had to be purchased and what items were, in fact, purchased.

Zutautas in his testimony contended that Craftsman exceeded in scope what was required of it respecting as electrical work. While the agreement did not call for spot lights, Adams had received spot lights and additional switches and circuits, which he did not pay for. Adams refused to pay for extra supplies which Zutautas estimated at \$2,000.00. He conceded that Craftsman did not supply the 8 baseboard heaters. The budget for electrical work was \$4,000.00, and this amount had been exceeded by some \$2,300.00 due to Adams requiring extra electrical items. Craftsman supplied these extra or items but was not paid by Adams for them.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven.

- 1) On February 13, 1993, Adams and Craftsman entered into a written agreement titled "Deposit Form" in which Adams agreed to pay Craftsman the sum of \$3,750.00 as a deposit for services which Adams required Craftsman to obtain for site preparation on Lot 4, Plan 1294, Part Lots 8 and 9, Orillia Township.
- 2) Adams paid Craftsman the sum of \$3,750.00 on signing the "Deposit Form".
- 3) Adams entered into a written agreement with Craftsman Homes and Cottages Ltd. and Craftsman Construction Services Inc. This agreement was titled "Sales Contract" and was signed on May 11, 1993 by Adams and the two aforementioned signed corporations, with Zutautas acting for the corporations. (Exhibit 4, Tab 3)
- 4) Under the "Sales Contract", Craftsman Homes and Cottages Ltd. was to supply Adams with the materials and site erection services for a 1680 square foot prefabricated residential home on Lot 4, Plan 1294 as above. The home was to have a loft area of 576 square feet and a roofed and screened porch area of 288

square feet. The price for the materials and site erection services totalled \$40,276.00. Craftsman Construction Services Inc. was to supply site erection services and a "Gold Seal Package" for the sum of \$9,399.00. The "Gold Seal Package" was the supervision by Craftsman of all building services in connection with the homes construction.

- 5) Attached to the Sales Contract were 3 handwritten pages, prepared by Zutautas and dated May 11, 1993.
- 6) In addition to the above, Craftsman Homes and Cottages Ltd. was to supply a post and beam foundation for the home which would cost Adams an additional \$5,000.00.
- 7) Prior to May 11, 1993, Adams became the holder of title to Lot 4 above.
- 8) Craftsman enrolled the home under the Ontario New Home Warranty Program.
- 9) By approximately September 1993, Adams had made various payments to Craftsman and others in connection with the homes construction. Adams and Craftsman concurred that such payments had resulted in what they termed an "overpayment" by Adams.
- 10) Adams and Craftsman agreed that Craftsman credit such overpayment to Adams' future obligations for the supply of materials to the home of Adams.
- 11) Prior to entering into the Sales Contract, Adams knew that special engineering requirements that may be required as part of the home's construction were to be paid by him as owner of the lot.
- 12) The agreed price for a post and beam foundation for the home was originally estimated at \$5,000.00 for which Adams knew he was liable. Adams also knew that the authorities refused to allow a pillar and post foundation due to soil conditions on the lot and that the authorities required a pressure treated foundation which required, inter alia, blasting of rock, excavation and the construction of foundation walls around the homes perimeter. Adams also knew that the authorities required a tile bed designed by an engineer. Adams knew he had to pay the costs. The above services were supplied and the cost of the engineering services carried out by Dearden amounted to \$2,822.13 of which \$768.00 was paid by Adams to Dearden.
- 13) Due to further requirements of the relevant authorities, Adams was obliged to have an engineer designed septic system approved by those authorities and then constructed according to the approved design.
- 14) Dearden was retained to design the septic system.
- 15) Bolsover supplied and installed materials for a septic system, the rough in of a driveway, lot fill, foundation material and tree removal in regard to Adams home for a total price of \$16,098.63 inclusive of G.S.T.

- 16) Bolsover registered a lien under the Construction Lien Act, R.S.O. 1990, on Adams' title to the lot during the home's construction.
- 17) Adams agreed that Bolsover provided \$16,098.63 worth of materials and services.(Exhibit 3, Tab 28).
- 18) By judgment of the Ontario Court (General Division) dated September 20, 1996, Bolsover was awarded \$9,261.66 plus pre-judgment interest of \$1,261.11 plus costs on a party and party basis of \$5,226.51 for a total sum of \$15,749.28.
- 19) Adams paid \$15,749.28 to Bolsover including the party and party costs of \$5,226.51 and interest of \$1,261.11.
- 20) The thermostat (heating timer) did not form part of the electrical work or components which were to be installed and/or supplied under the Sales Contract or any other agreement.
- 21) Slate vinyl siding was to be supplied by Craftsman for the home. A portion of such siding had not been affixed to the home when Craftsman left the site.
- 22) As at December 1993 when Craftsman left the site, drywall was installed in the home, had been taped and a first coat of compound had been applied. A second coat of compound as well as sanding of the drywall was required.
- 23) The Sales Contract does not refer to stairs to be installed from the home's porch to the ground.
- 24) The Sales Contract makes no reference to a storm door to be supplied or installed.

REASONS FOR DECISION:

The onus of proof based upon a balance of probabilities rests upon Adams.

Adams brings his appeal to the Tribunal under Section 14(1)(a) of the Act.

For Adams to succeed in his appeal to the Tribunal he must establish that

- a) Adams entered into a contract with Craftsman for the provision of a home
- b) Craftsman failed to perform the contract and
- c) Adams suffered damages due to Craftsman's failure to perform the contract.

The Sales Contract (Exhibit 3, Tab 4) and the pages accompanying it (Exhibit 3, Tab 5) do not define "gold seal package" for which Adams was charged \$2,784.00. However, the evidence of both Adams and Zutautas was to the effect that the "gold seal package" included supervision services to be provided by Craftsman although there was no consensus as to precisely what supervision amounted to. Craftsman was to provide a "home shell package" for \$40,276.00 which was for materials for the shell of the home. For an additional \$9,399.00 there was to be supervision of the home's building

including the erection of the home shell package. Both amounts were paid to Craftsman and an associate corporation of Craftsman.

The one page Sales Contract dated May 11, 1993 lacks in specificity, as do the three handwritten pages which accompanied the Sales Contract. In 1996 the Ontario Court (General Division) considered the Sales Contract and accompanying documents when Bolsover sued Adams. Mr. Justice MacKinnon stated in his Reasons for Judgment dated September 20, 1996 (Exhibit 4, Tab 17 at page 3) as follows:

My finding is that the document Mr. Adams signed on May 11 is ambiguous on its face, visavis the Gold Seal package and as a result the Court is permitted to consider or look at the other documentation as between the parties at and around the time of signing that sales contract on May 11.

The additional pages to which I refer then are four pages attached at TAB 2 of Exhibit # 2 - three in the handwriting of Mr. Zutautas on his own evidence and one being a sketch with some handwriting at the bottom said by Mr. Zutautas to be mainly in his handwriting. Those documents were, I find, prepared and dealt with by the parties on or about May 11, 1993, the three handwritten pages are dated that day and I take those into account as well in determining the nature of the relationship between the Defendant and Mr. Zutautas.

The Tribunal adopts the approach of Mr. Justice MacKinnon. Accordingly, in the determination of Adams' claims against the Program, the Tribunal will consider the Sales Contract and other documentation between Adams and Craftsman entered into at or about the time of the signing of the Sales Contract on May 11, 1993. To determine the precise nature of the agreement between Adams and Craftsman, the evidence given before the Tribunal by both those persons will be also considered and weighed.

Claim 1 - Overpayment of \$5,650.00

At some point in the course of the construction of his home, Adams paid \$5,650.00 in excess of what he should have paid. This has been referred to in these proceedings as an overpayment by Adams.

Section 14(1)(a) of the Act states as follows:

14. (1) Where

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

The Act does not provide that the Program is responsible for the owner of a home, such as Adams, making an erroneous overpayment to a vendor such as Craftsman. An overpayment cannot in the Tribunal's view be considered as "the vendor's failure to perform a contract". The contract did not call for an overpayment and was not dealt with in the contract. The Program itself therefore has no obligation under the terms of Section 14(1)(a) of the Act to meet Adams' claim for this overpayment.

After the discovery of the overpayment, however, Zutautas prepared a document headed "Cheques Breakdown - October 1993" (Exhibit 4, Tab 8) and gave this document to Adams. In that document the following entry appears:

Oct. 26/93	Barrie Windows re upgraded pkg. Windows - Porch Storm wind/door \$5,295.75 + \$471.22 + Paint M & T \$1,750.00 + \$2,097.96 Carpet home & Porch = Total \$ 9,614.93 Less \$5,650.00 Pkg. Over - Balance Rec. \$3,966.97

The above entry indicated how the overpayment was to be dealt with. It indicated that it would be utilized in the payment for upgraded windows as well as "porch storm wind/door, paint and carpeting of home and porch" totalling \$9,614.93. After applying the overpayment of \$5,650.00 to the \$9,614.93 there would remain a balance of \$3,966.97 due by Adams for the items listed above. This balance was paid by Adams issuing his cheque for the \$3,966.97 to the window manufacturer for the upgraded windows which were subsequently delivered and installed after Craftsman left the site. The other items were not proceeded with as is evidenced by the handwritten note of Adams alongside the above quoted entry. That note reads "Paid windows direct. Other items were deleted. Craftsman still owes \$5,650.00". By making payment of the sum of \$3,966.97, Adams clearly indicated he was in agreement with what was written in the above quoted document and that he considered there was overpayment of \$5,650.00 still due to him by Craftsman.

The arrangement referred to in the October 26, 1993 entry became an extension of the agreement between Adams and Craftsman. However, the deletion of the "other items" by Adams resulted in there remaining an overpayment made by Adams in the sum of \$5,650.00. For the reasons already stated above an overpayment under a contract cannot be considered as a "failure to perform the contract" in terms of section 14(1)(a) of the Act. Adams' right to claim payment of such overpayment is from the Program a matter beyond the jurisdiction of this Tribunal, and Adams' remedy is a civil action that may or may not be enforced by Court.

Accordingly, Adams claim before this Tribunal for the overpayment of \$5,650.00 is disallowed.

Claim 2 - Cash Advance \$1,328.00

This claim was abandoned by Adams.

Claim 3 - Bolsover \$15,749.28

Bolsover was retained for the supply and installation of a septic system on the lot, the rough in of the driveway onto the lot as well as the provision of fill for the lot. Bolsover invoiced Adams \$16,098.16 for the supply of materials and labour in connection with the above.

Adams does not dispute that Bolsover provided \$16,098.16 worth of materials and labour to his property in terms of Bolsover's invoice (Exhibit 23A). Adams also does not dispute that the sum of \$16,098.16 was not paid to Bolsover prior to it registering a lien against Adam's property.

Adams had paid Craftsman the sum of \$7,000.00 towards the cost of the septic system. This sum of \$7,000.00 however, was not paid by Craftsman to Bolsover. Craftsman contends it did not pay the \$7,000.00 to Bolsover as it had utilized that sum to pay for extras that Adams chose to have incorporated in the home after construction began.

When Adams signed the Deposit Form (Exhibit 4, Tab1) and paid Craftsman the \$3,750.00 deposit, he knew or ought to have known that there would be special engineering requirements in order to obtain building permits as well as other approvals from the authorities. Initially, he knew a post and beam foundation was contemplated. However, he learned that soil conditions would not permit the use of a post and beam foundation and that a more expensive foundation was required by the authorities. He also knew that the health authorities required a specially designed and engineered septic system, that rock found on the lot would have to be blasted and that an excavation for the foundation was to be undertaken. All of this was not contemplated initially. However, he knew that the cost of meeting the authorities requirements were to be paid by him.

This is what is stated in the deposit form he signed. Even if Adams did not personally retain the services of Bolsover in order to meet some or all of the requirements of the authorities, he knew that Craftsman did so on his behalf and for his eventual benefit. It is not correct for Adams to contend that Craftsman failed to perform the contract when the performance was by Craftsman through Bolsover. Adams received the services that he bargained for. There was no failure of Craftsman to perform the contract. Adams knew engineering and other necessary services were required in order to construct his home, and he knew he was obliged to pay for these services.

In the action between Bolsover and Adams in the Ontario Court (General Division), Mr. Justice MacKinnon held that "the contract between Zutautas' companies and the Defendent" (Adams) totalled \$92,616.57 and that the 10% holdback in terms of the Construction Lien Act was \$9,261.66.

Had Adams held back the sum of \$9,261.66, Adams would have had that sum available to pay Bolsover in satisfaction of Bolsover's invoice. Having failed to hold back \$9,261.66, that sum cannot now be claimed against the Program. The failure to retain the \$9,261.66 was Adams' failure and does not amount to a failure of Craftsman to perform the contract. See ONHWP v. R.A. Hunt, CRAT 1991.

In addition to Adams claiming the sum of \$9,261.66 as above, he also claims from the Program the party and party costs and interest awarded against him by Mr. Justice MacKinnon for a total claim under this heading of \$15,749.28.

Section 6(6) of Regulation 892 to the Act states as follows:

.....

Liability under subsection (3) or (4) is limited to damage to the home only and liability under subsection (5) is limited to damage to the common elements only there is no liability for any other damage, direct or indirect.

While the Program's limit of liability under section 6(1) of Regulation 892 is \$20,000.00 in the case of "a home" such as Adams', liability is "limited to damages to the home

only" and "there is no liability for any other damage, direct or indirect" (Section 6(6) of Regulation 892).

Both the cost award as well as the award of interest against Craftsman cannot therefore be claimed by Adams against the Program itself as such costs and interest fall outside section 6(6) of the above regulation.

Therefore based on the aforesaid, the Tribunal disallows the claim under this particular heading.

Claim 4 - Dearden & Stanton \$2,598.74

Dearden was retained as engineer to design the tile bed in regard to the septic system on Adams' property and to obtain the relevant health authority's approval and certification. For this work, Dearden invoiced Adams \$2,822.13 inclusive of G.S.T. There is no dispute that Dearden did the work for which it invoiced Adams nor is there a dispute as to the reasonableness of Dearden's charges. Adams paid an amount of \$768.00 to Dearden on account of Dearden's work but did not pay Dearden the remainder of its charges. Dearden then sued Adams for the unpaid balance of its charges plus interest and costs and was awarded judgment against Adams in the Small Claims Court. No copy of the judgment was produced at the hearing although the amount of the judgment according to Adams claim is \$2,598.74. It is this sum that Adams claims from Craftsman on the basis of Craftsman's failure to perform the contract.

For the same reasons as enunciated above under the Bolsover claim, this Tribunal denies Adams' right to claim from the Program either interest or costs.

Adams signed the Deposit Form (Exhibit 4, Tab 1) prior to the Sales Contract being signed by him and Craftsman. In items of the "note" on the form, it is clear that Adams knew engineering costs were for his account and that he was to be liable therefor. In addition, he knew that Dearden had been retained by Craftsman to do the engineering work on his behalf as he paid Dearden \$768.00 towards its charges. Further, from a reading of Zutautas' summary (Exhibit 4, Tab 5) addressed to Adams on August 14, 1993, Adams knew that engineering fees and drawings were part of the his contract with Craftsman. The "actual" engineering fees according to the summary totalled \$2,568.00, which was arrived at as to "initial engineering fee" of \$321.00 and "engineered drawings" of \$2,247.00. Adams, according to the summary, still owed the sum of \$768.00 which he subsequently paid to Dearden direct. Craftsman who had received from Adams the sum of \$2,247.00 had not paid that sum to Dearden, Craftsman claiming that it had utilized those funds for payment of extras and additions ordered by Adams. This non-payment by Craftsman to Dearden triggered the latter's action against Adams and forms the basis of this particular claim.

Having regard to the above it is clear that Adams received the services for which he had paid. Any loss that Adams suffered was occasioned by Craftsman not having paid Dearden from the funds in Craftsman's hands. As Adams received what he had bargained for, there cannot be a failure by Craftsman to perform the contract as specified under section 14(1)(a) of the Act. Adams may well have a claim in the courts against Craftsman on the basis of its failure to disburse funds in its possession. However the Act clearly states that the Program's liability arises out of the "vendors

failure to perform the contract". The vendor (Craftsman) did not fail to perform the contract as the engineering services of Dearden were obtained by Craftsman for Adams who thereby obtained the benefits of the contract.

Accordingly, the Tribunal disallows Adams claim under this heading.

Claim 5 - Extra Hydro \$1,000.00

This claim was withdrawn by Adams' Counsel at the hearing.

Claim 6 - Firewood \$420.00

Adams claims for 3 bushcords of firewood moved from his property by Craftsman to Adams' neighbour in settlement of the cost of the neighbours' hydro used in the construction of the home. Adams' "Brief of Damages" claims that each bushcord of wood was worth \$140.00

There was no evidence by Adams of how the wood came to be on his neighbour's land. The Sales Contract makes no reference to firewood. No other documentation before the Tribunal refers to firewood. No evidence was brought before the Tribunal to establish the value or quantity of wood found on Adams' neighbour's land.

There was no evidence before the Tribunal to indicate that there was any agreement between Adams and Craftsman as to the disposition of the wood, its quantity or its value. As there was no contract or agreement proven by Adams there can be no failure to perform the contract as is required by Section 14(1)(a) of the Act, and no liability on the Program to meet Adams' claim.

Accordingly, the Tribunal disallows this claim.

Claim 7 - Heat Timer \$105.94

The heat timer, also referred to in evidence as the thermostat, was according to Adams given to Zutautas' son when the latter was working on the home shortly before Craftsman left the property in December 1993. The timer, according to Adams, was not seen again, and he claims the cost of the timer. The original claim of \$105.94 as originally claimed was reduced during the hearing to \$99.30.

Zutautas in his evidence denied any knowledge of the timer, its whereabouts or that it was given by Adams to his son. He also denied that it was part of the contract between Adams and Craftsman or that it had been agreed that Craftsman install the timer. There is no reference to the timer in any of the documents that deal with electrical components. No written agreement or contract was alluded to or produced in evidence obliging Craftsman to install the timer.

In the absence of written contract regarding the installation by Craftsman of the timer, the Tribunal finds there was no written contract. The Tribunal also finds that there was no verbal evidence placed before the Tribunal that there was a verbal contract between Adams and Craftsman for the timer's installation by the latter.

Therefore in the absence of a contract having been proven there can be no failure to perform as is required by section 14(1)(a) and there can be no liability on the Program.

Therefore, the Tribunal disallows this claim.

Claim 8 - Siding \$3,103.54

There is no doubt that when Craftsman left Adams' property in December 1993, the siding had not been completely installed. Photographs taken at that time show incomplete siding installation. Craftsman concedes that there was siding still to be affixed when it departed the site but maintains such uninstalled siding had been delivered to the property before it left the site and had merely to be affixed. Although the documents do not specifically call for soffits and fascia to be supplied and installed, the Tribunal finds that soffits and fascia were to be supplied and installed and were part of the agreement between Adams and Craftsman. The Tribunal bases this finding on the fact that the soffits and fascia, according to Zutautas, were on site in the crawl space under the home when Craftsman left the site.

There is evidence that subsequent to Craftsman's departure, Adams had a contractor, "Boss", supply and install the siding, soffits and fascia that remained to be installed. Such work plus necessary repairs by written quotation (Exhibit 6, Schedule "A") cost him \$3,103.54. This is the loss he claims due to the failure of Craftsman to perform this aspect of the contract. He produced no cheque to support his statement that he paid \$3,103.54 to Boss. The Tribunal had an opportunity to assess the evidence of Adams and his demeanor while on the witness stand. The Tribunal found his evidence in regard to this claim to be credible and sees no reason to doubt that he did pay \$3,103.54 to Boss in terms of the written quotation.

Neither the Program nor Craftsman disputed the reasonableness of the charges reflected in the "Boss" quotation and the Tribunal accepts that such charges were reasonable.

Accordingly, the Tribunal allows this particular claim in the sum of \$3,103.54.

Claim 9 - Sanding \$500.00

The Tribunal finds that although the written documentation does not refer to drywall or taping, it was agreed to by Adams and Zutautas representing Craftsman. The Tribunal further finds that when Craftsman left the site in December 1993, the drywall except for the interior of the porch had been installed and taped. The Tribunal also finds that one coat of compound had been applied to the drywall that had been installed, but that it required a second coat of compound and sanding.

The Tribunal finds that to complete the drywall installation and sanding, Adams employed and paid Bill Break \$500.00. There is nothing on record to persuade the Tribunal against accepting the testimony of Adams who was found to be trustworthy in relation to his evidence regarding this claim. The cheque paid by Adams to Break for \$500.00 supports Adams' testimony. It had written on the face of it the word "sanding". There is no evidence to indicate the \$500.00 paid by Adams is unreasonable.

Accordingly, the claim of Adams for \$500.00 is allowed by the Tribunal.

Claim 10 - Stairs \$400.00

This claim refers to stairs from the porch which Adams maintains he did not receive. In Adams' Brief of Damages (Exhibit 6, Tab B), he claims \$400.00 for "missing front porch, stairs and handrail, basement door, unfinished interior wall between porch and house". He claims that the aforementioned aspects were incomplete when Craftsman left the site in December 1993 and that the \$400.00 in respect of all the above quoted aspects was paid in cash. There is no supporting documentation to support Adams' claim nor is there any evidence as to what portion of the \$400.00 relates to the stairs.

The Sales Contract as well as other documentation do not refer to stairs or handrail. The Sales Contract makes reference only to "roofed and screened porch area - 288 square feet".

Adams has not satisfied the Tribunal that stairs from the porch were to be supplied or installed. There is nothing on record to support his allegation that stairs were to be supplied. That stairs were not installed is obvious from various photographs (Exhibit 6, Schedule "C") but the photographs in no way support Adams' claim that there was an agreement with Craftsman to supply and install the stairs.

Apart from the foregoing, no evidence was placed before the Tribunal as to the stairs' cost of material and labour. In the absence of evidence as to stairs' cost within the globular sum of \$400.00, the Tribunal is not able to determine such cost and its reasonableness. Adams, therefore, has failed to satisfy the Tribunal as to his alleged loss or damages.

Accordingly, this claim is disallowed by the Tribunal.

Claim 11 - Screens and Storm Door \$751.00

Adams in his Brief of Damages claims \$784.79 in respect of "screens and porch door not installed". He claims that the aforementioned were not supplied or installed by Craftsman prior to it vacating the site in December 1993 and that Adams was therefore obliged after Craftsman had departed to have the screens and door installed. Adams referred to Schedule "B" in his Brief of Damages which document of Mariposa Glass and Mirror indicates the cost of an installed "storm door" at \$200.00 plus G.S.T. and the "total price to screen porch plus door" inclusive of G.S.T. to be \$784.79. Adams claims to have installed at a cost of \$784.79 the porch windows and door to complete what Craftsman failed to complete.

Zutautas in his testimony stated that under the "original contract" i.e. the Sales Contract there was to be screened windows and a door but not a storm door. Subsequently, Adams changed his requirement of screen windows to glassed windows on the porch. This, Zutautas claims, would have increased the overall price by approximately \$100.00 plus G.S.T.

The Tribunal has considered of the copies of photographs included in Adams' Book of Documents (Exhibit 4, Tab 16). From those photographs which were taken shortly after Craftsman vacated the site, it is clear that there were then no screens in place on the

porch windows. The Tribunal accepts that the neither screened windows nor glass windows were installed by Craftsman.

The Tribunal also finds that the Sales Contract while calling for a roofed and "screened" porch area did not call for a door. The cost of screens according to the Mariposa Glass estimate less its estimate for a storm door amounts to \$526.26.

Craftsman failed to install screens as called for by the Sales Contract and the Tribunal finds that the cost to supply and install such screens is \$526.26.

Accordingly, the Tribunal allows Adams claim under this heading in an amount of \$526.26.

Claim 12 - Insulation & Drywall \$400.00

At the hearing, counsel for Adams reduced the latter's claim to \$80.00. This \$80.00 is referred to in Adams' Brief of Damages as "additional drywall, insulation and vapour barrier installation". Adams produced no documents to support his claim or its quantum. Adams claimed that when Craftsman left the site, more work was needed on the drywall "including insulation".

The Tribunal has no evidence before it in relation to insulation as to what was still required to be done nor what the sum of \$80.00 represents. The question of drywall in the home has been dealt with elsewhere in this decision.

From various copies of photographs before the Tribunal (Exhibit 4, Tab 16), it appears that insulation was present in the home when Craftsman departed. What "additional insulation" was required has not been identified or quantified by Adams.

Accordingly, the Tribunal disallows this claim.

Claim 13 - Clean Up \$400.00

Adams testified that he paid someone \$100.00 cash to fill over 100 garbage bags to clean up the site. He claims this as an additional cost he was obliged to incur after Craftsman departed the site. Adams, had no document to substantiate this cost.

The Tribunal does not find it necessary to decide whether or not the site clean up took place and whether or not Adams paid \$400.00 for the clean up. What is clear is that there was no agreement or contract that obliged Craftsman to affect a site clean up or to pay for same. The Sales Contract makes no reference to clean up nor do the three pages that accompanied it. In the absence of a written or verbal agreement, there can be no failure to perform in terms of section 14(1)(a) of the Act and therefore no liability on the Program under that section.

Accordingly, the Tribunal disallows Adams claim of \$400.00 under this heading.

Claim 14 - Electrical \$2,142.13

Adams claims that he paid Craftsman \$4,350.00 in respect of electrical work. This sum, according to Adams, was the agreed contract price for electrical work to be performed in

and about the home. Adams claims that in addition to having paid Craftsman \$4,350.00, he was obliged after Craftsman left the site to expend a further \$2,219.97 to complete the electrical work left incomplete by Craftsman. Details of the \$2,219.97 are referred in Adams Brief of Damage (Exhibit 6, Schedule "D").

Electrical work in and about the home was envisaged in the contract as it was referenced in "heating/and electrical" under "Finishing Allowances" (Exhibit 3, Tab 5 - 2nd page). There was no scope of electrical work or materials referenced in that document or in the Sales Contract.

The Tribunal finds that Adams paid Craftsman \$4,350.00 to enable certain electrical work to be done in and about the home in terms of a "proposal" (Exhibit 3, Tab M) made by a Barrie electrical firm to Craftsman. The Tribunal also finds that in addition to the electrical work to be done in terms of proposal, Adams required extra electrical aspects to be done in the home by Craftsman.

The Tribunal also finds that when Craftsman left the site in December 1993, certain electrical work referred to in the proposal had not been completed. The Tribunal has no specific evidence before it as to precisely what had been done in the home and what still had to be done when Craftsman left. The Tribunal however, believes from the evidence that the following work had not been completed when Craftsman departed: some circuit breakers had not been installed; some wires had still to be run to different parts of the home; no plugs, receptacles or light fixtures had been installed and no permanent baseboard heaters had been installed. Unfortunately, there is no means of knowing what specifically was still to be supplied and installed as the Program was not brought into this matter until many months after Craftsman's departure and apparently did not inspect the home at all. Had the Program been advised upon Craftsman's leaving the site, the Program would have had the opportunity to inspect the home and observe the state of completion. Equally unfortunate is the fact that the exact terms and scope of the electrical work were never documented. If all the aforementioned is not sufficient to cloud the issue, certain extras or additions were evidently supplied by Craftsman in regard to electrical aspects although exactly what was supplied is far from certain and the value thereof unknown.

The only certainty regarding the electrical items is that Craftsman should have but did not supply the 8 baseboard electric heaters. The parties agree on that aspect. The cost of each such baseboard heater was \$24.68 plus P.S.T. and G.S.T. for a total figure of \$227.09. In addition to the baseboard heaters, there are some items of work and materials subsequently supplied that probably were the direct result of Craftsman not completing the electrical installation. The work and materials that the Tribunal refers to are the following which appear in Exhibit 6 at pages 19 & 20 thereof:

January 12	Plugs, switches and installation of breakers 2 - 8hours	\$240.00
January 18	Hanging fixtures, finishing basement, outside plug - 1 at 9 hours, 1 at 4½ hours	\$198.00
February 3	Hung bedroom lights, heaters in basement Light in pump room - 2 at 1½ hours	\$ 45.00

G.S.T. on above	\$ 33.81

Materials:

17 x 15A s/p breakers	\$122.40
2 x 15A d/p breakers	\$ 29.40
3 x 20A d/p breakers	\$ 47.25
1 x 30A d/p breakers	\$ 15.75
1 x 40 A d/p breakers	\$ 15.75

G.S.T. on above materials	<u>\$ 16.10</u>
	\$763.56

The Tribunal accepts that Craftsman supplied and installed certain "pot lights" in the home. The number or cost of the pot lights was not established. The Tribunal therefore does not take the value of pot lights into account when calculating the damages in regard to this issue.

Accordingly, the Tribunal allows the sum of \$763.56 in regard to this claim.

In summary the Tribunal finds as follows:

1.	<u>Claims 1 through 7</u>	<u>Amount Awarded</u>
	All above claims disallowed	NIL
2.	<u>Claims 8 through 14</u>	<u>Amount Awarded</u>
	Cost of completion of home:	
	Claim 8	\$3,105.54
	Claim 9	\$ 500.00
	Claim 11	\$ 526.26
	Claim 14	<u>\$ 763.56</u>
		\$4,895.36
		<u>\$4,895.36</u>
		<u>\$4,895.36</u>

The Tribunal finds that Section 6(7) of Regulation 892 is applicable insofar as the cost of completion is concerned. The greater of 2% of the sale price of the home or \$5,000.00 is the maximum amount allowed under the above subsection. The sale price of the home, as found by Mr. Justice MacKinnon, was \$92,616.57 and 2% thereof is \$1,852.33. Accordingly, Adams is entitled to \$4,895.36 being the amount found by this Tribunal to be the cost of completion of the home.

Entitlement to the cost of completion of the home depends upon whether or not Adams was the cause of Craftsman leaving the site in December 1993 at a stage when certain

aspects of the home were incomplete. There is a divergence in the evidence given by Adams and that given by Zutautas in relation to what occurred when Zutautas left the site in December 1993. Zutautas claims that funds advanced to him by Adams had been utilized to pay for cost increases for additional items or extras requested by Adams and provided by Zutautas. Adams claims that he had paid Craftsman what he was obliged to pay. He claims that when he asked Zutautas for details as to what extras and additions Craftsman had paid with funds he had advanced to Craftsman, Zutautas failed to give him information. Adams claims that it was only in December 1993 that he discovered that Craftsman had not paid Engineer Dearden or the Bolsover account.

The Tribunal believes that when Adams asked Zutautas for details of the extras and additions the latter claimed to have paid, such details were not forthcoming. This lack of information coupled with incomplete state of the home motivated Adams in coming to the decision to refuse further payments. However, the Tribunal believes that Adams at no time gave Craftsman justifiable cause to abandon the project. Craftsman abandoned the project when Adams would not provide no further funds to Craftsman.

ORDER:

Accordingly, by virtue of the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow claims one through seven and claims ten, twelve and thirteen; and to allow claims eight, nine, eleven and fourteen in a total amount of \$4,895.36.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: April 20th, 2000

190-ALCL

MED/00/190

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Antoine Aouad, M.D.,
Presiding Member

APPEARANCES: Sandra Quadrini, Respondent
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF HEARING: March 29, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Suspension Appeal Board (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – dated February 16, 2000
- b) Exhibit # 3 Medical information submitted by Applicant 4 pages
- received March 22, 2000

By the Respondent:

- a) Exhibit # 2 Ministry of Transportation submissions – tabs 1 – 20
- received March 10, 2000

PRELIMINARY MATTERS

The matter first came before the Board on March 20, 2000. At that time, the Agent for the Applicant, requested an adjournment on the grounds that he had been unable to advise his client of the hearing date.

The Agent also stated that more time was needed in order to obtain laboratory test results carried out on February 28, 2000 and as of yet were unavailable.

A letter was received by the Board on March 22, 2000, wherein The Agent advises that submissions under the Charter would be introduced at today's hearing, regarding the admissibility of a new Medical Report.

Prior to the beginning of the hearing, the Board provided The Agent with a copy of rules of procedure governing constitutional matters. Arguments under the Charter require "... *at least 15 days before the question is to be argued before the Tribunal...*"

The Agent submitted a Medical Report from Physician # 1, dated March 13, 2000, which was entered as Exhibit # 3, the Respondent's objections being duly noted.

FACTS

The Applicant's driver's licence was suspended effective "99 09 18" as per Notice of Appeal (Exhibit 1).

A Medical Report prepared Physician # 1 pertaining to an examination of the Applicant on "99 01 26" indicates that the Applicant suffers from an addiction (Exhibit # 3 Tab 1).

Under "History Details and Summary" Physician # 1, confirms that the Applicant is "...HEALTHY. FIT TO DRIVE PROVIDED ...ABSTAINS FROM ALCOHOL. CURRENTLY IN ALCOHOLISM TREATMENT PROGRAM WITH PSYCHOLOGIST PHYSICIAN # 2. HAS HAD NO ALCOHOL FOR 2 MONTHS - DOING WELL SO FAR" (Exhibit # 2 Tab 1).

A MINISTRY OF TRANSPORTATION ALCOHOL ASSESSMENT FORM was prepared by Physician # 1, the Applicant's physician, on July 19, 1999. Physician # 1 reports as follows:

- "YES" is checked under "Personal Health History" for "*Hospitalisations within the last 12 months*" and "*Days absent from work within the past two years ~ 40 days*".
- Under "Medical Consequences Related to Alcohol Use", Physician # 1 checked "YES" for "*Delirium Tremens*".
- According to the "*PHYSICAL ASSESSMENT AND LABORATORY EVALUATION*" all categories are marked "*NORMAL - Blood Pressure 136/86; GGT 42; MCV 93.9*".

- Under the heading “DSM-IV CRITERIA FOR ALCOHOL DEPENDENCE”, “Yes” was the reply for numbers “2,3,4,7” respectively: *“Withdrawal, Taking larger amounts than intended, Unsuccessful efforts to reduce alcohol use, Continued drinking despite knowledge of alcohol related physician or psychological problems”*.
- In the section labeled “CONSEQUENCES OF DRIVING”, Physician # 1 relates the Applicant’s two impaired driving convictions, his interpersonal difficulties with family members and employer, as well as health problems which have resulted from the Applicant’s addiction to alcohol.
- The Applicant has been addicted to alcohol since the age of 24 and attended several addiction programs in the past including the 12 Stop Program but has relapsed after a period of time.
- “ABSTINENCE” is the “RECOMMEND GOAL FOR ALCOHOL CONSUMPTION” (Exhibit # 2 Tab 2).

Two reports from MDS Laboratory Services show “*DATE OF SERVICE 13 -OCT- 99; MCV 92.8*”; “*DATE OF SERVICE 29 -SEP- 99; MCV 91.3*” (Exhibit # 2 Tab 4).

A report from MDS Laboratory Services shows “*DATE OF SERVICE 18 -OCT- 99; MCV 90.9*” (Exhibit # 2 Tab 6).

MDS Laboratory Services dated October 27, 1999 finds “*ETHYL ALCOHOL -BLOOD NOT DETECTED*” (Exhibit # 2 Tab 7).

MDS Laboratory Services dated November 4, 1999 finds “*GAMMA-GLUTAMYL TRANSFERASE 30; ETHYL ALCOHOL -BLOOD NOT DETECTED*” (Exhibit # 2 Tab 8).

A report from MDS Laboratory Services shows “*DATE OF SERVICE 10 -NOV - 99; MCV 88.7; GAMMA-GLUTAMYL TRANSFERASE 25*” (Exhibit # 2 Tab 9).

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS dated “*October 26, 1999*”, completed by Counselor #1, Number 20, Driver Improvement Counselor, details the Applicant’s history as explained by the Applicant. The Applicant discloses that he has admitted himself to the hospital and into rehabilitation programs on several occasions due “*...to overindulgence in alcohol... does not drink prior to working nor when he is driving... learned lesson as he was charged twice for impaired, once in 1983 and again in 1986...involved with AA now...has not had any alcohol since September 24, 1999...*” (Exhibit # 2 Tab 10).

MDS Laboratory Services dated November 24, 1999 finds “*GAMMA-GLUTAMYL TRANSFERASE 24; ETHYL ALCOHOL -BLOOD NOT DETECTED*” (Exhibit # 2 Tab 10 A).

Physician # 1, writes the Ministry, under the letterhead of the Brooklin Medical Centre, on October 1999. Physician # 1 states that “*... the Applicant has been a patient at the Medical Centre #1 since he was a child... personally first saw him ...on February 19, 1996... have been following for brief supportive psychotherapy on a weekly basis. He*

seems to be committed to making changes in his lifestyle.... has been out to several Alcoholics Anonymous meetings... has been compliant in his avoidance of alcohol.... I support his application for re-instatement provided he remains sober...." (Exhibit # 2 Tab 11).

The Applicant is the holder of an AZ licence who drove *"long haul in Canada and the United States from east to the west ..."* (Exhibit # 2 Tab 11).

MEDICAL ADVISORY COMMITTEE CASE STUDY dated December 2, 1999 recommends the Applicant's licence *"Remain suspended. Reconsider with a detailed assessment from a physician specializing in addictions which confirms abstinence from alcohol for a period of one year..."* (Exhibit # 3 Tab 12).

Canadian Medical Laboratories report finding on a sample of the Applicant's blood collected December 22, 1999 *"MCV 87.3; GAMMA-GGT 30; ETHYL ALCOHOL UNDETECTED"* (Exhibit # 2 Tab 14).

Canadian Medical Laboratories report findings on a sample of the Applicant's blood collected January 5, 2000 *"MCV 89.4; GAMMA-GGT 30; ETHYL ALCOHOL UNDETECTED"* (Exhibit # 2 Tab 15).

Canadian Medical Laboratories report finding on a sample of the Applicant's blood collected January 13, 2000 *"MCV 88.5; GAMMA-GGT 33; ETHYL ALCOHOL 2.5..."* (Exhibit # 2 Tab 16).

Canadian Medical Laboratories report finding on a sample of the Applicant's blood collected January 20, 2000 *"MCV 88.4; GAMMA-GGT 32; ETHYL ALCOHOL UNDETECTED"* (Exhibit # 2 Tab 17).

Canadian Medical Laboratories report finding on a sample of the Applicant's blood collected February 3, 2000 *"MCV 89.5; GAMMA-GGT 28; ETHYL ALCOHOL UNDETECTED"* (Exhibit # 2 Tab 18).

Canadian Medical Laboratories report finding on a sample of the Applicant's blood collected February 21, 2000 *"MCV 88.5; GAMMA-GGT 33; ETHYL ALCOHOL 6,7"* (Exhibit # 2 Tab 19).

Exhibit #3 Tab 20, Ministry of Transportation driving Record for the Applicant since 1979, shows a conviction for DRIVING WITH MORE THAN 80 MGS ALCOHOL IN BLOOD in 1983 and an IMPAIRED DRIVING conviction in 1986.

At the hearing, the Respondent offered a re-iteration of the written material provided for the hearing, Exhibit # 2, tabs 1 through 20, and on the policies of the National Safety Code for Motor Carriers and the Physician's Guide to Driver Examination.

The Respondent informed the Board that the Applicant came to the attention of the Ministry for failure to provide a medical report required every three years.

During his examination in chief and cross-examination the Applicant testified that he was drawn back to drinking recently due to his brother's passing and his separation from his wife.

The Applicant attested that he had seen Physician # 2 in “ ... 98” ...but this is not document by a letter because nothing been requested from the Ministry at that time.

The Applicant was present when Physician # 1 prepared the MINISTRY OF TRANSPORTATION ALCOHOL ASSESSMENT FORM, but disagrees with the information. He drinks “...50 beers a month not a week ... Physician # 1 did not stress abstinence required....”.

The Applicant described that he had suffered several relapses because he did not realize that his career could be jeopardized. Further, he was driven to drink due to frustration, after his licence was suspended

ISSUES

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.
- (2) The Board may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS

Section 47(1) unquestionably empowers the Registrar to “...*suspend or cancel*” a driver’s licence for “*any...sufficient reason...*”. The Applicant came to the attention of the Ministry for failure to provide a medical report required every three years.

The Board finds that the Ministry acted properly and in accordance with the Regulation, by suspending the Applicant’s driver’s licence.

The Respondent, contends that the Applicant is in violation of Section 14 (b) which states that:

“An applicant for or a holder of a driver’s licence must not,

- b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely”.

The Applicant has elected not to provide the Board with any reports from either his psychiatrist or any of the rehabilitation programs he has attended.

The Board is left to consider only the Applicant’s testimony, and the recommendations of the Applicant’s family physician.

The Applicant, by his own admission acknowledged a drinking problem that has plagued him for years. He has checked himself into the hospital and rehabilitation programs on several occasions. Nonetheless, the Applicant claims that his drinking has not affected his driving since his previous convictions in 1983 and 1986.

Physician # 1 is quite specific as to the Applicant’s ability to safely operate a motor vehicle. In the Medical Report prepared after examination of the Applicant on “99 01 26” Physician # 1 emphasizes that the Applicant is “.... *FIT TO DRIVE PROVIDED ...ABSTAINS FROM ALCOHOL...*” (Exhibit # 2 Tab 1).

In the MINISTRY OF TRANSPORTATION ALCOHOL ASSESSMENT FORM dated July 19, 1999. Physician # 1 leaves no doubt that “*ABSTINENCE*” is required (Exhibit # 2 Tab 2).

Further, Physician # 1 re-asserts his position in his letter of October 22 1999: “... *I support his application for re-instatement provided he remains sober...*” (Exhibit # 2 Tab 11).

Physician # 1’s letter March 13, 2000, is more favourable to Respondent’s position than

the Applicant's. It is evident by Physician # 1's statement that he has not been made privy to all the facts. Physician # 1 comments : "...*All the tests have been negative except for one minor infraction recorded on January 13, 2000 with a blood ethanol level of 2.5...*" A Canadian Medical Laboratories report shows a second relapse in the Applicant's blood sample collected February 21, 2000 "... *ETHYL ALCOHOL 6,7*" (Exhibit # 2 Tab 19).

The N.S.C. (National Safety Code for Motor Carriers -13.2 recognizes habitual alcoholic intoxication as a serious disability. The standard applied is explicit "...*persons habitually dependent on alcohol should not drive any class of motor vehicle until evidence of alcoholism is no longer a problem*".

The Board recognizes, and has taken into consideration that the above-mentioned guidelines of the Ministry of Transportation Medical Advisory Committee and the National Safety Code for Motor Carriers are only policy not legislation. However, the guidelines are relevant to the determination of whether there is sufficient reason to suspend a driver's licence.

It is laudable that the Applicant is willing continue receiving treatment for his condition. Nonetheless, all evidence corroborates the fact that the Applicant's previous endeavours to stop drinking were unsuccessful. Thus, while commending the Applicant for his efforts, the Board feels that it is reasonable to allow at least the recommended time period to elapse, prior to re-instatement of his licence.

In weighing the evidence presented, the Board is satisfied that the Applicant does not meet the criteria described in the Regulation 340/94 section 14 (b) of the HTA, and that it is appropriate to confirm the Ministry's decision on the evidence.

DECISION

Upon the application by the Applicant to appeal the decision dated September 18, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Board, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE BOARD pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: April 5, 2000

BURLINGTON AUTO & LEASE CENTRE INC.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BURLINGTON AUTO & LEASE CENTRE INC. AND
JOHN ALEXANDER SHERESKY AND ANDREW HOWARD BAILEY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: March 21st, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BURLINGTON AUTO & LEASE CENTRE INC.
and JOHN ALEXANDER SHERESKY and
ANDREW HOWARD BAILEY

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Burlington Auto & Lease Centre Inc. and John Alexander Sheresky and Andrew Howard Bailey, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 18th, 2000

TO: The Registrar
Motor Vehicle Dealer and Salespersons Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Commercial Registration Appeals Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Burlington Auto & Lease Centre Inc.
932 Brant Street
Burlington, ON L7R 2J7

And From: Andy Howard Bailey
524 Upper Kennilworth Avenue
Hamilton, ON L8T 4H1

And From: John Sheresky
410 John Street, Apartment 612
Burlington, ON L7R 4P5

RE: Burlington Auto & Lease Centre Inc., John Sheresky and Andy Howard Bailey

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Burlington Auto & Lease Centre Inc. (hereinafter referred to as "the Dealer") Andy Howard Bailey and John Sheresky consents to the following terms and conditions to their registration as a motor vehicle dealer and salespersons:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Commercial Registration Appeal Tribunal based upon the following Terms and Conditions;

1. The Dealer acknowledges and understands that when the Dealer receives funds towards the purchase of a motor vehicle prior to the delivery of the motor vehicle, the entire amount received will be deemed to be trust funds.
2. The Dealer agrees to maintain a ledger account into which shall be entered the names and addresses of all persons from whom trust funds are obtained with details of the amounts retained and a record of all disbursements from them.
3. The Dealer agrees to maintain, in respect of all funds that come into the Dealers hands, in accordance with clause 1 of this Order, a separate trust account into which the Dealer shall deposit the funds and the Dealer shall, at all times, keep the funds secure and make disbursements from the trust account, in accordance with the terms of the trust.
4. Where trust funds are paid to the Dealer in accordance with clause 1 of this Order, whether by way of deposit, down payment or otherwise, the Dealer agrees to retain the funds in trust for the purchaser until,
 - a. the motor vehicle is delivered;
 - b. the contract is mutually cancelled; or
 - c. direction or authority is received from the Registrar concerning disbursements
5. The Dealer agrees to provide free access to his books and records to any authorized representative of the Registrar.
6. The Dealer agrees to comply with the Retail Sales Tax Act with respect to the collection of tax and remittance when due.

7. The Dealer agrees to make reasonable efforts to repay any judgements outstanding against it that arise from its operations as a motor vehicle dealer.
8. The Dealer acknowledges that its registration as a motor vehicle dealer and the registrations of Andy Howard Bailey and John Sheresky as salespersons will be revoked if it breaches any of the terms and conditions set out herein or if the Dealer, Andy Howard Bailey or John Sheresky provide false information to any representative of the Registrar, either verbally or in writing.
9. I hereby consent to an order of the Commercial Registration Appeal Tribunal, which may include the Terms and Conditions set out herein.
10. I hereby withdraw my appeal to the Commercial Registration Appeal Tribunal.
11. I hereby acknowledge that I have obtained or have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2000.

Signature (Burlington Auto & Lease Centre Inc.)
I have authority to bind the Corporation

Signature (Andy Howard Bailey)

Signature (John Sheresky)

Carl Compton
Registrar, Motor Vehicle Dealers Act

HOPKINS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
WAYNE WILLIAM HOPKINS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 15th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WAYNE WILLIAM HOPKINS

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by Wayne William Hopkins, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 10th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

And To: Commercial Registration Appeal Tribunal
1 St Clair Ave West
12th Floor
Toronto ON M4V 1K6

From: Wayne William Hopkins
P.O. Box 132
9 Erwest Street
Lindsay ON K9V 4R8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, (fill in name, herein after the "Salesperson") and the Registrar, Motor Vehicle Dealers Act, (herein after the Registrar, MVDA,) waive the requirement of a hearing and consent to an Order of the Commercial Registration Appeal Tribunal (herein after the "Consent Order") based on the following terms and conditions:

1. The Salesperson agrees, if he is criminally charged in the future, to immediately notify the Registrar, Motor Vehicle Dealers Act, in writing, of the charges laid against him.
2. The Salesperson agrees, if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Salesperson agrees not to transfer his registration as a salesperson under the Motor Vehicle Dealers Act to another dealer. Should he wish to transfer his Registration, he shall submit a new application for registration to the Registrar.
4. The Salesperson agrees not be the final signatory on contracts.
5. The Salesperson agrees to give full disclosure of true distance travelled of all motor vehicles he sells. He also agrees to disclose all material facts relating to any motor vehicle he sells. Failure to do so will result in the automatic revocation of his registration.
6. The Salesperson acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
7. The Salesperson acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
8. The Salesperson acknowledges that his registration as a motor vehicle salesperson will be revoked if he breaches any of the terms and conditions set out herein.
9. The Salesperson hereby consents to an order of the Commercial Registration Appeal Tribunal, which may include the Terms and Conditions set out herein.
10. The Salesperson hereby withdraws his appeal to the Commercial Registration Appeal Tribunal.

11. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 20____.

(Signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

SANDALJ & SANDAL CAPITAL CORP. o/a GOODWILL LEASING

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SANDAL CAPITAL CORP. O/A GOODWILL LEASING AND
MARKO SANDALJ

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: November 4th, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SANDAL CAPITAL CORP. O/A GOODWILL LEASING and
MARKO SANDALJ

Applicants

- and -

REGISTRAR, *Motor Vehicle Dealers Act*

Respondent

CONSENT ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act* R.S.O. 1990, Chapter M.42, as amended, (the "Act"), Sandal Capital Corp. o/a Goodwill Leasing and Marko Sandalj (the "Applicants") appealed a proposal of the Registrar under the Act dated November 4, 1999 in terms of which the Registrar proposed to revoke the registrations of the Applicants;

AND WHEREAS, following attendances on April 3, 2000, at the hearing before the Licence Appeal Tribunal (formerly the Commercial Registration Appeal Tribunal) of Marko Sandalj (the "Applicants") and Aviva Harari, Counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar") at the commencement of the hearing, the parties came to an agreement to settle on consent with terms and conditions;

AND WHEREAS having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of further proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

Beverley Reade
Vice-Chair, Presiding

Bruce Fitzpatrick
Vice-Chair, as Member

Released: April 3rd, 2000

TO: The Registrar
Motor Vehicle Dealer and Salespersons Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Commercial Registration Appeals Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

In accordance with section 4.1 of the Statutory Powers Procedures Act and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Sandal Capital Corp. o/a Goodwill Leasing (hereafter the "Dealer" and Marko Sandalj (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act (hereafter the "Registrar MVDA") waive the requirements of a hearing and consent to an order of the Commercial Registration Appeal Tribunal based upon the following terms and conditions;

1. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying selling and leasing on behalf of a Dealer. "Buying selling and leasing" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing to contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to store its books and records at the location approved by the Registrar. Books and records cannot be stored at any other location, including the applicant's dwelling. Books and records shall be readily available and a representative of the Registrar shall have full and free access to the books and records.
4. The Dealer and Salesperson will ensure that all advertisements placed by or on behalf of the Dealer will identify the registered name and the address of the location approved by the Registrar.
5. The Dealer agrees not to invite the public to deal at a place other than the approved location, which at this time is 547 Frederick St., Kitchener.
6. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in registered business premises in the form required by the Registrar.
7. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer and Salesperson under the Motor Vehicles Dealers Act.
8. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser, in a retail transaction.
9. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
10. The Dealer and Applicant agree to post a permanent sign, visible to the public at the registered premises and the dealer and applicant shall maintain a clearly identified lot, adjacent to the registered premises for the display of vehicles.
11. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
12. The Dealer and Applicant agree that they are under a positive obligation to disclose all material facts about the vehicles sold to customers. The Dealer and Applicant agree to make reasonable efforts to

research the history of vehicles prior to sale to ensure all material facts are disclosed. The Dealer and Applicant agree that should any information come to light which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.

13. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
14. The Dealer and Applicant will comply with all aspects of the Retail Sales Tax Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
15. The Dealer and Applicant will pay all amounts owing to the minister of Finance in respect of all future audit assessments when due.
16. The Dealer and Applicant hereby acknowledge that in the event of a breach of any of the terms and conditions set out herein, the Registrar is directed to, and shall revoke the registrations of both the Dealer and Applicant.
17. The Dealer and Applicant hereby acknowledge that the Registrar may take further administrative action, including a proposal to revoke both registrations, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
18. The Dealer and Applicant hereby acknowledge that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the sale of motor vehicles that may have occurred in the past or may occur in the future.
19. The Dealer and Applicant consent to an order of the Commercial Registration Appeal Tribunal, which may include the Terms and Conditions set out herein.
20. The Dealer and salesperson hereby withdraw the appeal to the Commercial Registration Appeal Tribunal.
21. The Dealer and Applicant acknowledge that they have read, understood and will comply with the above terms and conditions of Registration.
22. The Dealer and Applicant acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of Toronto this day of April, 2000.

"Marko Sandalj"

(Signature) Marko Sandalj

I have authority to bind the corporation
Sandal Capital Corp.

"Marko Sandalj"

Marko Sandalj

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Per "Laura Gordon" Director Compliance
Carl Compton, Registrar

Date: Apr 3/00

LEE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ROBERT HOI YU LEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 14th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ROBERT HOI YU LEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by Robert Hoi Yu Lee, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 20th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

And To: Licence Appeal Tribunal
1 St Clair Ave West
12th Floor
Toronto ON M4V 1K6

From: Robert Lee
220 Hollingham Rd
Markham ON L3R 8K3

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Robert Lee (herein after the "Salesperson") and the Registrar, *Motor Vehicle Dealers Act*, (herein after the Registrar, MVDA,) waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (herein after the "Consent Order") based on the following terms and conditions:

1. The Salesperson agrees, if he is charged in the future, of any industry specific offence, to immediately notify the Registrar, Motor Vehicle Dealer's Act, of the charges laid against him.
2. The Salesperson agrees, if he is charged in the future, of any industry specific offence, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Salesperson agrees is registration will automatically be revoked if he is convicted of any industry specific offence.
4. The Salesperson will give full disclosure on all future applications.
5. The Salesperson acknowledges that the disclosure he provided was accurate. Should the Registrar discover that material facts surrounding each conviction differ from what was previously disclosed, the Registrar will automatically revoke his registration.
6. The Salesperson agrees not to transfer his registration as a salesperson under the Motor Vehicle Dealers Act to another dealer without having obtained prior written consent of the Registrar to effect this transfer.
7. The Salesperson agrees to provide a copy of this order to his employer.
8. The Salesperson acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Salesperson hereby acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action against him, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that might be alleged to have occurred in the past or that may occur in the future.
10. The Salesperson acknowledges that should he breach any of the terms and conditions contained in this order, in whole or in part, the Registrar is directed to, and shall carry out the proposal to revoke, and the Salesperson's registration will automatically be revoked.

11. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of this day of April 2000.

(Signature) Robert Lee

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

HACHE

MOTOR VEHICLE DEALERS ACT

Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF

RANDY BRIAN HACHÉ

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 1st, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RANDY BRIAN HACHÉ

Applicant

- and -

REGISTRAR, *Motor Vehicle Dealers Act*

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by Randy Brian Haché, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 6th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario M2P 2E9

AND TO: Commercial Registration Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

FROM: Randy Hache
1112 Peoples Rd
Sault Ste-Marie ON P6C 3W5

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Randy Hache (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Commercial Registration Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, *Motor Vehicle Dealer's Act*, of the charges laid against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant agrees not to transfer his registration as a salesperson under the Motor Vehicle Dealers Act to another dealer without having obtained prior written consent of the Registrar.
4. The Applicant acknowledges if the particulars surrounding his convictions differ substantially from that which was previously disclosed to the Registrar, his registration will automatically be revoked.
5. The Applicant agrees to enrol into and successfully complete the certification course within 60 days of the issuance of this order.
6. The Applicant agrees to make full disclosure on all future applications submitted to the Registrar.
7. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
8. The Applicant hereby acknowledges that his Registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action against him, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that might be alleged to have occurred in the past or that may occur in the future.
9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein in whole or in part the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall be revoked.
10. The Applicant hereby consents to an order of the Commercial Registration Appeal Tribunal,

which may include the Terms and Conditions set out herein.

11. The Applicant hereby withdraws his appeal to the Commercial Registration Appeal Tribunal.
12. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Sault Ste-Marie, this day of March 2000.

(Signature) Randy Brian Hache

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

CREED

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
BLAYNE COREY CREED

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 3rd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

BLAYNE COREY CREED

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Blayne Corey Creed, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 17th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

And To: Commercial Registration Appeal Tribunal
1 St Clair Ave West
12th Floor
Toronto ON M4V 1K6

From: Blayne Corey Creed
1 - 131 Mountjoy Ave
Toronto ON M4J 1K1

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Blayne Corey Creed (herein after the "Salesperson") and the Registrar, *Motor Vehicle Dealers Act*, (herein after the Registrar, MVDA,) waive the requirement of a hearing and consent to an Order of the Commercial Registration Appeal Tribunal (herein after the "Consent Order") based on the following terms and conditions:

1. The Salesperson agrees, if he is charged in the future, under any law, to immediately notify the Registrar, *Motor Vehicle Dealers Act*, in writing, of the charges laid against him.
2. The Salesperson agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Salesperson agrees, if he is convicted under any law, his registration will automatically be revoked.
4. The Salesperson agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without prior consent from the Registrar.
5. The Salesperson agrees that his disclosure to the Registrar is accurate. Should the Registrar discover that the circumstances surrounding the convictions differ materially from the Salesperson's disclosure, the Salesperson's registration will automatically be revoked.
6. The Salesperson agrees to provide a copy of this Order to his employer.
7. *The Salesperson acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to financial circumstances and honesty and integrity.*
8. The Salesperson acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

9. The Salesperson acknowledges that, should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to, and shall carry out the proposal to revoke, and the Salesperson's registration shall automatically be revoked.
10. The Salesperson hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
11. The Salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.
12. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of April 2000

(Signature) Blayne Corey Creed

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton, Registrar.
Date:

REID

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ANN and NORM REID

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting the
said Decision pursuant to section 16(2)

ANN and NORM REID

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

KIRKOR COLLEGE GATE LTD.

Added Party

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by the Applicants, Ann and Norm Reid and Counsel for the Ontario New Home Warranty Program for issuance of a Consent Order of the Tribunal to settle certain issues which will no longer form part of the continued hearing; and

Having reviewed the written Minutes of Settlement signed by the Applicants and signed on behalf of the Ontario New Home Warranty Program and the Added Party, Kirkor College Gate Ltd. as to the disposition of these issues which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, pursuant to section 16(3) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, this Tribunal orders that the issues set out in Schedule "A" in this matter are disposed of on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair

Released: April 6th, 2000

Chrysler Credit Canada Ltd.-TIME

CHRYSLER CREDIT CANADA LTD.

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Chrysler
Credit Canada Ltd. seeking an extension of the
time requirements for this Applicant to
commence this appeal from an impoundment
order of the Registrar under Section 55.1 of the
Highway Traffic Act;

AND IN THE MATTER of

Chrysler Credit Canada Ltd.

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: Stuart Cork, Presiding Member

APPEARANCES: Sandra Quadrini
Representative for the Registrar of Motor Vehicles

Neil Abbott,
Solicitor for the Applicant

DATE OF
MOTION: April 11th, 2000

ORDER

A motion was heard on April 11th, 2000, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the Highway Traffic Act, R.S.O. 1990. c.H.8 amended ("HTA").

Submissions of Written Material

Mr. Abbott submitted a motion record book which was entered with the consent of both parties as exhibit one. Included in exhibit one was an Affidavit of Service of the motion record on both the Licence Suspension Appeal Board (which as of April 1, 2000 is known as the Licence Appeal Tribunal) and the Driver Improvement Office of the Ministry of Transportation.

The Facts

The Applicant is the owner of a motor vehicle impounded for a period of 180 days pursuant to the above-captioned legislation. The Applicant leases the vehicle to 1111956 Ontario Ltd. in the name of Michael Lumley, who entered into a lease agreement with the Applicant on October 12th, 1997.

The motor vehicle was impounded on February 22nd, 2000 while being driven by Wayne Hunt, whose driver's licence was under suspension at the time of the impoundment. The vehicle was taken by Mr. Hunt without the knowledge or consent of either the Applicant, or Mr. Lumley. Furthermore, the Applicant had no knowledge of Mr. Hunt. Mr. Lumley subsequently reported the vehicle as stolen to the police, and learned of its impoundment some two days later.

Upon learning of the vehicle's impoundment, Mr. Lumley contacted an Applicant's customer service agent at the Applicant's offices, who referred Mr. Lumley to an adjuster. Mr. Lumley then notified the Applicant of the impoundment by faxed letter of March 2nd, 2000. 1111956 Ontario Ltd. had been informed of the impoundment by letter of February 23rd, 2000 (exhibit one, tab B) which also stated that the registered owner of the vehicle had been served with an Order to Impound.

The fifteen-day deadline for filing an appeal with the Board was March 8th, 2000. The Applicant filed its Notice of Appeal with the Board on March 22nd, 2000, twenty-nine days into the impoundment period, and fifteen days past the appeal deadline date.

Mr. Abbott stated on behalf of the Applicant, that as of the date of this Motion, the Applicant was still not in possession or aware of the location of the above mentioned Notice of Impoundment. The only copy of the Notice of Impoundment that the Applicant was in possession of was the copy supplied to them by Mr. Lumley. The Applicant attributed this to the fact that they are a large corporation, and that they receive a substantial amount of mail on a daily basis. Mr. Abbott stated that the Notice of Impoundment appeared to have become lost in the Applicant's paper work, and that it was an unfamiliar document to the Applicant.

Notwithstanding the fact that Mr. Lumley informed the Applicant of the impoundment six days prior to the expiration of the fifteen-day appeal filing period, it took an additional twenty days to file the appeal. Mr. Abbott stated that this was due to Mr. Lumley notifying an individual at the Applicant's offices who was not associated with the file.

The Order

THE BOARD RULED TO REFUSE TO GRANT an extension of the time to commence this appeal for the following reasons.

REASONS FOR ORDER

Section 20(7) of Regulation 632/98, provides the Board with the specific criteria that the Applicant must meet to satisfy the Board that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that the owner, acting in good faith, was unable through accident, illness or other cause beyond the owner's control to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. The Board is precluded from considering other factors not arising from or directly related to these criteria.

The criteria listed in Section 20(7) which the Board should consider in granting an extension are matters outside the Applicant's control. There is no provision for the Applicant's failure to employ timely procedures for handling incoming information which impacts directly upon the Applicant and its vehicle. Such circumstances are not beyond the Applicant's control.

The Board heard no evidence that would support an argument that the circumstances of the delay in this matter were beyond the Applicant's control. There is no evidence before the Board that the Applicant was unable through a cause beyond the Applicant's control, to bring the appeal within the prescribed fifteen days. Instead the Board is asked to accept that due to the large size of the Applicant's operation, it is assumed that documents would be lost within the organization.

The Applicant failed to provide a satisfactory reason as to why a delay in completing the appeal occurred after Mr. Lumley had informed the Applicant of the impoundment. The Applicant had received this written notice six days prior to the fifteen-day filing period for making an appeal. The fifteen-day deadline to file the appeal expired March 8, 2000. The Applicant's Notice of Appeal was not filed until March 22, 2000.

The Board finds that the Applicant was thus notified on two separate occasions of the impoundment, initially by the Respondent immediately following the impoundment, and again by Mr. Lumley. In either case, no timely action was taken to file a Notice of Appeal with the Board.

The evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle under Section 55.1 of the Highway Traffic Act was the result of accident, illness or other cause beyond the Applicant's control. Accordingly, the motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574, R.R.O. 1990, is dismissed.

LICENCE APPEAL TRIBUNAL

Stuart Cork
Presiding Member

RELEASED: April 18, 2000

JEFF A. WILHELM

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: RAYMOND KOLYNCHUK
Presiding member

APPEARANCES: K. M. BIEL
Representative for the Registrar of Motor Vehicles

JEFF A. WILHELM, Applicant
unrepresented

DATE OF HEARING: April 20, 2000

DECISION RELEASED: April 20, 2000 Toronto

REASONS FOR DECISION

A hearing was held on April 20, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Jeff A. Wilhelm (the "Applicant")
Motor Vehicle: 1991 Ford Ranger, Plate # 562 IBD (the "vehicle")
Date of Appeal: March 27, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Board on March 27, 2000 and proceeded as a written hearing.

There were no preliminary matters in dispute between the parties.

ISSUE:

The Applicant's request for a hearing filed with this Board (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

"As owner of said impounded vehicle has caused my family exceptional hardship due to the loss of our only vehicle. In transporting our children to and from school and my wife's only way to and from her work place causing financial hardship. And as likely unable to afford to have said vehicle released on date of impoundment release.

The vehicle ownership permit is still in said vehicle."

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jeffrey Allan Wilhelm;

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 14, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Facts Found Proven

The following are the facts found by the Board to have been proven:

1. The Applicant is the owner of the motor vehicle that was subject to the impoundment order.
2. At the time that the vehicle was detained, it was being driven by the Applicant, Jeffrey Allan Wilhelm;

3. At the time the vehicle was detained, the driver (Applicant) had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 14, 2000.

Onus of Proof

The onus of proof, based on the balance of probabilities, rests upon the Applicant.

Should the Board set aside the impound order of the Registrar on the basis that the order will result in exceptional hardship?

The Applicant submits that the loss of the family's only vehicle will present hardship in transporting his children to school. The use of alternative means of transportation including public transit, school buses, friends, taxis, etc. has not been advanced. There is no indication that any of the children have missed school. In this context, the Applicant and his children are possibly being faced with inconvenience which is not an authorized ground for appeal under the Act and regulations and the Board is precluded from considering it.

The Applicant submits the loss of the family's only vehicle will cause financial hardship as it is the only way for his wife to travel to and from her work place. The Applicant has not submitted any supporting information suggesting his wife:

- has fully explored other means of transportation to travel to and from her location of employment;
- has been unable to attend her place of employment or any information suggesting her employment status has adversely changed.

As such, the circumstance as arisen respecting his wife's employment cannot be considered an exceptional hardship

Accordingly, based on all of the above reasons, this ground of appeal must fail.

DECISION:

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Raymond Kolynchuk, Presiding Member

RELEASED: April 20, 2000

RONALD PITAWANIKWAT

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

RONALD PITAWANIKWAT, Applicant

DONALD R. ORAZIETTI, Q.C.
Solicitor for the Applicant

DATE OF HEARING: March 29, 2000

DECISION RELEASED: April 3, 2000 Sault St. Marie

REASONS FOR DECISION

A hearing was held on March 29, 2000, at Sault St. Marie, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

1. BACKGROUND

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Ronald Pitawanikwat (the "Applicant")
Motor Vehicle: 1994 Dodge Spirit (the "vehicle")
Date of Appeal: March 8, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Board on March 29, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

2. ISSUE

The Applicant's request for a hearing filed with this Board (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

3. FACTS

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

I am a native Canadian and I am employed at a charity casino. I have a high school education and I do not understand all the legal technicalities involved in this incident. However, my understanding is as follows and is drafted with the help of my lawyer.

I retained a lawyer, Mr. Orazietti, to appeal my conviction for operating a motor vehicle over the legal limit. That conviction was on April 13, 1999.

I was given a document which is called an Order which I was told, by my lawyer, I could take to the Ministry of Transport office to obtain a temporary licence. I was also told to carry that Order with me in my vehicle in the event that I should be stopped, which I did. I am enclosing the original Order which I carried in my vehicle. That Order was made on Wednesday, the 21st day of April, 1999.

I attended the Ministry of Transportation with a copy of the Order which I have enclosed and obtained a temporary licence on April 22, 1999. I subsequently obtained a renewal of that licence some time in July of 1999.

To my knowledge, my conviction for driving over the legal limit was under appeal. Mr. Orazietti has provided to me a Notice of the Appeal which I am enclosing for your consideration.

Mr. Orazietti advised that I was entitled to drive once the Ministry gave me a temporary licence. I honestly believed that I was entitled to drive and if I had thought for a moment that I was under suspension, I would not have operated a motor vehicle.

As a result of being stopped on December 6, 1999, my vehicle was impounded and I was also charged with the offence of driving while disqualified under the Criminal Code. I attended court on January 24, 2000. Upon explanation by Mr. Orazietti to the Crown Attorney regarding the fact that I was not aware of that suspension, that charge was withdrawn on January 24, 2000. I enclose a copy of the charge which is marked withdrawn and a court transcript of the Crown Attorney requesting the withdrawal of that charge.

The only witness called was Mr. Pitawanikwat. After he took the oath, he was questioned by his Counsel, Mr. Orazietti. Mr. Pitawanikwat stated he had been convicted of driving with over .08 mgs of alcohol in his blood, and he had asked for an appeal of that conviction (Exhibit 6). He also applied for a stay while the appeal was pending. The stay was granted (Exhibit 5). He then went to the Ministry of Transportation in Sault Ste. Marie, on the advice given to him by his Counsel, and presented the Superior Court of Justice Order, by Justice F. R. Caputo to the Ministry Office. After surrendering his driver's licence, he was given a temporary 90-day licence, with instructions to return prior to the expiry of the 90-day licence, if the matter had not yet been resolved.

Mr. Pitawanikwat stated he returned twice to have the temporary licence renewed once in July 1999, and again approximately 90 days later. He also stated he continued to carry the Order staying the conviction. On December 6th, 1999, he was stopped by police and charged with the offence of driving while disqualified under the Criminal Code, and the order to impound the vehicle was issued for December 6th, 1999. The charge of driving while disqualified under the Criminal Code was withdrawn on January 24th, 2000 at request of the Crown.

The Ministry of Transportation representative, Ms. Kim Grosskurth, then cross-examined Mr. Pitawanikwat. Under cross-examination, when asked if he could produce the temporary licence, Mr. Pitawanikwat stated that he had left it at home and did not carry it, as he was not now driving. Although it would have been a valuable piece of evidence, the Board found Mr. Pitawanikwat a creditable witness and found no reason to doubt his testimony.

Ms. Grosskurth stated that it is ministry policy now, not to "stamp", (renew) a temporary licence and at that time, they would only "stamp" (renew) a temporary licence once. Mr. Pitawanikwat's response was he did not know what the Ministry policy was. He had followed the instructions, of his counsel and the officer at the Ministry of Transportation

Office and was led to believe he had a valid licence to drive. Ms. Grosskurth did not take the witness stand nor was she sworn. She also called no witnesses, and she produced no documentation to the Board regarding temporary licences. She also stated that the reason a temporary driver's licence was granted and the original conviction did not show on the Ministry of Transportation office computer in Sault Ste. Marie was, perhaps, because of the delays of up to ten days in getting information "into the system". This does not explain why a renewal was issued 90 days later. In any event, her statement can not be considered evidence because she was not a witness at the hearing.

Under further cross-examination, it became clear that the Appeal of the original charge against Mr. Pitawanikwat, was dismissed on November 29th, 1999. Mr. Pitawanikwat did not attend court on that day, as he had to work and his counsel attended on his behalf. Mr. Pitawanikwat was stopped on December 6th, 1999, some seven days later, and subsequently charged and his vehicle impounded.

When asked if he had contacted the Ministry of Transportation regarding the status of his driver's licence, Mr. Pitawanikwat stated he had not.

The Board then questioned Mr. Pitawanikwat to clarify dates and sequence of events. The Board asked Mr. Pitawanikwat what he had done to check the status of his driver's licence after November 29th, 1999 to which he stated he had called his lawyer five or six times.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained, was being driven by Mr. Pitawanikwat;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving with more than .08 MGS. Alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 13th, 2000.

4. LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of

the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

5. APPLICATION OF LAW TO FACTS

As to whether Mr. Ronald Pitawanikwat exercised due diligence in establishing that his Ontario driver's licence was valid at the time of the impoundment, the Board finds that he did. Since the time of the charge of driving with over .08 mgs. of alcohol in his blood, Mr. Pitawanikwat retained counsel. He contacted counsel often throughout the proceeding of charges against him and followed the advice given to him by his counsel and indeed by the Ministry of Transportation office in Sault Ste. Marie. During the suspension period from April 13th, 1999, he had attended the Ministry of Transportation office in Sault Ste. Marie and surrendered his driver's licence and obtained a temporary licence based on the Stay of conviction. Further, he had the temporary licence renewed by the Ministry during this time. At no time was he told his licence to drive was suspended. After the date that his application for appeal was to be heard, regarding the impaired charge, he tried to contact his lawyer up to six times to determine the outcome. Further as shown in Exhibit 8, the Crown moved that the charge of driving while disqualified under the Criminal Code be withdrawn. Although the Board is not bound by that decision, it does consider it to be relevant to this decision. Mr. Pitawanikwat obtained legal counsel to advise him throughout this confusing process and made every effort to co-operate with the Ministry of Transportation. He looked to both for advice and guidance and was led to believe his driver's licence was valid.

6. DECISION

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: April 3, 2000

APPLICANT (MVIA/00/147)

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

Applicant

Representative for the Applicant

DATE OF HEARING: March 31, 2000

DECISION RELEASED: April 5, 2000 Barrie

REASONS FOR DECISION

A hearing was held on March 31, 2000, at Barrie, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant
Motor Vehicle:	1999 Pontiac Sunfire, Plate # (plate no.) (the "vehicle")
Date of Appeal:	March 9, 2000

The lessee, as agent for the owner, filed an appeal of this impoundment order (**Exhibit 2**) with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The Applicant appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Board on March 31, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing. The Respondent provided the Board, as well as the lessee, a copy of (driver)'s Notice of Suspension of Driver's Licence for their information and not for inclusion into evidence. As well, the Respondent requested that the lessee's daughter leave the room while the lessee gave her testimony. The lessee consented to the Respondent's request.

All documents were submitted into evidence with the consent of both parties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Board (**Exhibit #2**) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The lessee's written submission filed with the Board in support of appeal states:

I the owner of this vehicle that was impounded on Feb 29/00 wish to appeal this on the grounds that such vehicle was taken without my knowledge.

On Tuesday evening I left my home at approx 5.50 pm to take an evening course, leaving the person (driver) who was staying at my home at the time (My daughters boyfriend) My daughter was away on vacation at the time) I arrived home this same evening around 930 and was having a cup of tea when the phone rang and it was (driver)s brother to say the police were at there house and had picked up (driver) up on radar (speeding) driving my car. I went immediately to the police station which is in walking distance to my house and waited for the (Constable Officer #1 to return). I was so upset because I thought the car was in the garage safe like it should have been, and now I hear its impounded you can imagine how shocked I was to find out that (driver) someone I knew and liked could have done this, he is a young offender not eighteen years old yet who had already a suspended licence.

I was not able to receive a copy of the charge I laid against him but I am enclosing a card with a reference #(recognition#). I have requested a telephone conference if there is anything more you need to know. I just would like to get my car back.

The following is a summary of both the lessee and her daughter's testimony given under oath. The Lessee's testimony was given first, separate and apart from her daughter's. The Board found the evidence of both these witnesses to be accurate and consistent.

The representative for the Applicant is the lessee of the 1999 Pontiac Sunfire, which was leased on June 5, 1999, and is also the owner of a 1989 Honda Accord. The above-mentioned Sunfire was stationed in the lessee's garage and was not being driven due to an axle problem.

The lessee has known (driver) for approximately six months. (Driver) is 17 years old and was the lessee's daughter's boyfriend. Since (driver) was having problems with his parents, the lessee, out of the goodness of her heart, allowed him to move into her home in early February, 2000 until he resolved certain issues with his parents.

On the evening of February 29, 2000, the lessee left her home at approximately 5:50 p.m. to attend an evening course, which she takes on Monday and Tuesday evenings from 6 p.m. to 9 p.m. Shortly after she returned home that evening, she received a phone call from (driver)'s brother. He advised the lessee that the police were at his parents' home to advise them that (driver) was caught speeding with the lessee's Sunfire, that (driver) was being charged with "driving while disqualified", and the vehicle had been impounded. The lessee immediately went to the police station to obtain details about the incident and to speak to P.C. Officer #1.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

Certified copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as lessee (**Exhibit 6**);

Certified copy of Notice to the Registrar (**Exhibit 6**) indicating, among other things, that the vehicle at the time it was detained was being driven by (driver);

Certified copy of the Order by the Registrar of Motor Vehicles to impound the vehicle (**Exhibit 1**);

A copy of the Notice of Suspension of Driver's Licence indicating that at the time of the impoundment the driver had been convicted of the offence "*driving or having care or control of a motor vehicle while ability impaired*" under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for 1 year effective September 14, 1999. The copy was only provided to clarify (driver)'s suspension since he is a young offender and which foregoing charge does not show up on his driving record.

P.C. Officer #1 swore an oath before giving testimony.

P.C. Officer #1, Badge number (badge no.), has been an officer of the Barrie Police Service for 11 years.

On the evening of February 29, 2000, P.C. Officer #1 was conducting radar on Lakeshore Drive in Barrie. At approximately 9:04 p.m., he stopped a speeding Sunfire bearing licence plates (licence plate no.) registered to the lessee. The driver of the vehicle identified himself by providing an Ontario driver's licence no. (driver's licence no.). P.C. Officer #1 was advised he was a suspended driver, which was confirmed on CPIC. (driver) was charged with "driving while disqualified".

Since (driver) is a young offender, P.C. Officer #1 was required to give notice to his parents of the charge being laid against him.

Shortly thereafter, P.C. Officer #1 received a call to speak with the lessee of the impounded vehicle at the station. When he arrived, the lessee wanted details of what had transpired. She was advised that her vehicle had been towed and impounded for 180 days since the leasing company she had leased her vehicle from had two previous impounds against it (**copies included under Exhibit 6**).

P.C. Officer #1 testified that before he could lay any further charges against (driver), he wanted to obtain a statement from the lessee's daughter with regard to any privileges she may have given (driver), regarding the impounded vehicle. The lessee's daughter was away on holidays until March 6th, 2000. The lessee asked P.C. Officer #1 to lay a charge of theft against (driver).

After interviewing the lessee and obtaining her statement, P.C. Officer #1 added the additional charge of "taken without consent" to the existing charge of "driving while disqualified".

Ultimately, (driver) pleaded guilty to "driving while disqualified" and the charge of "taken without consent" was dismissed.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS

The issue to be considered in this appeal is whether the motor vehicle was stolen at the time in respect of which the order was made.

The burden of proof is on the Applicant to establish whether the impounded vehicle was, in fact, stolen.

In her evidence, the lessee specifically stated that the only house rule she imposed on (driver) was that he must attend school while living in her home. Although she was unaware of his suspension until after this incident, the need to verbally state that (driver) was not permitted to use any of the vehicles did not even cross her mind. She assumed that even though he was living in her home, he did not have the privilege of using her vehicles. The lessee's daughter testified that she needed her mother's permission to take any of the two vehicles and did not enjoy a colour of right in this regard.

No measures were taken to deny access to the car keys. The lessee's as well as her daughter's set of keys while she was away on holidays were kept in a drawer in the hallway.

P.C. Officer #1 testified that he was of the opinion that (driver) was not involved in the commission of any other crime.

The definition of ***"theft"*** under section 322(1)(a) of **Martin's Criminal Code 1999** states:

"Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether animate or inanimate, with intent,

- (a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property of interest in it, of the thing or of his property or interest in it."

The definition of ***"taking motor vehicle...without consent"*** under section 335(1) of **Martin's Criminal Code 1999** states:

"Subject to subsection (1.1), every one who, without the consent of the owner, takes a motor vehicle or vessel with intent to drive, use, navigate or operate it or cause it to be driven, used, navigated or operated, or is an occupant of a motor vehicle or vessel knowing that it was taken without the consent of the owner, is guilty of an offence punishable on summary conviction."

Although the lessee had good intentions, she was betrayed and her trust misused. The Board found no proof that (driver)'s intent was to permanently deprive the lessee of her vehicle, but the evidence was quite clear that (driver) did wrongfully take the vehicle without the lessee's consent.

The facts surrounding the taking of the lessee's vehicle are crucial to a determination of whether or not the lessee's vehicle was stolen by the driver. The term "stolen" includes not only the taking of the vehicle but also the intention of the person who takes the vehicle to deprive the owner of that vehicle. If the driver takes the vehicle and intends to deprive the owner of the possession of that vehicle permanently, then the vehicle was stolen. Here, it is not clear that the driver even intended to deprive the lessee of the use of the vehicle temporarily.

In the facts of this case, there is no doubt that the lessee asked the police to charge the driver with theft of the vehicle. In addition, the evidence indicates that the driver did not ask the lessee for the use of the car. On the other hand, the driver was living in the lessee's home. There was no discussion between the lessee and the driver as to using the car. The driver was not offered the keys but had access to those keys. The evidence indicated that the driver took the car from the home while the lessee was at a night school class and was returning the car to the home in time to have it there when the lessee returned. This indicates that the driver did not wish to deprive the lessee of the ability to use her car.

The Board must also note that the charge of "taking without consent" was dismissed. The driver did not give evidence before the Board to clarify the nature of his intent respecting the car. In the circumstances of this case, the Board can not conclude that

the driver intended to deprive the lessee of the possession of her car. Therefore, the Board is of the view that the impounded vehicle was not, in fact, stolen from the lessee within the meaning of section 50.2(3)(a) of the Act.

DECISION

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: *April 5, 2000*

DARROCH-EXHP

DIANE DARROCH

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

DIANE DARROCH, Applicant
unrepresented

DATE OF HEARING: March 30, 2000

DECISION RELEASED: April 5, 2000 Toronto

REASONS FOR DECISION

A hearing was held on March 30, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Diane Darroch (the "Applicant")
Motor Vehicle: 1992 Chevrolet Cavalier, Plate #174 JKZ (the "vehicle")
Date of Appeal: March 13, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Board on March 30, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing. The Respondent submitted copies of their submissions bearing original certification seals.

All documents were entered into evidence with the consent of both parties.

The hearing proceeded.

ISSUE

The Applicant's request for a hearing filed with this Board (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

I am appealing the impoundment decision because the loss of my vehicle will result in exceptional hardship. This vehicle is our only family vehicle. I am on social assistance

so any monies that I have to put out for impoundment fee's, rental etc, will take away from our family income. As it stands right now after our bills and rent are paid we are left with \$200.00 for food so any extra expenses are going to deeply affect our family. I have a two year old son who is in daycare and a one month old baby. I use the vehicle for taking my son to school and picking him up, also because I was a high risk pregnancy. I've had several follow up doctor appointments, and both my children are sick with a viral infection so follow-up doctor appointments. I use my car for grocery shopping and at the present time William Darrod (who was the driver) is in jail so I am left with all these responsibilities solely. I was unaware (because I was sleeping) when my car was being driven that day. His responsible decisions have already affected our family directly and the upcoming results of his trial will either burden our family financially (fine) or because of his absence. Also our cat has a follow-up vet appoint to remove stitches from a previous operation. I have no family in the city and the only friends I have either require their vehicle or don't drive. So to summarize the impact this impoundment would have on our family is directly effecting us and not the driver right now. Financially it would burden us. My son and daughter (two yrs and newborn) are transported by car. Also all family chores i.e. grocery shopping, banking, doctor appointments, psychiatry would be next to impossible, to attend. I feel that our family is being a victim to his irresponsible behaviour.

The Applicant testified that on the morning of March 4th, 2000 she was awakened by a phone call from which she learned that her vehicle had been impounded. She stated that she and William Darroch, the driver of the impounded vehicle, had been visiting a friend at some previous date. The Applicant and Mr. Darroch took a taxi home that evening and left the vehicle at that friend's location. At some time subsequent to this, Mr. Darroch was in the area visiting a friend, and decided to return the vehicle to the Applicant's home where they both reside. At some point between the Applicant's friend's house where the car had been left, and the Applicant's home, Mr. Darroch was stopped by a police R.I.D.E. spot check. His licence was found to be under suspension, and the vehicle was impounded.

Since losing her vehicle, the Applicant testified that she has endured financial hardship in maintaining the scheduled medical and other appointments for herself and her two young children. She has had to borrow money to rent a vehicle on two occasions for a total of eleven days, during which she managed to squeeze in all her errands. The Applicant stated that she has also had to make use of public transit, though it is very difficult with two small children. The Applicant further testified that she has managed, with some re-scheduling, to maintain all of hers, and her children's medical appointments, and there is no risk to health and safety as a result of the impoundment.

The Applicant is on a fixed social assistance income, and resides in the city of Toronto. The Applicant's common law husband, the driver of the vehicle Mr. Darroch, is also on a disability income, and is employed during the summer months only.

Mr. Darroch testified that he chose to take a chance and return the Applicant's vehicle at the time of the impoundment, as a result of concern for the health of his child since they needed the car to take her to the doctor.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by William A. Darroch;

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence fail to provide a breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 23, 2000.

LAW

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Board with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Board is precluded from considering other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under Section 22(2)(a), (b), and (c), she must have demonstrated that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

The Applicant resides in the City of Toronto, in an area well served by public transit which she stated she has made use of on several occasions. Furthermore, the Applicant has managed to rent an alternative vehicle for short periods of time. Though these alternatives represent a significant hardship to the Applicant as she is on a fixed income, nonetheless they do constitute alternatives available to the Applicant which she has utilized.

The Applicant has not presented the Board with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as per Section 22(4) of the Regulation. The Board finds that the Applicant has failed to meet the onus under the Section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *April 5, 2000*

CLARK-EXHP

VICTORIA J. CLARK

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: F. C. ROWETT
Representative for the Registrar of Motor Vehicles

VICTORIA J. CLARK, Appellant

DWAYNE CLARK, Representative for the Appellant

DATE OF HEARING: April 13, 2000

DECISION RELEASED: April 20, 2000 Owen Sound

REASONS FOR DECISION

A hearing was held on April 13, 2000, at Owen Sound, Ontario, to consider the Appellant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA but as an Order to Impound for 45 days.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Victoria J. Clark (the "Appellant")
Motor Vehicle: 1990 Dodge Caravan, V.I.N. # 2B4FK553OLR623730
(the "vehicle")
Date of Appeal: March 22, 2000

The Appellant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Board on April 13, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing.

The representative for the Appellant, Mr. Dwayne Clark, the Appellant's husband asked to submit a letter dated Thursday April 13, 2000 regarding a vehicle they sold, a 1987 Dodge Caravan. The Respondent had no objection and copies were provided.

The Board ruled to accept the letter as evidence and marked it as Exhibit #6.

ISSUE:

The Appellant's request for a hearing filed with this Board (Exhibit #1) identifies the basis of the Appellant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Board heard the evidence given in support of the Appellant and the Respondent.

Evidence for the Appellant

A summary of the Appellant's evidence follows.

Appellant's written submission filed with the Board in support of appeal states:

My husbands name is Dwayne, mine is Victoria Clark. We are writing to you hoping you may help us.

On Wednesday March 7th – 2000 we purchased a vehicle which we were told that the police had in their possession because the plates were not registered. We contacted the Meaford police and discovered they had the van but the plates were stolen. They told us we could have the van as soon as they had the driver. We told them where the driver was and they arrested him on March 8th – 2000. They then told us that as soon as they had completed their investigation that they would release the van to us. During our next conversation on March 9 we were told the driver was disqualified and that the new laws tied their hands where it came to giving us the van.

To raise the money to pay for the van we sold our van painfully cheap and borrow from everyone. At this point, my work is starting to pick up again because of the early spring. We work for Dennis Way Painting. We paint for a construction company who also owns a lot of properties. At this time of yr my wife and I paint all the apartments since the sale of own van. Right now our boss is able to manage but as more work piles up, he is in a position where he will have to replace us or be replaced himself. I have 4 kids, a mortgage we are now finding ourselves in a position to not be able to provide for them. My home is a duplex and we also have Victoria's father living with us. He is retired and not in good health. He is scheduled for surgery on March 29th admit time 6:45 to replace arteries in his groin and legs. He cannot get around and relies on us for everything. Victoria also needs surgery on her knee but it was ignored for now because of financial difficulties. My children are loosing out on all their groups – cadets, awana's swimming etc. because of lose of vehicles. I know this sounds like a bit much but it all can be verified if requested.

Mr. Clark testified that on March 6, 2000 his brother-in-law, Steven Jackson offered to sell the Clarks the 1990 van. They agreed to purchase the vehicle from Steven Jackson (Victoria Clark's half brother) but he was not the "registered" owner. The vehicle was registered to one Wilfred J. Neil and used by Mr. Jackson through some sort of mutual agreement. The Clarks made arrangements to sell their older van (Exhibit # 3 and 6) and borrow some money to finance the purchase of the 1990 Caravan. Exhibit # 3 shows photocopies of two bills of sale, one for the 1987 van, which the Clarks sold, and one for the 1990 van, which the Clarks purchased, both dated March 7, 2000.

When the 1990 van went into police custody following an impaired driving complaint and the discovery that it had stolen licence plates, Mr. Clark inquired about its status with the Meaford-Thornbury Police Services and was told it would be released after Steven Jackson, the driver was apprehended.

In cross-examination by Ms. F. Claire Rowett for the Ministry of Transportation, Mr. Clark stated he was aware the Meaford-Thornbury Police impounded the 1990 Dodge Caravan March 8, 2000 because it was displaying licence plates that were reported as stolen.

On March 9, 2000 an order to impound for 90 days was issued by the Registrar of Motor Vehicles. The vehicle registration with the Ministry of Transportation was changed from Wilfred J. Neil to Victoria Clark on March 10, 2000.

Mr. Clark was asked if he tried to find an alternative vehicle, and he stated he tried to buy back his old van but the purchaser refused.

Mr. Dwayne Clark testified that the vehicle in question was used for the house painting work he and his wife Victoria do and is the only family vehicle. It is used to transport the children to various activities and to transport his father-in-law who is handicapped. He also stated that his job is at risk now that the Clarks have no vehicle at their disposal (Exhibit # 4 page 1). His boss can pick him up for work at the present time but it is only

a temporary solution and cannot be continued throughout the busy part of the construction season.

His employer cannot take him to work on a regular basis as they do not always work in the same area.

Public transport is unreliable and the buses stop running at 9 pm which would leave his children no way of getting home from their activities and he and his wife travel outside of the area to work. Sometimes Mr. Clark receives very little advance notice of where they will be working.

The Clarks have borrowed vehicles in the past but most people are reluctant to lend to them because they have to transport paint and materials to jobsites that can damage vehicles.

The Clarks had not inquired about rental vehicles, but Mr. Clark stated he had tried to rent one approximately four years ago and rentals were too expensive. He further stated the rental companies wanted a credit card and they do not have one.

Mr. Clark stated Victoria's father finds travelling by cab expensive and difficult because of his poor health.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Appellant were as follows:

Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Appellant as owner;

Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained had been driven by Steven A. Jackson;

Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 1, 2002.

The Respondent called one witness; Meaford/Thornbury Police Constable Kevin Cornell.

Officer Cornell stated that on March 7, 2000 the police received a report of an impaired driver and subsequent investigation located the vehicle but not the driver. The licence plates on it had been reported stolen on March 6, 2000. The 1990 Dodge Caravan was towed to the police station and impounded because of the improper licence plates.

On March 7, 2000 Dwayne Clark called police to enquire as to the status of the vehicle and was informed that it would be held until the driver was located.

On March 8, 2000 the driver Steven Jackson was apprehended and confessed to driving on March 7, 2000 while disqualified with no insurance and the wrong licence plates on the vehicle. Jackson explained he had borrowed the licence plates and not returned them. On March 9, 2000, the Registrar of Motor Vehicles ordered the Dodge Caravan impounded for 90 days.

Mr. Clark did not cross-examine Officer Cornell.

Summations

Mr. Clark in summation stated he has tried to co-operate with the police and Ministry of Transportation in this matter in that he took keys for the vehicle to the police and had picked up Mr. Jackson's personal property from the van. Mr. Clark also offered to pay any costs regarding the impoundment if the vehicle was released to Victoria Clark. He also was helpful in locating Mr. Jackson when Police were looking for him. Mr. Clark indicated he felt he and Victoria Clark were also victims of Mr. Jackson's behavior.

Ms. Rowett in summation recapped the evidence:

1. On March 7, 2000 the vehicle was impounded because of the stolen licence plates.
2. On March 9, 2000 the vehicle was impounded by the Registrar for 90 days.
3. On March 10, 2000 the vehicle was registered in Victoria Clark's name.

Ms. Rowett argued that the loss is significant but not lasting in that neither Victoria or Dwayne Clark have lost their jobs.

The Board asked if an Order To Impound would show on the "sales kit" vehicle history issued at the time of registration to a new owner. Ms. Rowett had no objection to the Tribunal viewing Ms. Clark's "sales kit". No such entry was found.

There was no evidence before this Tribunal as to there having been a previous section 55.1 impoundment order against the registered owner of the vehicle.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Appellant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under

- suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Subsection 50.2(2) of the Act states the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

Testimony and evidence established that on March 10, 2000 Victoria Clark became the owner of the 1990 Dodge Caravan within the meaning of subsection 50.2(11) of the Act following her purchase of the van on March 7, 2000 for which a receipt was issued (Exhibit#3). The evidence is that on March 7, 2000 the registered owner was Wilfred J. Neil. A disqualified driver was driving the vehicle and as a result the Order to Impound was issued. Victoria Clark bought a vehicle that was impounded for 90 days.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

As to the issue of exceptional hardship, the evidence established that it is very inconvenient and expensive for the Clarks to be without their vehicle. However, bus and taxi service is available to meet the personal needs of the family and transporting Ms. Clark's father.

As to the use of the van for business purposes, Mr. Clark failed to establish that he had explored all possible options to rent or lease another vehicle, relying only on his past experiences.

Can the Board confirm the Registrar's Order of a 90-day impoundment?

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

2. *For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.*

As dealt with above, the fact of ownership (which implies the issue of prior impoundments against the owner) was put in issue by the Appellant. The Registrar's representative tendered no evidence to confirm a previous impoundment.

The Board therefore proceeds on the basis that only a 45-day impoundment is established. The Appellant having failed to establish her appeal under section 50.2(3)(d) of the Act, the Board will confirm the Registrar's order for a 45-day impoundment period.

DECISION:

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Appellant's motor vehicle for **45 days**.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: April 20, 2000

ADLS/00/218

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

Solicitor for Applicant

DATE OF HEARING: April 26, 2000 Barrie

DECISION AND ORDER

A hearing was held on April 26, 2000, at location, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL SETS ASIDE the suspension dated March 9, 2000 imposed by the Registrar pursuant to Section 48.3 HTA.

THE TRIBUNAL ORDERS that the Applicant's driver's licence be reinstated subject to any other suspension under this Act pursuant to Section 50.1(5).

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *April 27, 2000*

ADLS/00/218

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: Antoine Aouad, M.D.,
Presiding Member

APPEARANCES: Kyle Biel,
Representative for the Registrar of Motor Vehicles

Applicant

Solicitor for Applicant

DATE OF
HEARING: April 26, 2000

DECISION
RELEASED: April 27, 2000

Barrie

REASONS FOR DECISION

A hearing was held on April 26, 2000, at Barrie, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Board released its Decision on April 27, 2000, with Reasons to follow.

THE BOARD RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated March 16, 2000, and was received by the Tribunal on March 16, 2000, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

A copy of a report from Physician # 1 forwarded to the Ministry by the Applicant was filed as Exhibit # 5.

The Breathalyzer Test Procedure Record together with the Alcohol Influence Report and the notes of PC Officer # 1 and PC Officer # 2 was filed as Exhibit # 6.

Prior to the Commencement of the hearing, the Respondent and the Counsel for the Applicant took a ten-minute recess for discussions.

It is the understanding of this Tribunal that the document filed as Exhibit # 5 is not to be taken into consideration in the deliberation of the decision. The reports of Dr. Mate and Dr. Goldstein are to be acknowledged without the reference therein to the reports from Physician #1.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – dated March 16, 2000
- b) Exhibit # 2 Applicant Medical Information – received March 17, 2000
- c) Exhibit # 3 Affidavit from the Applicant – dated March 20, 2000
- d) Exhibit # 5 Report from Physician # 1 – received April 26, 2000

By the Respondent:

- a) Exhibit # 4 Submissions from the Registrar – received April 19, 2000

b) Exhibit # 6 Breathalyzer Test Procedure Report and the notes of PC Officer # 1, PC Officer # 2 – received April 26, 2000

Issue

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

The Law

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act (“HTA”) states:

50.1 (1) “A person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver’s licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS

The Applicant's driver's licence was suspended effective "*March 08 2000*" as per Notice of Appeal. (Exhibit # 1)

Physician # 2, the Applicant's family physician for "*1 years 2 months*", indicates in the "*Applicant's Medical Information*" form dated "*2000/3/17*", as follows: "*on the 8 March 2000 the Applicant was seen in the ER by Physician # 3. He was assessed for complaints of chest pain and shortness of breath. Physician # 3 diagnosed hyperventilation and chest pain of unknown cause. The Applicant was admitted for observation and discharged the following morning, I am unable to clarify how much of the above condition might affect his ability to complete a breathalyzer test. The Applicant was admitted to hospital 24 FEB 2000 for a similar pain and is currently awaiting a cardiac stress test to further investigate the cause of his pain.*" (Exhibit # 2)

The Applicant provided an Affidavit dated March 20, 2000 attesting as follows:

He is 55 years old and a self-employed contractor who has recently been suffering from chest pain along with shortness of breath.

The Applicant was hospitalized overnight on the "*24th February, 2000*". The diagnosis is "*...suspected angina...*" and the Applicant was given a prescription for Nitroglycerin prior to leaving the hospital.

After being stopped by the police, the Applicant became stressed by the officer's allegation of speeding and drinking, and started to feel chest pain.

The Applicant was arrested and handcuffed and his condition worsened to the point where he had to ask the officer to allow him to use his medication.

The Applicant was "*...unable to blow the proper strength for the full amount of time...*" and could not do so after being given two or three opportunities.

The Applicant was taken to the hospital, where he stayed overnight, after being placed in the lock up.

"*At no time...*" did the Applicant "*feign any attempt to blow into the Intoxilyzer machine.*" (Exhibit # 3)

The Ministry of Transportation Driver Information details the Applicant's driver's record since 1986. Three charges are noted: *"FAILURE OR REFUSAL TO PROVIDE BREATH SAMPLE, in 1972 and 1983 and one IMPAIRED DRIVING"* in 1980. (Exhibit # 4)

By letter dated April 7, 2000, under the letterhead of Grey Bruce Health Services, Physician # 3 advises the Ministry that the Applicant was assessed in the Emergency Department. Physician # 3 states that it was his *"...impression that he was not suffering from a medical condition which would prevent him from providing a breath test..."* (Exhibit # 4)

In a letter dated April 14 2000, Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP, Professor of Medicine and Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a *"...consultant respirologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis... familiar with the Alcotest and the Intoxilyzer 5000C..."* (Exhibit # 4)

After reviewing the evidence, Dr Goldstein concludes that *"...there is no obvious respiratory condition which would prevent him from providing a satisfactory breath sample. Only those present could be sure as to whether his psychological condition (anxiety or panic attacks) was at that moment sufficient to have interfered with the provision of a breath sample ..."* (Exhibit # 4)

Dr. Eva S. Mate, FRCP (C), a consultant in respiratory medicine with The Wellesley Hospital, in a letter dated March 17,2000, qualifies that she has been in *"... practice since 1982..."*, and that she has *"...extensive experience in the management of chronic respiratory illness such as obstructive lung disease and asthma."* Dr. Mate goes on to describe her qualifications: *"...lengthy experience with performance and interpretation of pulmonary function tests.... Assistant Professor at the University of Toronto...know the background evaluation of instrumentation such as Intoxilyzer 5000 cc and also Alcotest...aware of breath sampling criteria required to provide acceptable information using the above instrumentation."* Dr Mate's final comments are that she sees *"...nothing objective in terms that would prevent the patient from giving a breath sample upon request..."* (Exhibit # 4)

At the hearing, the Applicant's Solicitor did not allow the Applicant to testify, but rather asked the Tribunal to rely on the Affidavit sworn by his client and entered as Exhibit # 3.

The Respondent called the two officers involved in the incident as witnesses.

P.C. Officer # 1, arrested the Applicant and took him to the detachment for a breathalyzer test. On the way to the detachment, P.C. Officer # 1 asked the Applicant if needed medical attention. The Applicant declined. During the time that P.C. Officer # 1 spent with the Applicant, there were no visible signs of discomfort or distress, on the part of the Applicant, only the signs of someone impaired.

At the detachment, the Applicant's nitroglycerine was taken away from him as part of the breathalyzer requirements procedures.

After being charged with failure to provide and placed in a cell, the Applicant was *"...taken to hospital complaining of chest pains."* (Exhibit # 6) PC Officer # 1 stated that although he saw nothing wrong with the Applicant *"...but because he was a pain and to cover... butt, I took him to the hospital."*

P.C. Officer # 2, testified as the qualified technician on duty on the night in question. Once arriving at the detachment, P.C. Officer # 2 tested the breathalyzer to ensure proper functionality. The mandatory 15 minute waiting period was adhered to. The Applicant was explained the requirements. An exhalation into the machine of 8 to 10 seconds is essential in order to obtain an adequate reading.

P.C. Officer # 2 reiterated his comments in the Alcohol Influence Report. The Applicant was given five opportunities to provide a breath sample. On the "... 1st attempt no ...blowing; 2 nd attempt - sputtering 4 to 6 seconds; 3 rd attempt - sputtering 4 seconds & stop; 4 th attempt 4 to 6 seconds - not hard - sputtering...; 5 th attempt 6 to 8 seconds - not hard or continuous - not sufficient..."

The last attempt although approximately 8 seconds did not provide enough of a breath sample to obtain a reading.

The Applicant told P.C. Officer # 2 he had a heart problem and was taking medication. P.C. Officer # 2 advised the Applicant that medication cannot be used during the test.

The Applicant was panting when asked questions but did not appear to be struggling for air at any other time. P.C. Officer # 2 noticed no other signs of physical distress on the part of the Applicant and assumed the panting was due to nervousness. The Applicant did show signs of "...stress and nervousness..."

In response to the Counsel's question as to why no blood samples were collected, P.C. Officer # 2 stated that "... during the test was sure the Applicant did not have a medical problem..." P.C. Officer # 2 also affirmed that experience has proven that failure to provide a breath sample was usually due to refusal not medical condition of instrument glitches.

APPLICATION OF THE LAW TO FACTS

At issue is, how does the medical condition of the Applicant relate to Section 50.1 (2) (b), and did this medical reason cause him to fail or not comply with the breath demand. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

Physician # 2's comments in the Applicant's Medical Information form that he is "...unable to clarify how much of the above condition might affect his ability to complete a breathalyzer test...". Nonetheless, the fact remains that the Applicant "...was admitted for observation and discharged the following morning." At the time he was complaining and "...assessed for chest pain and shortness of breath." (Exhibit # 2)

The Tribunal further notes that this was not the first incident in which the Applicant was admitted to the hospital. According to Physician # 2, "...the Applicant was admitted to hospital 24 FEB 2000 for a similar pain..." The Applicant has also been prescribed and carries with him nitroglycerine. (Exhibit # 2)

The Tribunal must weigh this evidence against the opinion letters from Physician # 2, Dr. Mate Dr. Goldstein, which constitute part of the Respondent's evidence. Physician # 2 assessed the Applicant in the ER. Physician # 2 states that it was his "...impression that he was not suffering from a medical condition which would prevent him from

providing a breath test..." Yet, the Applicant was apparently admitted to the hospital overnight. (Exhibit # 4)

Dr. Mate's final comments are that she sees "...nothing objective in terms that would prevent the patient from giving a breath sample upon request..." Yet, with all due respect to Dr. Mate she did not physically examine the Applicant. (Exhibit # 4)

Dr. Goldstein is right on the mark with his statement that "... Only those present could be sure as to whether his condition was at that moment sufficient to have interfered with the provision of a breath sample ..." (Exhibit # 4)

P.C. Officer # 2 and P.C. Officer # 1 are the only witnesses who can elaborate on the Applicant's demeanour at the time. Unfortunately this evidence is found to be somewhat contradictory. Both officers asserted that there was nothing visibly wrong with the Applicant, other than signs of impairment. Yet, the Applicant has to be transported to a hospital and admitted.

The Applicant's diagnosis remains elusive, thus, on the surface it might appear that the preponderance of the evidence corroborates the Respondent's case. This Tribunal must accept the fact that the Applicant was twice hospitalized and was prescribed nitroglycerine. The Tribunal is satisfied that the Applicant has met the onus to establish the merit of his appeal. The Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that he was unable to provide a breath sample due to medical reasons.

DECISION

Upon the application by the Applicant to appeal the suspension order dated March 8, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested under section 50.1(4) of the HTA, the Tribunal orders the suspension set aside.

Antoine Aouad, M.D.,
Presiding Member

RELEASED: May 2, 2000

SAUNDERS

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario, 1990 Chapter R.4

IN THE MATTER of the REGISTRATION of
MICHAEL SAUNDERS
as a Broker under the Act

AND IN THE MATTER of the PROPOSAL of the
Registrar under the Real Estate and Business Brokers Act
made pursuant to Section 8 of the Real Estate and Business Brokers Act
TO REVOKE REGISTRATION
- Proposed dated: January 4th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MICHAEL SAUNDERS

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000, is known as the Licence Appeal Tribunal) by Counsel for Michael Saunders, the Applicant, and counsel for the Registrar under the Real Estate and Business Brokers Act for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the Statutory Powers Procedure Act, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the Real Estate and Business Brokers Act as to the disposition of these proceedings which is filed and attached hereto as Schedule "A".

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 28th, 2000

To: The Registrar
License Appeal Tribunal
12th floor
1 St. Clair Avenue W.
Toronto, Ontario
M4V 1K6

Pursuant to Section 4.1 of the Statutory Powers Procedure Act, Michael John Saunders hereby waives the requirement of a hearing with respect to the Proposal dated January 4, 2000 of the Registrar of Real Estate and Business Brokers to revoke the registration of Michael John Saunders as a salesperson under the Real Estate and Business Brokers Act (hereafter the "Proposal").

The parties to the Proposal, Michael John Saunders and the Registrar of Real Estate and Business Brokers, hereby request that the Proposal be disposed of by way of a Consent Order of the License Appeal Tribunal, which Consent Order shall include the attached "Terms and Conditions to the Registration of Michael John Sanders as a Salesperson Under the Real Estate and Business Brokers Act" consented to by Michael John Saunders pursuant to Section 6(2) of the Real Estate and Business Brokers Act.

DATED at Kitchener this _____ day of _____, 2000.

WITNESS' SIGNATURE

MICHAEL JOHN SAUNDERS
Registration No.:

WITNESS' NAME

DATED at Toronto this _____ day of _____, 2000.

WITNESS' SIGNATURE

TOM WRIGHT
Registrar
Real Estate and Business Brokers Act

WITNESS' NAME

To: The Registrar
Real Estate and Business Brokers Act
3250 Bloor Street West
East Tower, Suite 600
Toronto, Ontario
M8X 2X9

I, Michael John Saunders, hereby consent to the following Terms and Conditions to my registration as a salesperson under the Real Estate and Business Brokers Act:

1. I hereby consent to the suspension of my registration as a salesperson under the Real Estate and Business Brokers Act ("my registration") for a period beginning May 1, 2000 and ending February 15, 2001, inclusive (the "suspension period"). At the end of the suspension period, my registration will re-commence and the Registrar of Real Estate and Business Brokers ("the Registrar") will issue a new registration certificate to me.
2. During the suspension period, I shall not trade in real estate as a salesperson as defined by the Real Estate and Business Brokers Act (the "Act") and shall not accept any compensation or other remuneration for a trade in real estate, except that I may accept compensation or remuneration for a trade in real estate resulting from an agreement of purchase and sale ("agreement") made by the parties to that agreement before the start of the suspension period, regardless of whether that agreement is firm or conditional, even if the closing of that agreement occurs during the suspension period.
3. I hereby agree to complete a three (3) hour course on the Real Estate Council of Ontario's Code of Ethics within twelve (12) months of the start of the suspension period.
4. I shall not apply as a real estate broker under the Act ("broker") or on behalf of a broker, including a corporation, for five (5) years from the date of these Terms and Conditions.
5. I shall not be a partner, director, officer, office manager or branch manager of a broker for five (5) years from the date of these Terms and Conditions.
6. I shall not, and any corporations or partnerships that I control, including as a shareholder or as a partner, director, officer or directing mind, shall not hold shares of a broker corporation for five (5) years from the date of these Terms and Conditions.
7. For five (5) years from the date of these Terms and Conditions, I shall immediately advise the Registrar in writing of any charges laid against me under any statute and any convictions by any court (except municipal parking violations and *Highway Traffic Act* proceedings that do not result in the suspension of my driver's license) as well as any civil court judgments or orders against me, and any ethics or disciplinary decisions against me by a real estate board or the Ontario Real Estate Association.
8. For five (5) years from the date of these Terms and Conditions, I shall not transfer my registration from my current broker, Re/Max Twin City Realty Inc. (my "current broker") without first obtaining the written authorization of the Registrar. I agree that,

if the Registrar authorizes the transfer of my registration, my new broker shall submit to the Registrar written acknowledgment of these Terms and Conditions before the transfer occurs. This provision also applies to any subsequent transfers within the five (5) year period that it is in force.

9. For five (5) years from the date of these Terms and Conditions, I and my broker shall immediately notify the Registrar in writing if any complaints are made against me by members of the public or other registrants under the Act, and I and my broker shall forthwith provide details of such complaints and any documentation that the Registrar may require.
10. For five (5) years from the date of these Terms and Conditions, I shall submit to the Registrar's office a copy of my then-current police record or C.P.I.C. search with any application I submit for registration, renewal or reinstatement under the Act.
11. I hereby state that I have not, and shall not make any agreements, oral or written, express or implied, including, without limitation, any side agreements with any person or corporation that violates the spirit and intent of these Terms and Conditions.
12. I hereby acknowledge that if new or additional information comes to the attention of the Registrar related to my honesty, integrity, compliance with law or financial responsibility, or if I breach any of these Terms and Conditions, the Registrar may take further administrative action, including a proposal to revoke my registration, based on the totality of the evidence of my past conduct and/or financial position, including the allegations set out in the Proposal of the Registrar dated January 4, 2000 to revoke my registration under the Act.
13. If any of these Terms and Conditions are deemed to be illegal, unenforceable, or a mutual mistake that is not a typographical, calculation or similar error, all such Terms and Conditions shall be severed and the remaining Terms and Conditions shall remain in force and effect.
14. I hereby acknowledge that I have read, and understand, and have obtained or had opportunity to obtain independent legal advice with respect to these Terms and Conditions.

DATED at Kitchener, this _____ day of _____, 2000.

WITNESS' SIGNATURE

MICHAEL JOHN SAUNDERS
Registration No.:

WITNESS' NAME

ACKNOWLEDGED AND UNDERSTOOD BY:

WITNESS' SIGNATURE

SIGNING OFFICIAL OF BROKER,
RE/MAX TWIN CITY REALTY INC.

WITNESS' NAME

McHUGH-EXHP

ALLANA MCHUGH

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JOHN CARMICHAEL, M.D.
Presiding member

APPEARANCES: F. C. ROWETT
Representative for the Registrar of Motor Vehicles

ALLANA MCHUGH, Applicant
unrepresented

DATE OF HEARING: April 19, 2000

DECISION RELEASED: April 28, 2000 Ottawa

REASONS FOR DECISION

A hearing was held on April 19, 2000, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Allana McHugh (the "Applicant")
Motor Vehicle: 1989 Chev S10, Plate #575 ZML (the "vehicle")
Date of Appeal: March 31, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Board on April 19, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing.

The Applicant introduced a letter from her employer which, with the agreement of the representative for the respondent was accepted by the Board to be given weight as the Board sees fit in its deliberations.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Board (Exhibit #4) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

*Loss of the vehicle will result in exceptional hardship

Due to the impoundment of my vehicle I am experiencing exceptional hardship. I need to use my car to get to work. I have 4 to 5 clients homes to visit during the day as a personal support worker for Bayshore Health

Care, whom I'm presently employed with. I work 6 days a week for this company. I do not have another vehicle that is in running condition and do not have the money to fix it. Also the bus system does not allow me to get to clients homes on time and doesn't reach all my clients locations.

If I cannot use my vehicle I will lose my clients and possibly my job. Then I will have no income to pay my bills.

I am also taking math, chemistry and biology courses in Cornwall, ON so that I may be able to enter the Nursing program at Algonquin College in Ottawa. I need my car to go to Cornwall to hand in lessons and write tests for these courses.

This impoundment of my vehicle is very inconvenient for myself.

I would also like to say that I had seen Gerald Rochon's drivers licence and did not know it was under suspension and he says he did not have any knowledge of the suspension either.

I do not have a copy of the Registrar's order of impoundment if or when I receive it I will fax it to you thank you

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Gerald Rochon;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence blood/alcohol content in excess of .08 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 8, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose

service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant is asking that the decision of the Registrar of Motor Vehicles to impound her vehicle be set aside on the basis "that the order will result in exceptional hardship" (subsection 50.2(3)(d) of the Highway Traffic Act).

The Applicant is currently employed by a home care agency. Her duties are to provide home care, cooking, washing, house cleaning etc, to clients on a regular basis. The Applicant is paid an hourly wage with car allowance for travel between clients.

She has not worked since her vehicle was impounded.

The Applicant lives in Ottawa. She is upgrading her education at a community college in Cornwall and uses her car to commute, to hand in assignments, write tests etc.

The Applicant owns a second car which is not road worthy. It is to be towed away for scrap. Other options to provide alternate transportation have not been properly explored.

The individual to whom the vehicle was loaned was known to the Applicant for only a few months. The Applicant was not aware of the borrower's current driver's licence suspension, or his past driving record.

The Board acknowledges the considerable dependence of the Applicant on the use of a vehicle and the inconvenience this is causing. Despite this inconvenience, on the basis of the evidence given by the Applicant, the Board was not convinced that the Applicant had exhausted every possibility for an alternative means of transportation as required by section 22(4) of Regulation 632/98.

No evidence was presented by the Applicant or her employer to suggest that the Applicant's or her clients' health or safety has been threatened.

DECISION:

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

John Carmichael, M.D.
Presiding Member

RELEASED: *April 28, 2000*

CHRYSLER CREDIT CANADA LTD.

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Chrysler
Credit Canada Ltd. seeking an extension of the
time requirements for this Applicant to
commence this appeal from an impoundment
order of the Registrar under Section 55.1 of the
Highway Traffic Act;

AND IN THE MATTER of

Chrysler Credit Canada Ltd.

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: SANDRA QUADRINI,
Representative for the Registrar of Motor Vehicles

CAROL CHANDRON,
Solicitor for the Applicant by teleconference call

DATE OF
MOTION: April 25th, 2000

ORDER

A motion was heard by teleconference on April 25th, 2000, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the Highway Traffic Act, R.S.O. 1990. c.H.8 amended ("HTA").

Submissions of Written Material

Applicant through its Solicitors submitted the following documents:

1. Copy of Impound Order dated March 6, 2000 relating to the impoundment of the motor vehicle for 180 days. (Exhibit # 1)
2. Original Notice of Appeal dated April 3, 2000 received by the Tribunal on April 6, 2000. (Exhibit # 2)
3. A copy of a Vehicle Lease Agreement dated November 19, 1999 between Chrysler Credit as Lessor and Michael James Watson as Lessee relative to the impounded motor vehicle. (Exhibit # 3)
4. Statement of the Applicant's position. (Exhibit # 4)

The Facts

The Applicant is the owner of a motor vehicle which was impounded for a period of 180 days pursuant to an order of the Registrar issued under section 55.1 of the Highway Traffic Act R.S.O. 1990, c. H.8 as amended (the "Act"). The Applicant leased the motor vehicle to Michael James Watson ("Watson") under a written lease dated November 19, 1999.

The motor vehicle was impounded on March 6, 2000 while it was being driven by Watson whose driver's licence was then allegedly under suspension. Subsequent to the impoundment, Watson did not report the impoundment of the motor vehicle to the Applicant.

The Registrar's Order to Impound was sent on March 6, 2000 by ordinary mail to the Applicant at its' address at 2700 Matheson Boulevard, Suite 400, Mississauga, Ontario. The Applicant's Notice of Appeal to the impoundment was dated April 3, 2000 and was received by the Board on April 6, 2000.

The Applicant concedes that its Notice of Appeal was not filed with the Board, as required by section 20(1) of Regulation 632/98 made under the Highway Traffic Act, within 15 days of the issuance of the order to impound. The motion presently before the Board is for an order, in terms of section 20(7) of the above regulations, for an extension of the time for the filing of the Notice of Appeal.

The Law

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Board under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Board within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Board may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
 - (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions that it considers proper as a result of extending the time.

The Order

THE BOARD RULED TO REFUSE TO GRANT an extension of the time to commence this appeal for the reasons that follow.

REASONS FOR ORDER

Pursuant to section 20(1) of Regulation 632/98, the Applicant's Notice of Appeal should have been filed with the Board within 15 days of the issuance of the order to impound the motor vehicle. The date of the issuance of the order to impound was March 6, 2000 and the notice of appeal to the Board should accordingly have been filed by March 21, 2000. The notice of appeal was in fact filed with the Board on April 6, 2000 a significantly longer period than permitted by the Regulations. There is in the Board's opinion no basis for the Applicant's submission that it is entitled to an allowance of five days for the mailing of the impoundment order thereby effectively allowing the Applicant twenty days within which to file its notice of appeal. Section 20(1) of Regulation 632/98 is clear and unambiguous. It states that the filing of notice of appeal with the Board shall be within 15 days of the issuance of the impound order.

Section 20(7) of Regulation 632/98 enumerates the situations under which the Board may extend the time for commencing an appeal. The first two situations enumerated, namely accident or illness clearly do not have application in this matter. The subsection does however refer to a third situation which is "or other cause beyond the owner's control". The Applicant contends that the voluminous quantity of mail received by it and the time required to route mail, including the impoundment order, to the proper channels was the cause of the delay and was beyond its control.

The Board does not agree with the Applicant's contention. It is not reasonable to presume that voluminous quantity of mail cannot efficiently be directed to the proper department. It is not reasonable to suggest that the significant delay in routing the impoundment order was beyond the Applicant's control. Controls can and should have been instituted by the Applicant. The procedures in place to deal with the mail and to route it efficiently and expeditiously have not either shown or proven by the Applicant.

The Applicant has advanced no evidence whatsoever to support its contention that the delay in dealing with the impoundment order was beyond its control.

Accordingly, the Applicant has not demonstrated to the Board that there was cause beyond the Applicant's control to bring the appeal within the prescribed 15 days as required by section 20(1) as read with section 20(7) of Regulation 632/98.

Further, the Applicant has not demonstrated to the Board or satisfied the Board that there are reasonable grounds for applying for the extension and for granting relief. Accordingly the requirements under section 7 of the Licence Appeal Tribunal Act has not been met.

The motion brought by the Applicant to the Board for an extension of time to appeal is therefore dismissed.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: *April 26, 2000*

SHAH

NIRANJAN SHAH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

Niranjan Shah, representing himself
Andrea York, Counsel, representing the Ontario New Home
Warranty Program
Carmen DeFacendis, Counsel representing the added party, Steluk
Building Corporation

DATES OF
HEARING:

April 17 and 18, 2000

Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by the Applicant, Niranjan Shah, from a decision from the New Home Warranty Program (the Program) made in two letters denying his claims for warranty on his new home.

BACKGROUND:

The Applicant, Mr. Shah, is self-employed as a taxi driver and a part-time real estate salesman. His wife works in a factory in quality control and they have two sons in their twenties. They are good hard working people. Once before in 1985 they had bought a new house. They lived there for a few years then moved into an apartment. In 1995 Mr. Shah agreed to buy a new home in the Richmond Hill development. However, when he signed the agreement of purchase and sale he became understandably confused about who was responsible for the new home warranties provided and who had to be notified of any claims. It appeared to Mr. Shah that the builder managed the warranties since the agreement of purchase and sale set out the warranties in essentially the same terms as appear in the Ontario New Home Warranties Plan Act (the Act). The confusion was not remedied when he signed the Program's certificate of completion and possession in 1997.

The certificate has a warning set out after the signatures of the purchaser and vendor. In small black letters it reads "the builder/vendor warrants that the home is constructed in a workmanlike manner and free from defects in material" then in red capital letters not much larger it continues "A COMPLAINT MUST BE REPORTED TO BOTH THE VENDOR AND ONHWP IN WRITING". Mr. Shah consequently tried to conduct his appeal on the false assumption that he had only to deal with the builder to be entitled to the warranties under the Act. This created considerable difficulty for the Tribunal and prolonged the hearing.

THE ISSUES:

The Applicant, Niranjan Shah, made some 25 claims (of widely varying validity) for warranty which required written notice to be given to the Program within one year from the date of possession of the home. The first issue in this appeal is whether or not he did so.

The second issue concerns three claims for warranty for items requiring written notice to be given within two years. The adequacy of the notice is not in dispute. Two of these claims were for leaks in the home which, although corrected, left damage behind. A third claim in this category is whether there was a heating vent which should have been installed in the master bedroom. The threshold issue is whether the Applicant denied the Builder access to repair these defects.

FACTS FOUND PROVEN:

- 1) The Applicant bought a new home from the builder/vendor Steluk Building Corporation (also known as Mattamy Homes). He then took possession of it on 25th September 1997.
- 2) From the outset, Mr. Shah made numerous complaints to the builder but did not pass these on to the Program until it was too late for claims requiring written notification to be made within one year from the date of possession of the home. The Program received this notice on 11th May 1999, one year and seven months later.
- 3) However, the notice given on 11th May 1999, sufficed for those claims which had to be given within a two 2-year period. That relates to the leaks in the basement and a missing return air vent in the master bedroom.
- 4) With respect to the leaks in the basement, they were corrected after a water test in June 1999, but the minor damage resulting from the leaks was not. In particular, where it had been excavated the ground was not leveled and sodded to Mr. Shah's satisfaction. There were also stains remaining on the wall and glass insulation needing replacing where it had been wetted.
- 5) With respect to the absence of a return air vent in the master bedroom, the Tribunal finds that there should have been one. That is because the Director of Customer Service for the builder, Steluk Building Corporation, put the following note in a letter of 6th April 1998 to Mr. Shah, which acknowledges this.

"The existing return air installation, although a deviation from the original plan, meets the requirements of the Ontario Building Code. The installation has been passed by the Town of Richmond Hill and therefore no further action is required."

- 6) The Tribunal finds that the builder has been denied reasonable access to the home to rectify the items complained of. There are several aspects to this finding. On some occasions Mr. Shah did allow the builder in to remedy defects complained of, but later on other occasions Mr. Shah told the builder that he did not want Percy Butler, the Customer Service Manager, or his three servicemen in the house. Adding to that, Mr. Shah has an outstanding action in Small Claims Court against the builder which has not improved their relations. When the builder sent a letter by hand in August 1999 to Mr. Shah asking for suitable dates to come and correct the outstanding items which had been set out in a conciliation report, Mr. Shah ripped it up and never responded although he knew from another copy of the letter that a response was required.
- 7) The conciliation meeting that took place in June 1999 did not change the underlying problem. The meeting had been arranged by the Program after Mr. Shah had contacted the Program in a high state of frustration. Every effort was made to get the outstanding matters resolved. As a gesture of goodwill the Program waived the \$50 fee. Unfortunately after Mr. Shah reluctantly agreed to let Mr. Butler participate in the meeting as an essential party, he concluded the Program was biased against him.

THE LAW:

With respect to all the Applicant's claims except for the leaks and the air vent item, the relevant provision of the Ontario New Home Warranty Plan Act are:

- s. 13(1) Every vendor of a home warrants to the owner
 - (a) that the home
 - (i) is constructed in a workmanlike manner and is free from defects in material,
.....
 - (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect.....

Regulation 892 of the Ontario New Home Warranties Plan Act states:

- s.4(1) Each person with a claim under the Plan shall give written notice of the claim to the corporation.

With respect to the Applicant's claims for the leaks and the air vent in the master bedroom, the law on mitigation of damages has to be considered.

Section 14(1)(b) of the Act states:

14(1) Where

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

In the case of Schollenberg CRAT 1999, this Tribunal found that the Applicant failed to mitigate his damage by failing to allow the builder access to carry out repairs and rectify the defects. To like effect are the cases of Liddy 1997 CRAT and Migliano 1994 CRAT.

APPLICATION OF THE LAW TO FACTS:

It is clear that this Tribunal has no jurisdiction to consider any of the 25 claims made by the Applicant for defective workmanship or materials because written notice he gave was not received by the Program within the one year time limit prescribed. His appeal therefore fails in that respect.

As to the remaining two claims for the resulting damage from leaks and for the claim of non-compliance with the requirement to install a return air vent, the Tribunal finds the Applicant has not given the builder reasonable access to rectify defects and has therefore failed to mitigate the damages as required by section 14(3) of the Act.

In closing, the Tribunal wishes to note that much of the problem could have been avoided if the procedure for making claims to the Program had been presented in a clearer fashion. It should have been made obvious that the Program itself had to receive timely written notice separately from the builder.

In addition it should be noted that the Program made commendable and valiant efforts to try and get the dispute resolved.

DECISION:

Accordingly, for these reasons and pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: April 25, 2000

RUNNALLS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ROSS RUNNALLS

AND IN THE MATTER OF a DECISION
of the Board of Trustees
Ontario Motor Vehicle Dealers Compensation Fund

TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

ROSS RUNNALLS

Applicant

- and -

BOARD OF TRUSTEES
ONTARIO MOTOR VEHICLE DEALERS COMPENSATION FUND

Respondent

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on April 18th, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., on Wednesday, June 7th, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 19th, 2000

NOBLE, DENNIS and THE COACH CONNECTION INC.

THE COACH CONNECTION INC. and DENNIS NOBLE

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

DENNIS NOBLE, representing the Applicants,
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: March 23, 2000
Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated November 23, 1999, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to revoke the registration of The Coach Connection Inc. as a motor vehicle dealer and Dennis Noble as a motor vehicle salesperson under the provisions of the Act.

By letter dated December 8, 1999, the Applicants requested a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000, is known as the Licence Appeal Tribunal).

REGISTRAR'S POSITION:

The particulars of the Applicant's conduct which the Registrar found to be inconsistent with the intention and objective of the Act are as follows:

On or about September 23, 1999, an inspector duly appointed under the Act attended at the registered premises of The Coach Connection Inc. to conduct an inspection. The Coach Connection Inc. was not operating from its registered premises.

On or about January 21, 1999, Dennis Noble, on behalf of The Coach Connection Inc., signed a document containing the terms and conditions

attached to its registration which terms and conditions have been breached by the Applicants and those particular terms and conditions which have been breached are as follows:

- 1) The dealer will not invite the public to deal at a place other than their approved location.
- 2) The dealer agrees to operate exclusively from the location approved by the Registrar.
- 3) The dealer will maintain an office and a sign visible to the public at its registered location.
- 4) The dealer will maintain a lot adjacent to the office for retail sales.
- 5) The dealer agrees to apply for the Registrar's approval by way of prior written notice of any change in their business location in the form required by the Registrar.

THE EVIDENCE:

Jean Cameron, an inspector employed by Ontario Motor Vehicle Industry Council ("OMVIC"), testified that on September 23, 1999, she attended at 1060 Rymal Road East, Hamilton, Ontario, the registered premises for The Coach Connection Inc. and met with Ed Cummings who advised that The Coach Connection Inc. had never been a tenant at that address. Mr. Cummings advised Ms. Cameron that he was familiar with Dennis Noble because Mr. Noble serviced furnaces and had done work for Mr. Cummings.

According to Ms. Cameron, on October 25, 1999, she received a message on her voice mail from Dennis Noble asking her to call him at his home telephone number ((905) 679-6088) which she did. During the course of that conversation, Ms. Cameron asked Mr. Noble how many vehicles he had bought and sold to date and was advised that he sold three (3) vehicles and that when he recently tried to transfer registration of a vehicle he was unable to do so. Ms. Cameron advised Mr. Noble that the Applicants were presently prohibited from carrying on business, and she was preparing a proposal which would be issued revoking their registrations. When Mr. Noble inquired as to why Ms. Cameron was proposing to revoke the registrations, she advised that he was not nor had he ever been at the registered premises for The Coach Connection Inc. Mr. Noble acknowledged that he had never been at 1060 Rymal Road and indicated that he was keeping vehicles at another location.

When Ms. Cameron raised the issue of Mr. Noble having not set up an office, he advised that he had an office with a computer at his home. Ms. Cameron stated that when asked by Mr. Noble as to how one changed the registered premises for a dealership, she advised him that it was a requirement that a municipal permit be provided with a change of address form. She reminded Mr. Noble that he needed an office with a sign where the books and records of the dealership would be maintained.

Ms. Cameron's notes of her attendance at 1060 Rymal Road on September 23, 1999 and her notes of the telephone conversation on October 25, 1999, were tendered in evidence by counsel for the Registrar as part of Exhibit #4.

Mary Jane South, Director of Operations and Deputy Registrar, after having testified with respect to the purposes of the Act and OMVIC's role and the application of section 5 of the Act to the present situation, referred to the printout from the Ministry of Consumer and Commercial Relations-Companies Branch which appears at Tab 7 of the Book of Disclosure, Exhibit #4, which indicates that Dennis Marshall Noble was the president and sole director of The Coach Connection Inc. Ms. South referred to the terms and conditions signed by Mr. Noble on behalf The Coach Connection Inc., a copy of which appears at Tab 8 of the Book of Disclosure and more specifically to paragraphs (e) and (f) thereof with particular reference to the last sentence of paragraph (f) which reads:

The dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in their business location in the form required by the Registrar

and also, subsection 13(5) of the Regulations to the Act under the heading: "Terms and Conditions of Registration" which provides:

Every motor vehicle dealer shall, within five (5) days after the event, notify the Registrar in a form provided by the Minister of any change in location of the dealer's place or any of the dealer's places of business

Ms. South testified that the Registrar had concern about the public perception that it was dealing with a private seller in situations where a dealer was not conducting business from a registered premises with a proper sign and office. Further, Ms. South testified that as of the date of the hearing, the Registrar had still not received any notice of change of address with a municipal form.

Ms. South referred to the Applicants' application for registration as a motor vehicle dealer submitted by The Coach Connection Inc. wherein, under the heading: "Business Address", the Applicants identified 1060 Rymal Road East, Hamilton, Ontario as the business location. Ms. South testified that the Registrar's concerns were not only that the Applicants were not carrying on business from the registered premises, but that their failure to give notice in accordance with the terms and conditions and the Regulations of the Act went to the issue of honesty and integrity.

Dennis Noble testified that at the time of the application for registration he was in discussion with two other people, one of whom was to look after locating and leasing the premises and the second was to provide financing. Mr. Noble stated that he was presenting leasing space from Leydon MacDonald and referred to a letter from Mr. MacDonald, the original of which had been given to the Tribunal with the hearing request form but which was not provided to counsel for the Registrar. After permitting counsel for the Registrar to review the letter from Mr. MacDonald, the letter was admitted as Exhibit #5.

Mr. Noble testified that he had done little advertising and had sold one (1) bus and a second was sold as scrap. He advised that his other business was that of air conditioning and heating, etc. and that as a result of those business activities, the need to provide a change of address "went out of his head".

When asked on cross-examination as to what steps he took after October 25, 1999 to notify the Registrar, Mr. Noble advised that he had done nothing because he had been told that a proposal to revoke his registration was being processed.

Mr. Noble testified that it was an individual by the name of Robert Wilson who was to negotiate with Mr. Cummings for a lease of the premises however, because of problems Mr. Cummings had had with Mr. Wilson's son, who had been a tenant at 1060 Rymal Road East, Mr. Cummings' partners were unprepared to lease space to The Coach Connection Inc. Mr. Noble stated that these discussions were going on in December 1998 into January 1999 and that it was his belief that things were going smoothly.

Mr. Noble acknowledged that it was his signature which appears at the bottom of the terms and conditions at Tab 8 of the Book of Disclosure and he acknowledged that he had never set up business at the 1060 Rymal Road East address.

On further questioning, Mr. Noble indicated that as he spent the majority of his time on the air conditioning and heating business, it was his hope that Robert Wilson would become a partner so that the business could have the advantage of Mr. Wilson's knowledge and contacts. Mr. Noble also stated that it was not until March 1999 that he discovered that there would be no lease for 1060 Rymal Road East.

Counsel for the Registrar called Ms. South back to the stand to give reply evidence as the Registrar's concerns about Mr. Noble's involvement with Robert Wilson who was a principal in a company referred to as Braemar which had come to the attention of the Registrar as Braemar had sold a bus with a substantial lien upon it to a purchaser, Northern Tours, who suffered a loss of approximately \$100,000.00.

Ms. South testified that an inspector had met with both Mr. Wilson and his son and had been advised that they were trying to resolve the issue of the lien however, subsequently the Registrar was advised that Northern Tours could no longer find Braemar and that Braemar's registration was subsequently revoked without appeal in August 1996.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

- 1) At no time has The Coach Connection Inc. carried on business at 1060 Rymal Road East, Hamilton, Ontario which were the registered premises of The Coach Connection Inc.
- 2) The Registrar has not, prior to the commencement of these proceedings, been advised by the Applicants of the location from which The Coach Connection Inc. is carrying on business.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to revoke the registration of the Applicants under the Act.

LAW:

The authority granted to the Registrar is provided in subsection 6(2) of the Act which states:

6(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

The Registrar has proposed to revoke the registration of the Applicants as the Applicants' conduct was not in compliance with subsection 5(1)(b) of the Act, which states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

APPLICATION OF LAW TO FACTS:

Subsection 6(2) of the Act states that the Registrar may revoke a registration for any reason that would disentitle a registrant to registration under section 5 if the registrant were an applicant.

Subsection (5)(1)(b) of the Act entitles an applicant to be registered by the Registrar except where the past conduct of the applicant affords the Registrar reasonable grounds for belief that the applicant will not carry on business in accordance with law and integrity and honesty.

The Registrar has the onus of proof to satisfy the Tribunal that he has reasonable grounds to believe that the registration of The Coach Connection Inc. and Dennis Noble ought to be revoked.

The question to determine then is whether The Coach Connection Inc. and Dennis Noble have carried on activities in contravention of the Act and regulations and whether

such past conduct provides the Registrar with reasonable grounds for the belief that they will not carry on business as required by section 5 of the Act.

It is the Registrar's belief which is at issue in these proceedings, not that of the Tribunal. The test that the Tribunal must apply is whether the Registrar is wrong in concluding that the past conduct of the Applicants affords him reasonable grounds for his belief (*Richard G. Brenner and the Registrar of the Motor Vehicle Dealers and Salesman* 19 CRAT SCO Decisions and Orders (1971-1989)).

In order for the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar in order to determine whether or not he was in error in coming to the conclusion that the past conduct of the Applicants afforded reasonable grounds to believe that the Applicants will not carry on business in accordance with law and with integrity and honesty. This review is conducted by an examination of the allegations put forward by the Registrar with respect to the activities of the Applicants and to consider such allegations in light of the evidence given by the Registrar and the Applicants with respect to those allegations.

- 1) The Applicants' failure to carry on business at its registered premises.

It is an undisputed fact that The Coach Connection Inc. never carried on business from the premises named in its application as its business address and which, for the purposes hereof, were its registered premises. Indeed, Mr. Noble in his correspondence of December 8, 1999, appearing at Tab 2 of the Book of Disclosure, acknowledges that he moved the business premises without informing the Registrar and this position is repeated in Mr. Noble's correspondence of January 20, 2000, which accompanied the Applicants' hearing request form.

- 2) The Applicants' failure to obtain the Registrar's approval by way of prior written notice to any change in its business location.

The Tribunal accepts the evidence of Mr. Noble that he did not know until March 1999 that negotiations for a lease at the location at 1060 Rymal Road East, Hamilton, Ontario had collapsed and that he had to find another location. Mr. Noble states that the reason he did not give notice to the Registrar was partially due to ignorance and partially because he was spending a far greater amount of time with his air conditioning business. Further, after being advised by the inspector of his failure to carry on business from the registered premises or to notify the Registrar of a change of premises, the Applicants still took no further action because, according to Mr. Noble, the inspector indicated that she was presently preparing a proposal to be issued revoking his registration and this statement is supported by the notes from the inspector at Tab 10 of the Book of Disclosure.

The conclusions to be drawn from the evidence adduced is that the Applicants were notified once by telephone on October 25, 1999 that they were in breach of the Act, its regulations and the terms and conditions attached to its registration and was told at the time of such notification that a proposal would be issued revoking the Applicants' registrations.

Although the Tribunal recognizes the need for all registrants under the Act to provide current addresses from where they are carrying on business, the Tribunal is not

persuaded that this single breach provided to the Registrar reasonable grounds for the belief that they will not carry on business in accordance with law and with integrity and honesty.

It was suggested in the course of the hearing that the notation by Mr. Noble in the hearing request form that "the business had moved six months previously" was an effort to mislead the Registrar, however, note must be taken that in the letter of January 20, 2000 previously referred to, Mr. Noble states that he was unable to obtain the Rymal Road location and, having provided such a statement, it would be counterproductive to then try and suggest that the business had operated from the Rymal Road at some point and subsequently moved.

Further, the Tribunal notes that six months from October 1999, when Mr. Noble was advised of the breach complained of, would be March 1999, which was when Mr. Noble indicated he learned that the lease would not be secured for the Rymal Road premises.

With respect to the relationship between Mr. Noble and Robert Wilson, it must be noted that the Registrar's reasons for proposing to revoke the Applicants' registrations, were not based upon their association with Mr. Wilson and no evidence was presented to the Tribunal that Mr. Wilson was presently involved with the operation of The Coach Connection Inc. or that Mr. Noble knew of Robert Wilson's prior conduct which was of concern to the Registrar.

The Tribunal acknowledges the Registrar's concern when parties, who would be denied registration if they themselves applied, attempt to carry on business using an individual whose registration would not be challenged as a "front" however, there is no clear evidence that this is the case in the present situation and the Tribunal makes no finding with respect to this issue.

DECISION:

In applying the evidence placed before it to the relevant legal principles, the Tribunal finds that the past conduct of the Applicants did not afford reasonable grounds for the Registrar to believe that the Applicants will not carry on business in accordance with law and with integrity and honesty.

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to refrain from carrying out his proposal dated November 23, 1999, to revoke the registrations of The Coach Connection Inc. and Dennis Noble as a motor vehicle dealer and motor vehicle salesperson respectively under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: April 18th, 2000

WHITHAM

JOHN and JENIFER WHITHAM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

BARRY E. SMITH, Counsel representing the Applicants
MICHAEL BADER, Counsel representing the Ontario New Home
Warranty Program
LAWRENCE WALLACH, Counsel representing the Added Party,
Lorne Park Townhomes Inc.

DATES OF HEARING: January 19, 20, & 21, &
March 22 & 23, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1, 2000, is known as the Licence Appeal Tribunal) from the decision dated March 26, 1999, of the Ontario New Home Warranty Program (the "Program") wherein the claim of John and Jenifer Whitham (the "Applicants") for damages for a breach of the vendor's warranty under the Ontario New Home Warranties Plan Act (the "Act") was disallowed. The claim was for a total of \$12,000.00. As set out herein, the Tribunal found that there was no breach of warranty, defect in materials or workmanship or breach of contract by the builder. Accordingly, the Applicants are not entitled to succeed in their claim against the Program for the reasons hereinafter set out.

FACTS:

It is not disputed by the parties that the home is a condominium townhome built by Lorne Park Townhomes Inc. (the "builder") and sold to the Applicants with a final closing date of December 16, 1997. The date on the Pre Delivery Inspection Report was August 19, 1997. On August 20, 1997 the Applicants took possession of the property under an interim occupancy arrangement. After taking possession of the property the Applicants noticed a deficiency in the height of the ceilings within the first month but did not raise the issue with the builder until October 13, 1997. The ceiling height in the living room

was eight feet six inches rather than nine feet, and the highest point in the vaulted ceiling part of the master suite was eight feet. There was correspondence between the builder and the homeowner on this issue, and the transaction finally closed and title was transferred to the Applicants on December 16, 1997.

A Proof of Claim was filed by the Applicants on May 27, 1998 by which a claim was made on the stated grounds that there was a substitution of non-selectable items in that there was a failure to deliver ceiling heights as specified.

The Program disputes the entitlement of the Applicants to compensation under Section 14(1)(b), or Section 13(1) (a)(i) of the Act. If the Applicants are found to be entitled to compensation the Program disputes the quantum claimed. The Program asserted that:

That there was not an improper substitution as the building was constructed substantially in accordance with the Agreement of Purchase and Sale and the said Agreement permits minor changes.

WITNESSES FOR THE APPLICANT:

Evidence was called by the Applicants. Testimony was given by the Michael Mulvale, and John Whitham.

The Applicants' first witness Michael Mulvale is an appraiser who was hired by the Applicants to inspect the height of the ceilings in question, review the drawings and evaluate the value of any monetary loss due to the reduced height. He testified that the market recognizes that nine foot ceilings would be a desirable feature, and he tried to place a pecuniary value on it. There were various methods available to him, but he decided on a version of the "Cost to Cure" approach. He could not find properties that were similar in every way except for the height of the ceiling, and testified that he could not use a 'Market Value' approach to directly quantify the market value of the ceiling height as a specific feature. To make his calculation, he estimated the cost of a retrofit, and deducted the estimated increase in the cost of original construction. In total, he estimated that the decline in value would be between \$7500 and \$9000.

During cross-examination he agreed that when a "Comparative Value" approach is used to establish value, the sales of similar homes are examined and adjustments made for differences in the homes. Although he had been in the business for 22 years, he had never before given an opinion on the effect of ceiling height on the value, and said that there was no data available to allow him to quantify the adjustment for ceiling height.

As part of his research, he spoke to approximately 20 people in the industry, and testified that about 80% told him that if ceiling height had no value, it would not be advertised in the promotional material, but they also told him that there was a great difficulty in quantifying its value. In the addendum to his report (Exhibit 12) he specifically stated that although the higher ceiling height adds to the appeal of the home, it is difficult to prove the value of it as a single item, and that the cost of adding it, and the value of it may be different. No estimates were obtained from builders, but he estimated the remedial cost to be \$15,000, and the original cost to the builder to be \$6000. In his opinion, the loss would not be the full value of the difference, as a purchaser would not pay the full difference on a resale of the property. The comparison

was made with a swimming pool, where the cost of installation is greater than the cost that a purchaser would pay for the feature on a resale. He agreed that this property was not marketed as a luxury townhome, and was not designed with nine foot ceilings throughout. In his report (Exhibit 3, Tab 6, p. 57) he had stated that higher ceilings contribute to the feeling of space in the room; however, under cross-examination he agreed that the rooms are bigger than in a normal townhome, and he was unsure how much the extra height would affect the feeling of spaciousness.

The next witness was Mr. John Whitham who explained that he and his wife had sold a large luxury condominium unit and they wished to purchase a summer home in Toronto, and a winter home in Florida. This luxury condominium was 2,200 square feet and had 2 rooms with 10-foot ceilings. He explained that the Lorne Park area was a very desirable part of the city and he wished to buy a spacious condominium as his summer residence there. After examining many options he decided that Style 7, Phase III, of the Lorne Park Townhomes project met his requirements. Mr. Whitham testified that he did not see the plans and was concerned about the "rider" on the brochure. He assumed that nine foot ceilings were part of the package and talked to a salesperson about it. His evidence was that when the Agreement of Purchase and Sale (Exhibit 3, Tab 2) was reviewed, he amended paragraph 42 and added the following words to protect himself from the builder making changes without his agreement as he understood material changes to be those which would materially affect the value of the property:

"with the proviso that there is no material loss of value"

Mr. Whitham testified that the price included some but not all of the features, and he purchased some of the optional features such as skylights which were added by the inclusion of a reference to the "floor plan, block plan, extra" on the first page of the Agreement of Purchase and Sale (Exhibit 3 Tab 2 p. 3).

The floor plan of the Home Style 7 design (Exhibit 3 Tab 2, p. 22) clearly showed nine foot ceilings in the living room and part of the master bedroom. He was told by the salespeople that there would be two steps going down into the living room which would create a nine foot ceiling. He wished to have a sense of spaciousness in the house, and he considered that the nine foot ceilings would contribute to this and therefore had an inherent value. He testified that by amending paragraph 42, he was protecting himself from changes which would reduce the value of the house, and considered that nine foot ceilings would be covered by that clause. Mr. Whitham testified that he understood paragraph 28 of the Agreement of Purchase and Sale to mean that if there was a material change it must be of equivalent or greater value.

There were two letters from the builder (Exhibit 3, p. 36 and p. 38) in which changes were made by removing one column from the design of the living room and rearranging the plumbing fixtures in the washroom. Mr. Whitham testified that he did not dispute these changes as they appeared to be reasonable. In mid-August he took possession of the property and within the first week or month noticed that there was a problem with the height of the ceilings in the living room and master bedroom. Although the shape of the ceiling in the master bedroom was correct, it measured eight feet rather than nine feet at its highest point and the slope on the walls began lower than he expected causing some difficulty in the placement of furniture. He did not approach the builder immediately as he said there were other things such as the kitchen to deal with first.

When Mr. Whitham did bring the problem of the ceiling heights to the attention of the builder by letter (exhibit 3 Tab 4, p. 40), he stated in the letter that there was a major issue that must be dealt with prior to the closing, and that the lower ceiling had materially reduced the value of his property so that it would be worth less money on resale. In reply, he received a letter from the builder (Exhibit 3 Tab 4 p. 42) advising him that they had used an extra thick joist system that may have reduced the ceiling height slightly in the living room, and claimed that the height in the master bedroom was close to nine feet. This letter also contested the issue of whether there was a material loss of value, and asserted the legal right to make construction decisions regarding the unit as provided for in paragraph 42 of the Agreement of Purchase and Sale. In the final phase of the exchange of letters, both Mr. Whitham and the builder threatened legal proceedings. Mr. Whitham advised the builder (Exhibit 3, p. 44) that if an accommodation could not be reached, then they would have to proceed accordingly. The builder advised Mr. Whitham by letter (Exhibit 3 p. 46) that he would have to live up to his legal obligations. This letter also said that the builder had taken measurements in another unit which confirmed that the lower measurements were correct, and then gave reasons for the lower height.

Mr. Whitham described why he thought the lack of nine foot ceilings would reduce the emotional appeal of the property and therefore lessen its value. He further explained that there was a loss of value. The purchase price was \$272,000, and the value adjusted by the annual increase provided to him by the real estate board would be \$295,000, but the appraisal by Mr. Rae was \$270,000. On this basis together with the opinion of Mr. Mulvale, he felt that there was a provable decrease in the value of home over what was provided for in the Agreement of Purchase and Sale.

In cross-examination, he agreed that there were discussions as to price with the builder, and that various options were chosen for the home. The home had not yet been built, and was sold on the basis of promotional materials which included brochures, floor plans, and artist's concepts. There was a video of a - computer simulated tour of the home based on the sketches, and artist's concept. He agreed that on the back page of the sales brochure (Exhibit 15) where the Homestyle Highlights including the nine foot ceilings were set out, there was a disclaimer stating that:

Materials, and floor plans are subject to change without notice. All house renderings are artists conceptions. All floor plans are approximate dimensions. Actual usable floor space may vary from the stated for area. Appliances are optional. E & O E.

The interior of the brochure showed the floor plans and included the nine foot ceiling in the living room and the master suite in a larger and darker print than some other words. At the bottom of this page there is a reference to home style highlights which set out the features which did not mention nine foot ceilings, and the above noted disclaimer. The floor plans shown in the brochure were included in the Agreement Purchase Sale. Mr. Whitham pointed out that his initials were between the living room and master suite on the sketch which was incorporated into the Agreement of Purchase and Sale (Exhibit 3, Tab 2, p. 22). He insisted that the initials related to the ceiling heights rather than the selection of an optional item. He agreed that he had read the disclaimer in Schedule "A" of the Agreement of Purchase Sale (Exhibit 3 Tab 2, p. 14) which stated as follows:

all specifications dimensions and materials are subject to change without notice, as set out by the Ontario New Home Warranty regulations and this purchase and Sale Agreement. Subject to paragraph 4 of the Agreement of Purchase Sale attached hereto,

the vendor shall have the right to substitute other products and materials for those listed in this schedule or provided for in the plans and specifications provided that the substituted products and materials are of quality equal to or better than, the products and materials so listed or so provided

Mr. Whitham testified that he had reviewed the clauses in the Agreement of Purchase and Sale and had made changes were appropriate. Specifically he added a proviso to paragraph 42 of the Agreement of Purchase Sale which is the disclaimer concerning material changes. His amendment, which was accepted by the builder, provided that the changes could only be made if there was no material loss of value. He stated that he did not know the remedies set out in that paragraph even though it stated that the purchaser's sole remedy was rescission of the contract, and he agreed that he turned his mind to the issues of the contract. The witness denied any knowledge of s. 52 (2) of the Condominium Act referred to in paragraph 42 of the Agreement of Purchase and Sale.

Mr. Whitham's evidence was that he took interim occupancy on August 20, 1997, and noticed the problem of the ceiling heights in early September, 1997. The home was 'a mess' so that he could not live there for two weeks after taking possession, and there were other issues which he said had to be dealt with prior to the problem of the ceilings. His evidence was that his delay in reporting the ceiling height problems was part of 'a strategy' as he wished to have the more basic items in the home finished first, although he agreed that up until the time he moved into the home, he had been dealt with properly by the builder.

His evidence was that this treatment changed once he took possession under the interim occupancy arrangement. The issue of the ceilings was first raised by a letter to the builder dated October 13, 1997 (Exhibit 3, Tab 4, p. 40). But this time, deposits had been paid to the builder, and upgrades had been paid for to private contractors as well. In these letters, the Applicants claimed that the value of the property would be diminished, and some type of accommodation would have to be reached. Mr. Whitham testified that he was not looking for structural changes to be made when those letters were sent or at the present time, as it would be very disruptive, and too difficult for his wife who was in poor health. Instead he was seeking a financial settlement. Throughout the time between taking occupancy and taking title, the Applicants lived in the home. Despite the ceiling problem, the closed the deal "under protest" although he did not know how this was done legally.

The witness stated that if he had not closed the deal, he could be subject to a lawsuit, and because he had already "been through hell" involving this home, he closed the deal. A letter was eventually sent to the Ontario New Home Warranty Program in May, 1998 as he was busy at work and did not write sooner. (Exhibit 4, Tab 8) He did not expect that the home would be rebuilt with nine foot ceilings in two rooms, and said that if he was adequately compensated he was willing to live with the ceiling heights.

The witness stated that he did not know of any other project in Ontario where the only difference was the ceiling heights, so it was not possible to use price comparisons to determine the value of the one feature. When he hired Mr. Mulvale to evaluate whether there was a loss of value due to the lower ceiling heights, he was again told that no comparison could be found in which the ceiling heights were the only variable. Mr. Whitham testified that this feature was valuable to him, and without it he would not have

purchased the home. During his re-examination, he denied that he initiated any discussion of settlement with Mr. Wegler and denied that there was an offer by Mr. Wegler to buy back the home.

WITNESSES FOR THE PROGRAM:

Evidence was called on behalf of the Program, and testimony was given by Bruce Rae, Eric Wegler, Sam Abdalla, and Patricia Lutz.

The Program's first witness Mr. Bruce Rae testified that he is a professional real estate appraiser, and limits his practice to the Oakville, Mississauga and Burlington area. He attended at the home on December 11, 1998 at the request of Mr. Wegler. He found the home to be a modern, superior, upgraded townhome. There was a step down into a sunken living room, creating the ceiling height of eight feet six inches in the living room even though the ceiling was not raised. In his opinion a nine foot ceiling would not have an effect on the value of the property on a resale even if the ceiling heights had been nine feet throughout the entire home. The standard ceiling height is eight feet and in his opinion there would be no increase in the value of the property unless the ceiling height was increased to twelve feet which in his opinion would be noticeable and something that the purchaser on a resale might pay for. In his opinion, using the direct sales comparison method for an evaluation, he would not make adjustment for nine foot ceilings as feature that would effect the value of property.

He also stated that certain features which are included as extras and paid for by the purchaser do not affect the value on a resale, or do not add the full value of their cost to the person who buys the home from the builder. When he did his evaluation, he was not aware of what the base price of the home was and was not aware that the final price included extras paid for by the Applicant. In making his evaluation, he agreed that he also did not take subjective factors into account.

The next witness for the Program was Mr. Eric Wegler who testified that he is a chartered accountant and was the senior vice president of River Oaks Homes Inc. during the time period in question. He testified that River Oaks Homes Inc. managed the project, and Lorne Park Townhomes Inc. was the builder. A total of 160 homes were built in three phases, and he was involved in the acquisition of the land, the planning, development, implementation, construction, and service of the project.

Mr. Wegler testified that the sales brochure (Exhibit 15) was used to identify specific models of the home, and that the 'fine print' used was the industry standard. His evidence was that the purchasers understood that the builder reserved the right to make changes without notice, and that the specifications shown were only approximate as the homes had not been built. In the "Homestyle Highlights", shown in the materials, there was a sunken living room which would cause the ceiling height to be nine feet; however, they were not able to accomplish this as the garage was below the living room, and they could not take the full one foot from the height of the ceiling in the garage. There was also to be a nine foot vaulted ceiling in the master bedroom; however, this was also not reached, and the ceiling height was eight feet. He explained that a change was made, and a better joist system was used which was thicker, provided space for the "mechanicals" and avoided the necessity for bulk heads, which lead to a more open feeling to the rooms. This new joist system was more expensive for the builder, but he

stated that it was used at no extra charge to the purchasers. In his opinion he was allowed to change the joist system without notification to the purchasers as it was a construction decision allowed for In the Agreement of Purchase and Sale.

Mr. Wegler testified that the architectural drawings (Exhibit 8) show a maximum height of eight feet in master bedroom, and still show nine feet in the living room. He testified that the project had already been given site plan approval which limited the overall height of the structure. The garage also created problems as it was under the living room area, and the garage floor could not be below the grade of the land. It was necessary to leave sufficient room for insulation, heating duct work, clearance for the garage door opener, and clearance for the door to the interior of the home from the garage. Mr. Wegler testified that given the construction issues of the necessary height of the garage, it was not possible to make the living room floor any lower. As a result, due to the thickness of the joist system, and construction factors caused by the requirements for the garage ceiling height, they were not able to achieve the nine foot ceilings in the two rooms as shown on the advertising material.

Mr. Wegler testified that the floor plan and sketches from the sales brochure was used in the Agreement of Purchase and Sale to identify the model, type, design and particular location of the home as well as to identify the options purchased by the customer. He stated that in the Agreement of Purchase and Sale, there was a specific notice at the end of Schedule A (Exhibit 3, Tab 2, p. 14) indicating that the specifications, dimensions, and materials were subject to change without notice, and allowing for the substitution of other products or materials than those listed in the schedule or provided for the plans or specifications if the products or materials were of equal or greater value. He testified that in his opinion the substitution of the joist system was of greater value, and that the changes in the specifications were permitted. He testified that the benchmark for a material change is whether the change effects the value of the unit as a whole, and in his opinion this did not reduce the overall value of the unit, change the amount of usable space in the unit, or effect the physical "envelope" of the unit. The plans for this development had been approved by the City of Mississauga building department, and there was a limit to the height of the building. Under cross-examination he agreed that he did not re-submit amended plans for approval by the City of Mississauga. At different times, different versions of the plans were made, and Exhibit 8 in this proceeding was not the final working drawing.

Mr. Wegler explained that the Pre-delivery Inspection was done prior to the Applicants taking possession of the home. The Applicants moved into the home under an occupancy license prior to the actual closing, as the home is a condominium, and title could not be transferred until the registration of the entire project. Prior to the actual closing of the transaction, there was an exchange of letters between Mr. Wegler and the Applicants in which the Applicants were seeking compensation and the Mr. Wegler was denying liability. The transaction closed despite this, and title was transferred after the issue of the ceiling heights had been raised. In Mr. Wegler's opinion, the Applicants were seeking a financial settlement as Mr. Whitham had suggested in a letter (Exhibit 3, Tab 4, p. 44) that an accommodation could be reached or they could agreed to disagree and proceed accordingly. He testified that in response to this, he had reminded the Applicants of their legal obligations and assumed that they would exercise their right of rescission or look to their other legal remedies. In his opinion, he had responded to the Applicants quickly and courteously. On other issues, such as, the delayed closing compensation, he stated that the demands by the Applicants were reasonable in his

opinion and they were settled quickly. He did not think that the issue of the ceilings was very important to the Applicants as it had not been raised in the pre-delivery inspection, and he assumed that they were simply trying to extract money in the situation.

In cross-examination, Mr. Wegler testified that the Applicants were given notice of two design changes which were agreed to in a reasonable fashion. He did not give the Applicants notice of the change in the joist system as he considered that it was within his substitution rights as a builder. This decision to change the type of joist system was made after the sale of units began in the project but before the working drawings. His evidence was that they did not discover the extent of the effect of the larger joist system until construction was under way at the framing stage so he did not ask the engineers or architects to change the plans. His evidence was that the architectural features of the home were maintained, the joist system was a more expensive upgrade, it eliminated bulk heads, and, in his opinion, the loss of a few inches was "worth it".

Mr. Wegler testified that the properties had gone up in value, but agreed that some upgrades which are purchased from builders do not maintain their value on a resale. He stated that he had offered to buy the home back together with the closing costs as he was certain that the unit had gone up in value so there would not be a loss, and he would save the costs of litigation. This was set out in a letter dated September 9, 1998 from Mr. Wegler to the Program (Exhibit 19) although he did not specifically ask the Program to put the offer to the Applicants. He testified that this was the second time the issue of buying the property had been brought up. He stated that he had spoken to Mr. Whitham about it during 1998 after the closing of the transaction, however, the offer had been refused, and he was told that there were other factors that precluded the Applicant from accepting the offer.

The next witness for the Program was Patricia Lutz who is the customer service supervisor in the Program's condominium office, and has worked for the Ontario New Home Warranty Program since 1990. She supervises the customer representatives, the condominium clerk, and a receptionist. She reviews the reports prepared by the Customer Service Representatives, and she signed the decision letter in this matter. Ms. Lutz evidence was that an error was made in the processing of the file and a Conciliation Report was sent out by Ann Robinson who was a Customer Service Representative at that time. Although this was a claim for compensation, Ms. Robinson treated it as a warranted item, and the Conciliation Report was sent to the Applicants in error. Ms. Lutz explained that once the document had gone out she began to request information, and was advised by in-house counsel for the Program to obtain an independent appraisal of the home with reference to the issue of the ceiling height. Several appraisers were contacted, but they would not give an appraisal of the loss of value caused by the reduction of the ceiling height.

In cross-examination, Ms. Lutz stated that when she was gathering information from Mr. Wegler, she did not give the Applicants the opportunity to respond since the issue to be determined was of a factual nature, and was based on the contract. In her opinion, the change in ceiling height was not a material change to the layout of the building, and the builder would not be required to amend the condominium documents. The ceiling height difference between eight feet and nine feet did not affect the square footage or configuration of the building, and would not be a material change that would effect the disclosure statement under the Condominium Act. In her opinion paragraph 28 of the Agreement of Purchase and Sale permitted minor changes and this was such a change.

Her understanding was that a better floor joist had been used which was a substitution of a product of equal or better value, and, as well, the required height of the garage was a necessary consideration. In her opinion, there were therefore valid factors as a result of which the home could not be built with the nine foot ceilings as advertised. In the circumstances, it was clear that the cost of raising the roof would not be justified. For these reasons she decided that the claim was refused.

The next witness on behalf of the Program was Mr. Sam Abdalla who is employed by the Program as a Condominium Technical Representative and has worked for the Program since 1989. He has a degree as a Civil Engineer from Cairo University (1970), an M.A. in Marine Engineering from the University of Liverpool (1977), and an M.A. from the University of Waterloo in Construction Management (1987).

He testified that he made one visit to the Applicants' home in the summer of 1998 on short notice at the request of Ms. Patricia Lutz. The witness was asked to take measurements, and after the visit he received a copy of the Agreement of Purchase and Sale and the floor plan. Mr. Abdalla measured the living room from the ceiling to the carpet, and found that it was eight feet, six inches "clear height" from the carpet to the drywall, and in the master bedroom at the highest point he found the height to be eight feet from the floor to the underside of the ceiling drywall. He did not recall if that room was carpeted. Once these measurements were taken, he sent his findings by e-mail to Ann Robinson. He had no further dealings with the matter. His evidence was that he did not direct Ann Robinson to send the Conciliation document but had prepared the information for internal use only. Until the date of the hearing, he was not aware that the Conciliation document had been sent out.

FACTS FOUND PROVEN:

The builder and the Applicants originally contemplated that the unit would have a sunken living room which would produce a nine foot ceiling, and a vaulted ceiling in the master suite with a maximum height of nine feet. These features appear on brochures, sketches, artists concepts, and promotional materials, but they are not listed as features in the Agreement of Purchase and Sale.

Mr. Whitham is an experienced purchaser. He carefully reviewed the Agreement Purchase and Sale and made various changes to it.

As the construction of the unit process progressed, the builder substituted a different joist system which eliminated the need for some bulk heads but caused some loss of height in the ceiling of the master suite. For construction reasons, the builder was not able to take the necessary one foot from the garage ceiling to lower the living room floor enough to achieve the nine foot ceiling height in the living room. The builder did not halt construction and attempt to amend the plans for the project and obtain approval from the municipal authorities to increase the overall height of the building. Instead, the builder relied on the rights under the Agreement of Purchase and Sale to make changes to the specifications of the building as required for construction purposes.

The Applicants did initial the floor plan in the Agreement of Purchase and Sale between the diagram of the living room and master suite. However, the Tribunal finds that the floor plan was used to identify optional features which had been selected, and the nine

foot ceilings were not an optional feature. All of the initials relate to options. The initials at issue do not relate to a non-optional feature which appears on the floor plan.

Mr. Whitham examined the Agreement of Purchase and Sale very carefully and made a change to paragraph 42 which was the paragraph giving the builder rights to change the interior of the unit, and providing the purchasers with the sole remedy of rescission. The Applicant sought to protect himself from a material loss of value, and did not otherwise amend the builder's right to make changes. It would seem unusual that Mr. Whitham would read the Agreement in such detail, and yet not realize that his remedy was rescission if there was a material change. This leads to the conclusion that he did not consider the change in the ceiling heights to be material, or if he did, he chose not to use his remedy.

There was no amendment to paragraph 35 of the Agreement of Purchase and Sale which provided an acknowledgement by the purchasers that the dimensions, and other data on the marketing materials is approximate only or paragraph 28 which permitted substitution of materials where in the opinion of the builder's architect they are of equal or greater value.

Mr. Whitham testified throughout that it was not possible for him to sell the house and move due to his wife's health, and it appears that he was seeking redress other than the remedy provided in the Agreement. On this basis, a remedy other than rescission would only be available to the Applicants according to the amendment made by Mr. Whitham, if the change was material, that is, resulted in a material loss of value. This leads to a consideration of whether there has been shown to be a material loss of value of the property.

There was evidence from two evaluators who gave very clear evidence that it was not possible to directly assess the value of the nine foot ceilings to the property based on a comparison with other properties. Mr. Mulvale found a way to put a value on it, but it involved a highly subjective assessment which was not based on a comparison with other properties. He estimated a cost of repair, less a rough estimate of the original cost to the builder, and adjusted it by a very imprecise percentage on the basis that he did not expect a purchaser on a resale would pay the full amount for the feature. This was the best effort by Mr. Mulvale, but was not a clear assessment of loss based on an accepted method in common use. Mr. Rae agreed that the ceiling heights were of some value to some purchasers, but he said that it was not a feature for which he would adjust price in an evaluation. In these circumstances there is no evidence of a clear quantifiable loss of value due to the ceiling heights.

The Applicants knew that the ceilings were less than nine feet prior to the closing as they lived in the home "under license" from the date of possession to the date of closing. They did not notice the problem of the ceilings for a period of between two weeks and four weeks from the date of their initial occupation of the property. The issue of the ceilings was not put on the Pre-delivery Inspection Report where they listed their concerns with the property. Later, they raised the issue with the builder prior to closing, and sought financial compensation for the deficiency. Financial compensation is still the issue with the Applicants as they do not intend to carry out repairs if they are successful in this application.

ISSUES:

The legal issues in this case are:

1. Was there a breach of warranty by the builder under the Act?
2. If there was a breach of warranty by the builder, have the Applicants shown that they have suffered a reduction in the value of the property as a result?

APPLICABLE LAW:

Section 1 under the *Ontario New Home Warranties Plan Act* states:

"home means",
.....

(c) a condominium dwelling unit, including the common elements

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

Section 13 under the *Ontario New Home Warranties Plan Act* states:

- (1) Every vendor of a home warrants to the owner,
- (a) that the home
 - (i) is constructed in a workmanlike manner, and is free from defects in materials.
 - (ii) is fit for human habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code.
 - (b) that the home is free from major structural defects as defined by the regulations; and
 - (c) such other warranties as are prescribed by the regulations

.....

(3) the vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

.....

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 under the *Ontario New Home Warranties Plan Act* states:

- (1) Where,
- (a) a person who has entered into a contract with the vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract.

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

Regulation 892, Section 4, under the *Ontario New Home Warranties Plan Act* states:

(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation

Regulation 892, Section 6, under the *Ontario New Home Warranties Plan Act* states:

(3) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to the owner out of the guarantee fund in respect of a claim made after August 1, 1989 under clause 14 (1)(b) or (c) of the Act is \$100,000.00.

Regulation 892, Section 19, under the *Ontario New Home Warranties Plan Act* states:

(19) Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

Condominium Act, Section 52 states:

(2) the purchaser, before receiving delivery of the deed to or transfer of the unit, may rescind the Agreement of purchase and sale within ten days after receiving the disclosure statement or, where there has been a material amendment thereto, within ten days after receiving the material amendment.

CASELAW:

Abdool v Somerset Place Developments of Georgetown Ltd. (1992) 10 O.R. 3d (Ontario Court of Appeal)

In this case, the plaintiff had alleged that the builder was in breach of the requirements for the Disclosure Statement of section 52(2) of the Condominium Act and that the Agreement of Purchase and Sale was not binding. It was held on appeal that the statute protects the rights of both parties and that all the other documents must be taken into account. To show that the Disclosure Statement is defective the plaintiff must show

on objective standard that information was not disclosed, or was inaccurate or sufficiently disclosed that a reasonable purchaser would regard the information as important enough to the purchasing decision that they would have been unlikely to go ahead with the transaction and would have rescinded the Agreement before the end of the cooling off period.

**Richards v Law Development Group (Georgetown) Ltd. (1994) O. J. No. 2914
Ontario Court Justice (General Division)**

In this case the purchasers claimed that the vendor did not make full disclosure of the alterations and sought a declaration that the Agreement of purchase and sale was null together with return of their deposits and damages. The purchasers alleged that the vendor had made negligent misrepresentations that had induced them to enter into the Agreement for the purchase of a home. The action was dismissed and the counterclaim against the purchasers was allowed. The home was purchased based on a brochure, and a site plan as the condominium townhouses had not yet been built. As construction continued some changes were made, the purchasers inspected the unit prior to the closing date and implied that they would close. The changes made were not part of the Disclosure Statement but the court found that the time of entering into the agreement of purchase and sale the builder could not have had knowledge that any of the alterations were changes would be needed as they became apparent as construction took place. In paragraph 86 of the judgment, the court found that the purchasers did not buy from a model suite and had confirmed that they would "firm up to deal". The court found that the purchaser simply was dissatisfied with the purchase, and was making an effort to get out of the agreement of purchase and sale.

Eldon Weiss Home Construction Ltd. v Clark et al (1982) 39 O.R (2d) 129 (County Court)

In this case the plaintiff agreed to construct a house for the defendants, there were defects in construction which would have cost call thousand dollars to remedy, the defendant paid for thousand dollars less than the agreed price, and the defendants sold a home for the full market price despite the deficiencies. The builder sued for the balance of the purchase price and the defendant counter-claimed for damages for breach of contract. The issue facing the court was whether to assess damages on the basis of the cost of remedy in the deficiencies or on the basis of the reduction in value of the property from the market value.

To allow a recovery for the cost of a remedy in the deficiencies would have unjustly enriched the defendants and would have put them in a better position than if the contract had been performed. The court cited authorities which found that they could look to the parties actual intentions and whether they intended to proceed with the repairs if they were awarded damages. Further, the court cited McGregor on Damages 14 ed. at p. 600 where the case of Applegate v Moss (1971) 1 Q.B. 406 (C. A.) was cited, which held that:

the value of the building as it is should have been less its value as it is becomes the appropriate measure where the plaintiff sells it without remedy in the defects

and the court in the Eldon Weis case held that there was no diminution in the value of the property due to the deficiencies and the defendants had not proven any damages.

Joe Florio v Ontario New Home Warranty Program (Tribunal's decision released April 14, 1999)

In this matter the Applicant purchased a house from the builder and claimed that there should have been 10 ft. high ceilings in the home which was built. It was found by the Tribunal that ceiling height was ambiguous as the plans and sketches did not deal with the issue of ceiling height. The schedule to the Agreement of Purchase and Sale referred to the ceiling heights in relation to a bungalow; however, it was not determined that the home in question was in fact a bungalow. Also, the Applicant had done some of the work on the home and used the plans himself. The issue was not raised until three months after the closing date. The Tribunal found that it was not the intention of the parties that the house have ten-foot ceilings, and the claim was dismissed.

Inderjit Singh Gandhi v Ontario New Home Warranties Program (Tribunal's decision released September 16, 1998)

In this case the Applicant claimed that the ceiling height of the Great Room was 6 ft. 8 in. rather than 8 ft. high as referred to in Schedule B of the Agreement of Purchase and Sale. The builder had made changes to the construction based on requests from Mr. Gandhi, and the result was to reduce the height of the ceiling in the Great Room. The Tribunal found no defects in workmanship or materials and that the room could perform its function. The drawings had been approved by the municipality, and based on the Agreement of Purchase and Sale the builder was permitted to make minor changes to the drawings. In this case, the changes leading to the adjustments was work done at the request of the homeowner, and it was found that the claim was not covered by the warranty as it fell under the section 13(2) exemption of the Act.

Mulveney v Ontario New Home Warranties Program (Tribunal's decision released June 24, 1997)

In this matter, the Applicant claimed that based on the advertising and promotional materials he intended to buy a home with nine foot ceilings. The ceilings were measured to be eight feet, six and a half inches in all but two areas where the ceiling height was eight feet. According to the Applicant, the ceiling height was a premium architectural feature and the reduced height affected the appearance of the window, the crown molding and the kitchen coverage, all of which were designed for a nine foot ceiling. The issues before the Tribunal were whether there had been a substitution with respect to an item referred to in the purchase agreement, if so was it of equal or better quality, and, if not, should damages be assessed. It was agreed by the parties that there was no reference to ceiling height in the Agreement of Purchase and Sale, although featured prominently in the advertising material which was designed to attract buyers.

The Tribunal found that to be considered a substitution under the Act, there must be a substitution of an item referred to in the Agreement of Purchase and Sale. Ceilings were not specifically referred to in the Agreement, and clause 33 of the Agreement precluded such representations from being considered part of the Agreement. It was found that this change in the height of the ceilings was not a substitution within the meaning of the Act and not within the jurisdiction of the Tribunal.

City of Toronto v Canadian Tire Corp. (1993) 29 O. M.B.R. (Ontario Municipal Board)

In this matter, the issue to be determined was whether the value should be assessed on the basis of objective market value approach or subjective determination. It was held that the rent must be fair and reasonable. This site was the flagship store of the company, held a historical value, and was positioned in a lucrative and highly visible market which made it a unique location. On this basis a subjective approach was used.

Thomas Bates & Son Ltd. v Wyndham's Lingerie Ltd. (1981) All E. R. 1077 Court of Appeal.

In this case, the landlord and tenant had executed a lease giving effect to their common intentions, but the document failed to provide a land review clause. The tenant was aware of the mistake on the date of the execution of the document and did not draw the landlord's attention to it. When the rent was up for review, the mistake was discovered and the landlord offered the tenants what they determined to be a market rent or arbitration. This was refused by the tenant and the matter proceeded to litigation. It was found that if the parties had a common intention and one party erroneously believed that the document gave effect to that intention, and the first party knew that the second party was unaware of the mistake and did not bring it to their attention, the court would not permit them to benefit from it. It was not necessary for the plaintiff to show that the defendant was guilty of sharp practice.

Halterm Ltd. v Her Majesty the Queen (1984) F.C.J. No. 125

In this matter, the issue involved the amount of rent to be paid for a twenty year lease. It was found by the court that there was not an inflexible rule that the objective market test must be used. The wording of the document, as well as the nature of the lease must be taken into account.

Strata Corp. NW 1714 et al v Winkler (1987) 45 D.L.R. (4th) 741 (British Columbia Court of Appeal)

In this case, the builder failed to properly construct a concrete floor and waterproof the walls. The building was still found to be serviceable and at trial the plaintiff was awarded a small award of \$12,000 as the cost of patching the waterproofing. The cost of bringing the work into conformity with the contract was in excess of \$170,000. At trial, the judge found that the cost of bringing the building into conformity with the contract would grossly exceed any benefit which would be obtained from the repairs being carried out. It was clear that the plaintiff had not carried out the repairs and did not intend to spend any money from the settlement in bringing the building up to the specifications in the contract. The issue on appeal was the level of damages to be awarded. The court adopted the reasoning that there are cases where damages for the default are to be measured by the costs of repairing the defect but this will be done only where the cost of performing the work is less than the reduction in the property value due to the default. If the plaintiffs were to be given damages for the cost of repairs, did not carry out those repairs, and the reduction in the value of the building was less than the cost of repairs,

this would result in a windfall for them and would not be appropriate damages. The appeal was dismissed.

Ceolaro v York Humber Ltd.. (March 29, 1994) (Ontario Court Justice General Division)

In this matter, a parcel of land was developed in an area that had been a sewage treatment plant. There were issues of whether the site had been properly developed given its earlier use and whether the disclosure document was adequate for the condominium project. It was found that the test for information required in the disclosure statement is objective. The question is whether a reasonable purchaser would regard the information as so important that he or she would be unlikely to have completed the transaction.

APPLICATION OF LAW TO FACTS:

The Applicants have not proven that there is a material loss in value of the home as a result of the builder failing to provide nine foot ceilings in the two rooms as contemplated by the parties prior to construction.

Paragraph 42 of the Agreement of Purchase and Sale as amended by the parties at the request of Mr. Whitham allowed changes that did not materially affect the value of the property. There is no evidence that the home is quantifiably of less market value in its present state than it would have been if it had been built with the nine foot ceilings. The changes did not, therefore, materially effect the value of the property, and were permitted pursuant to paragraph 42 of the Agreement of Purchase and Sale.

Nine foot ceilings are not specifically listed as a feature in the Agreement of Purchase and Sale, and changes were permitted as required during construction. Even if the nine foot ceilings had been listed as a feature in the Agreement of Purchase and Sale, there would still be the fact that there is no proof of an actual loss in the market value of the unit.

This Tribunal has jurisdiction to deal with a quantifiable loss in the value of the property caused by a breach of contract, a breach of warranty, or a defect in workmanship. The Tribunal finds that there is no breach of contract or warranty as or any defect in workmanship or materials as contemplated by the Act. Any loss that may have been suffered by the Applicants due to the ceiling heights would be in the nature of general damages based on a loss of enjoyment which is outside the jurisdiction of this Tribunal.

DECISION:

By virtue of the authority vested in it under s. 16 (3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow the claim.

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair

Released: April 17th, 2000

SASSON, JUDA o/a SADDON MOTORS

JUDA SASSON O/A SASSON MOTORS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: JUDA SASSON, representing himself
MITCHELL GOLDBLOOM, Counsel representing the Registrar
under the *Motor Vehicle Dealers Act*

DATES OF HEARING: April 4 & 5, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Juda Sasson ("Sasson") appealed to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) the written proposal of the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to revoke Sasson's registration as a motor vehicle dealer. The date of the Registrar's proposal is December 29, 1999.

The Proposal of the Registrar reads as follows:

REASONS

The intention and objective of the Act is to protect the public interest, The requirements of the Act include that Registrant be financially responsible In the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Dealer's past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act. Therefore, the Registrar is unwilling to continue to register the Dealer under the Act.

PARTICULARS

The reasons for this proposal are:

- 1) The Dealer is a sole proprietor, which has been registered as a motor vehicle dealer since on or about December 9, 1991. The Dealer's current registered business premises is 26-855 Alness Street, Downsview, Ontario.
- 2) On or about August 19, 1999, OMVIC received a complaint from a consumer (Jennifer Gibson) regarding a 1992 Toyota Tercel, VIN # JT2EL43E0N0140674, indicating that the bill of sale provided by the Dealer did not disclose the odometer reading. At the time of purchase of the

vehicle, the odometer reading was 115,004 Kms. Upon checking the history of the vehicle, Ms. Gibson determined that that (sic) the distance travelled by the vehicle [was] significantly higher than was represented to the consumer. When the Dealer purchased the vehicle on May 15, 1999, the odometer reading was 174,091 Kms. The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act.

- 3) On or about October 7, 1999, OMVIC received a complaint from a consumer (Heather Maclashen) regarding a 1990 Acura Integra, VIN # JH4DB1549LS801692, indicating that the bill of sale provided by the Dealer did not disclose the odometer reading. At the time of purchase of the vehicle, the odometer reading was 132,112 Kms. Upon checking the history of the vehicle, Ms. Maclashen determined that that (sic) the distance travelled by the vehicle [was] significantly higher than was represented to the consumer. When the Dealer purchased the vehicle on August 12, 1999, the odometer reading was 197,000 Kms. The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act.
- 4) On or about October 15 & 22, 1999, an inspector, duly appointed pursuant to the Act attended at the business premises and met with the Dealer and obtained the books and records of the Dealer.
- 5) An examination of the history of the vehicles purchased and sold by the Dealer revealed the following:
 - a) a consumer (John Tweedle) purchased from the Dealer a 1989 Toyota Tercel VIN# JT2FL32G9K035222 on or about March 17, 1998. The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act. When the consumer purchased the vehicle, the odometer reading was 119,361 Kms. However, when the Dealer purchased the vehicle on November 11, 1998, the odometer reading was 168,186 Kms; a consumer (Anthony George) purchased from the Dealer a 1991 Mazda 626 VIN# 1YVGD22A1M515220 on or about April 13, 1999. The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act. When the consumer purchased the vehicle, the odometer reading was approximately 127,000 Kms. However, when the Dealer purchased the vehicle on March 17, 1999, the odometer reading was 225,633 Kms;
 - b) a consumer (Keniweimo Ajoko) purchased from the Dealer a 1993 Honda Civic VIN# 1YVGL022A5N5214877 or about February 2, 1999. The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act. When the consumer purchased the vehicle, the odometer reading was 114,644 Kms. However, when the Dealer purchased the vehicle on September 9, 1998, the odometer reading was 148,029 Kms. The consumer came to see the Dealer as a result of an advertisement indicating that the vehicle had 111,000 Kms;
 - c) a consumer (Tanveer Sayed) purchased from the Dealer a 1992 Mazda Protégé VIN# JM1 BG2238NO453216 on or about April 22, 1999. The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act. When the consumer purchased the vehicle, the odometer reading was 120,116 Kms. However, when the Dealer purchased the vehicle on March 31, 1999, the odometer reading was 179,375 Kms. The Dealer further represented to Lubrico Warranty Inc. that the odometer reading was 120,116 Kms and failed to disclose the total distance travelled;
 - d) a consumer (Michel Constantino) purchased from the Dealer a 1990 Honda Accord VIN# 1HGCB7564LAD69626 on or about June 8, 1999. The Dealer failed to advise the consumer that the vehicle was "Branded Rebuilt" despite receiving notice on the bill of sale when the Dealer purchased the vehicle on June 2, 1999. The Dealer failed

to provide the consumer with a bill of sale containing the information as required by the Act;

e) a consumer (Branko Vrbaneck) purchased from the Dealer a 1990 Honda Prelude VIN# JHMB44155LC803556 on or about June 18, 1999. The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act. When the consumer purchased the vehicle, the odometer reading was approximately 117,000 Kms, However, when the Dealer purchased the vehicle on May 13, 1999, the odometer reading was 187,674 Kms. The consumer has experienced sever mechanical difficulties with the vehicle;

f) a consumer (Kenneth Cutler) purchased from the Dealer a 1993 Honda Civic VIN# 2HGEH2366PH000103 on or about August 3, 1999, The Dealer failed to provide the consumer with a bill of sale containing the information as required by the Act. When the consumer purchased the vehicle, the odometer reading was approximately 111,528 Kms. However, when the Dealer purchased the vehicle on July 8, 1999, the odometer reading was 211,000 Kms. The consumer came to see the Dealer as a result of an advertisement indicating that the vehicle had 111,000 Kms, The Dealer further represented to Lubrico Warranty Inc. that the odometer reading was 111,578 Kms and failed to disclose the total distance travelled

6) An examination of the books and record revealed that the Dealer failed on three contracts to complete the odometer section on the bill of sale contrary to the Act. These three (sic) contracts are:

- a) sale to Ameer Alimuddin of 1990 Honda Civic VIN # JHMED3642LS811618 on or about March 19;
- b) sale to Anthony Corbin of a 1989 Toyota Camry VIN JT2VY22F9K002951 on or about June 14, 1999
- c) sale to Robin Goswami of a 1990 Honda Accord VIN JHMCB7655LC820790 on or about July 2, 1999; and
- d) 1999 sale to Jason Power of a 1990 Honda Civic LX VIN # JHMED3508LS801903 on or about March 29, 1999.

THE LAW:

The Proposal of the Registrar was issued in terms of Section 7(1) of the Act, which reads as follows:

7(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons thereof, on the applicant or registrant

The Registrar bases his proposal upon Section 5(1)(b) and (d) of the Act, which reads as follows:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and integrity and honesty; or

.....

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The Registrar takes the position that Sasson's registration should be revoked as the past conduct of Sasson affords reasonable grounds for the Registrar's belief that the business will not be carried on in accordance with law and with integrity and honesty.

There is no dispute that Sasson is registered as a motor vehicle dealer and presently operates at 266-855 Alness Street, Downsview, Ontario, which is the approved location of the business. It is also not in dispute that Sasson is the sole proprietor of the business.

THE EVIDENCE:

The evidence adduced by the Registrar was both verbal and documentary. The evidence hereunder follows the order in which the evidence was adduced at the hearing.

ITEM 2 IN THE PROPOSAL OF THE REGISTRAR - 1992 TOYOTA TERCEL MOTOR VEHICLE - JENNIFER GIBSON

Donald Gibson, the father of Jennifer Gibson stated in his testimony that he assisted his daughter in her quest for a second hand motor vehicle. Mr. Gibson had seen an advertisement for a Toyota Tercel motor vehicle in motor publication called the Auto Trader. The advertiser was Sasson. He called upon Sasson, spoke with him and inspected the Tercel motor vehicle. He explained to Sasson that he was looking for a reliable vehicle for his daughter and Sasson advised him that the Tercel was a "good car". Mr. Gibson sat in the driver's seat of the Tercel and took note of the vehicle's odometer reading which was slightly over 115,000 kms. Mr. Gibson left after inspecting the vehicle. He arranged with his daughter Jennifer to return to view the vehicle with Jennifer. On August 9, 1999, both Jennifer and her father met at Sasson Motors, spoke with Sasson and inspected the Tercel. Jennifer stated in her testimony that she was happy with the vehicle which she needed to travel to and from work. She lives in Oshawa and works in Yorkdale Mall, Downsview. Mr. Gibson and Sasson settled on a purchase price of \$5,230.00 plus taxes. Jennifer stated that when she inspected the Tercel vehicle she noted that the odometer registered a few kilometers over 115,000 kms. She was not sure of its exact reading.

Both Mr. Gibson and Jennifer stated that the Bill of Sale in respect of the Tercel had already been completed by Sasson when it was placed before Jennifer for her signature. However, Jennifer noted that there was nothing filled in on the Bill of Sale where the words "Distance Travelled" appeared. Jennifer queried this omission and on the instructions of Sasson was told to write in the words "It doesn't matter". She did so as she trusted Sasson.

Already written in on the Bill of Sale in Sasson's handwriting under the heading "Notice to Buyer" were the words "buyer is not interested in how many kilometers are on the car". When she and her father left the dealership neither was given a copy of the Bill of Sale. All they were given was a form of receipt which indicated the purchase price of the vehicle and what has been paid for it.

After taking delivery of the vehicle Mr. Gibson felt uneasy about its mechanical condition. He caused enquiries to be made from a recent past owner of the vehicle who told Mr. Gibson of past problems with the Tercel and suggested that the Toyota dealership in Burlington be contacted for details. Mr. Gibson then spoke with the dealership and during the discussion with them was shocked to learn of the distance travelled by it according to the dealership's records. He was told that as at May 1998 it had a recorded 161,000 kms on it's odometer. This revelation, as well as the fact that the vehicle had by then required quite extensive mechanical repairs, caused Mr. Gibson to speak with the Ontario Motor Vehicle Council (OMVIC) which then commenced an investigation.

Mathew McKenzie an investigator at OMVIC who testified at the hearing stated he was handed the matter for further investigation. He discovered that the vehicle had been purchased by Sasson at a dealer's auction conducted by Canadian Auction Group. That auction had taken place on May 26, 1999, when Sasson had purchased the Tercel. The odometer reading of the Tercel when it was purchased by Sasson reflected that the vehicle had travelled 174,293 kms. McKenzie obtained from Sasson a copy of the Bill of Sale when Sasson sold the Tercel to Jennifer Gibson. McKenzie then forwarded that copy of the Bill of Sale to the Gibsons who stated they were shocked when they saw upon that copy that after the words " buyer is not interested in how many kilometers are on the car" there had been added "174,392 kms". Both Mr. Gibson and Jennifer denied that the latter words were on the Bill of Sale when Jennifer signed same. Jennifer during her evidence tendered a photograph, which she stated she had taken of the Tercel's odometer reading about one month after she purchased the vehicle and which photograph (Exhibit 3) reflected a reading of 128,317 kms.

ITEM 5(B) IN THE PROPOSAL OF THE REGISTRAR - 1992 MAZDA 626 - KENIWEIMO AJOKO

The next witness for the Registrar was Keniweimo Ajoko who stated in evidence that he saw an advertisement in the Auto Trader publication. This advertisement was for a 1992 Mazda 626 motor vehicle and had been placed in the publication by Sasson. Ajoko went to Sasson Motors to inspect the Mazda. He spoke with Sasson and inspected the Mazda. He noted that the odometer on the vehicle indicated a figure in the vicinity of 114,000 kms.

Ajoko agreed to pay Sasson \$5,700.00 plus tax as the purchase price for this motor vehicle. The Bill of Sale presented by Sasson to Ajoko already had the following words noted on that Bill - "Buyer is not interested in how many kilometers are on the car". Ajoko stated that where the words "distance travelled" appeared on the Bill of Sale, Sasson had written in 114,644 kms.

Mr. Ajoko signed the Bill of Sale, which was dated February 8, 1999, but he was not given a copy of the Bill when he left after purchasing the vehicle.

Ajoko also purchased through Sasson a Lubrico power train warranty for the Mazda motor vehicle at the same time he purchased the vehicle. Sasson completed the application form for the Lubrico warranty and also signed that form as the dealer who sold the vehicle. On that application form it stated that the Mazda vehicle had a "current reading" on its odometer of 114,644 kms.

Mathew McKenzie of OMVIC stated that during the course of his investigation of Sasson he came across the copy of the Bill of Sale of the Mazda and copy of the Lubrico warranty application. When OMVIC sent copies of these documents to Ajoko the latter noted for the first time that after the words "buyer is not interested in how many kilometers are on the car" appeared the words "143,189". Ajoko stated that these words were not on the Bill when he signed it. He went to see Sasson and remonstrated with him. He then came to an agreement with Sasson whereby Ajoko agreed to sell the Mazda back to Sasson in return for Sasson refunding Ajoko \$4,500.00. The vehicle was then left for two weeks with Sasson in order for Sasson to sell it and refund the \$4,500.00 to Ajoko. However, when Ajoko called upon Sasson after two weeks for the \$4,500.00, the car had not been sold and Ajoko was obliged to take back the Mazda and was not paid the \$4,500.00.

Further evidence was given by Mathew McKenzie to the effect that OMVIC had obtained certain documents and information pertaining to the vehicle following its investigation. OMVIC obtained from Sasson's records, a copy of the auction Bill of Sale when Sasson purchased the vehicle. This Bill of Sale reflects that Sasson had purchased the Mazda through Canadian Auction Group on September 9, 1998 and that the odometer reading on the Mazda at the time of the auction was 148,029 kms.

A further witness on this particular issue was Joan Amanfoli, who stated she was present when Ajoko called upon Sasson and signed the Bill of Sale for the Mazda. She stated that she saw the Bill of Sale that Ajoko signed and was quite sure that such Bill when signed did not contain the figures and words "143,189 kms" after the words in the Bill that "the buyer is not interested in how many kilometers are on the car".

ITEM 3 IN THE PROPOSAL OF THE REGISTRAR - 1990 ACURA INTEGRA - HEATHER MACLASHEN

Heather MacLashen testified that she works at the Brampton Motor Vehicle Licence office.

MacLashen stated in testimony that she called at Sasson's premises and there inspected the Acura motor vehicle that she subsequently purchased from Sasson. On the first occasion that she saw the Acura she test-drove it. She liked the car and returned later to put down a deposit of \$300.00 on the car. On August 24, 1999, MacLashen returned to Sasson and paid him the balance of the purchase price of the vehicle. On that day she was presented with a Bill of Sale by Sasson for her signature. On reading the Bill of Sale she noted the words "buyer is not interested in how many kilometers are on the car". MacLashen told Sasson the amount of kilometers travelled by the car was important to her and she then noted on the Bill of Sale alongside "Distance Travelled" the figures "132,112" and ticked the letters to "Km" printed behind those figures. She placed her initials alongside the additions she had made.

After completing the purchase MacLashen began feeling uneasy regarding the kilometers the car may have been driven. She decided to investigate this aspect.

During her investigation she spoke with a motor dealer in the building next door to Sasson's business. MacLashen was told by this dealer that to his knowledge three people who purchased vehicles from Sasson had returned their purchases due to incorrectly stated distances on the odometers of the vehicles they bought from Sasson. She also spoke to other motor dealers who had their businesses near to Sasson's. One of these dealers apparently alerted Sasson to MacLashen's enquiries and Sasson telephoned her and offered to take back the car if she was not happy with it. At that time MacLashen advised Sasson that she had not decided what to do. However, she then ordered a kit from the Ministry of Transportation regarding the history of the vehicle and from the information in that kit she managed to contact and speak with a previous owner of the car. This person told MacLashen he had traded in the vehicle when its odometer read 205,000 kms. When this information came to MacLashen's notice she contacted Sasson, and he made a full refund to her of the purchase price and took the vehicle back.

Mathew McKenzie of OMVIC testified that he investigated this allegation. He stated he obtained certain documents and records concerning the vehicle from which he learned that Sasson had purchased it at a dealer's auction held in Kitchener, Ontario. The Bill of Sale relating to that sale was dated August 12, 1999, and it reflected that the vehicle was sold on that day to Sasson. On the auction Bill of sale, the odometer of the vehicle was recorded as 197,000 kms. McKenzie also stated that according to the records of the Ministry of Transportation there was a Safety Standard Certificate issued in respect of a previous sale of this vehicle. That certificate which was issued on June 3, 1997, indicated that the odometer reading of the vehicle at that date was 181,510 kms.

ITEM 5(C) IN THE PROPOSAL OF THE REGISTRAR - 1992 MAZDA PROTÉGÉ - TANVEER SAYED

Tanveer Sayed testified that while he was out of Canada his brother, at Sayed's request, bought a motor vehicle for him from Sasson. He had received a telephone call from his brother while he was out of the country and advised that his brother had seen a Mazda Protégé with 120,000 kms on it and that it appeared to be clean car. Sayed authorized his brother to purchase the car on his behalf. On April 22, 1999, his brother signed a Bill of Sale on behalf of Sayed and paid Sasson on Sayed's behalf the purchase price for the Mazda Protégé.

Sayed's brother, Urfan Sayed did not testify at the hearing but did furnish a letter to OMVIC which was placed before the Tribunal at the hearing. This letter stated that Urfan had seen an advertisement in the Auto Trader in which Sasson had advertised a Mazda Protégé for sale. Urfan called upon Sasson at his premises on April 22, 1999 and saw the vehicle.

He checked "the mileage" which was "120,116 kms" according to the vehicle's odometer. He drove the vehicle and after deciding to purchase the vehicle for his brother he paid the purchase price to Sasson. On April 22, 1999, when he signed the Bill of Sale he also signed an application for a power train warranty with Lubrico. He took delivery of the vehicle the next day.

When Urfan signed the Bill of Sale he contended that the Bill contained the hand-written words "buyer is not interested in how many kilometers are on the car". There was nothing filled in on the Bill of Sale as to "Distance Travelled" by the vehicle.

Mathew McKenzie of OMVIC testified that when investigating Sasson and inspecting Sasson's records he came across the Lubrico power train warranty application dated April 22, 1999, which had been signed by Sasson as the selling dealer. On that application the vehicle's current odometer reading was stated to be 120,116 kms. McKenzie also stated that in the records of Sasson was a copy of the Bill of Sale regarding Sasson's purchase of the Mazda at the auction. That Bill was issued by Canadian Auction Group which auctioned the vehicle and reflected that the date of sale to Sasson was March 31, 1999 and the vehicle's odometer reading was then 179,375 kms.

Sayed stated in his evidence that when he was contacted by McKenzie, it was the first occasion he was made aware of the different odometer readings. He stated that had he known the vehicle had an odometer reading of 180,000 kms he would not have purchased the vehicle from Sasson.

Finally, Sayed stated that he had recently called upon Sasson, and Sasson had agreed to repurchase the vehicle from him. Pursuant to that agreement, Sasson refunded the purchase that Sayed had paid when purchasing the vehicle in April 1999.

ITEM 5(F) IN THE PROPOSAL OF THE REGISTRAR - 1993 - HONDA CIVIC - KENNETH CUTLER

Mathew McKenzie of OMVIC testified in regard to this matter. McKenzie stated that he had met with Cutler and interviewed him. He also had correspondence with Cutler who did not testify at the hearing.

McKenzie stated that Cutler had informed OMVIC that he had seen an advertisement in the Auto Trader publication in which a 1993 Honda Civic was advertised for sale by Sasson. The advertisement stated the Honda had travelled 111,000 kms. Cutler called upon Sasson, inspected the vehicle and came to an agreement regarding price. When paying Sasson the purchase price, Sasson presented Cutler with a Bill of Sale for signature. Cutler enquired why the bill had nothing written in the space following the printed words "Distance Travelled". At the insistence of Sasson, Cutler filled in the words "doesn't matter" in the blank space. He told Cutler that the vehicle had only had one owner and therefore it could not have a high mileage. When Cutler signed the Bill of Sale there were no kilometers entered after the words "buyer not interested in how many kilometers are on the car". Cutler was not given a copy of the Bill of Sale after signing.

McKenzie stated he made investigations in this matter and found that Sasson had purchased the Honda on July 8, 1999 at a dealer's auction conducted by Kitchener Auto Auction. On the copy of the Bill of Sale of Kitchener Auto Auction relative to the vehicle's sale to Sasson on July 8, 1999, the distance travelled by the Honda was recorded as 211,000 kms. Thereafter on August 8, 1999, the Honda was sold to Cutler by Sasson. The Safety Standard Certificate dated August 3, 1999 relating to the Honda reflected an odometer reading at date of inspection of the vehicle as 111,578 kms.

McKenzie further stated that a Lubrico warranty regarding the vehicle's power train was purchased by Cutler when he purchased the vehicle from Sasson. The application for warranty protection by Lubrico was signed by Sasson as selling dealer and on that application the odometer's current reading was given as 111,578 although that reading did not indicate whether that was kilometers or miles.

ITEM 5(D) IN THE PROPOSAL OF THE REGISTRAR - 1990 HONDA ACCORD - MICHEL CONSTANTINO

Mary Jane South the Director of Operations and Deputy Registrar under the Act addressed this matter in her evidence. Constantino was not called by OMVIC to testify.

Ms. South referred to the copy Bill of Sale before the Tribunal regarding the purchase by Sasson of the Honda vehicle on June 2, 1999. Sasson purchased the Honda at a dealers' auction conducted by the Canadian Auction Group. Written on the face of that Bill of Sale are the words "Branded Rebuilt". Ms. South stated that those words when used in the industry mean that the vehicle is a severely damaged vehicle and can only be put back on the road if it has been rebuilt and repaired by a licenced motor repair facility and certified by a licenced structural inspection station. When reselling a vehicle that has been "branded rebuilt", that information must be disclosed to a purchaser. This Sasson failed to do.

EVIDENCE OF OMVIC REPRESENTATIVES GENERALLY

Mathew McKenzie during the course of his evidence noted that as far back as May 11, 1995, Sasson was served with an Inspection Deficiency Notice by the Ministry of Consumer and Commercial Relations. That notice required Sasson to correctly and fully complete sales contracts as was apparently discussed with Sasson by a Compliance Officer that visited him.

McKenzie pointed out that upon investigating Sasson it came to his notice that there were other allegations of odometer tampering besides the ones attested to by the consumer's during these proceedings. He pointed to a number of Bills of Sale seized by OMVIC from Sasson's business which the Bills either failed to reflect the distance travelled by certain vehicles, or reflected sales to consumers in which the odometers read less when sold by Sasson than the vehicle's odometer read at the time Sasson purchased such motor vehicle.

Mary Jane South, Director testified to the Act being a consumer protection statute and pointed out that the Registrar looks upon odometer tampering as one of the worst situations that can occur when a consumer purchases a vehicle. Not only does it affect the consumer who made the purchase, but it also has long term effects in that subsequent purchasers are affected. Ms. South also pointed to numerous Bills of Sale completed by Sasson that failed to comply with the Act in honestly and fully disclosing the distance travelled by the various vehicles.

EVIDENCE OF SASSON

Sasson gave evidence at the hearing. He stated that in the approximate ten years that he has been a motor vehicle dealer he has had no complaints registered against him.

He further stated that at the end of 1998 he met people "that were criminals" and who threatened him and forced him to permit them to turn back the odometers on vehicles he was to sell. He agreed to permit them to turn back the odometers and paid cash for their services in each instance. He was afraid not to comply with their demands as they threatened him physically. Eventually, however, he found the courage to discontinue his association with these people and he testified that he has not seen them since that time.

He further contended that he did tell his customers the true mileage of the vehicles he sold to them.

Sasson also stated that he is 67 years of age, that he has a heart condition that requires monitoring on a daily basis and that the proceedings before the Tribunal have negative implications on his health. He also referred the Tribunal to some letters of commendation from various individuals as well as a Rabbi who has known him for many years and who stated that Sasson is naïve and too trusting of people.

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to have been proven:

- 1) Sasson is a motor vehicle dealer, registered as such under the Act and has carried on business as a registered dealer since 1989.
- 2) Sasson sold a 1992 Toyota Tercel to Jennifer Gibson in August 1999, at which time Sasson knew that the distance travelled as displayed on that vehicle's odometer was false and that the true distance travelled by that vehicle was at least 60,000 kms in excess of the 115,000 kms displayed on the vehicle's odometer at the time of its sale to Gibson.
- 3) Sasson sold a 1992 Mazda 626 motor vehicle Keniweimo Ajoko in February 1999, at which time Sasson knew that the distance travelled by the vehicle as displayed on the vehicle's odometer was false and that the true distance travelled by the vehicle was at least 29,000 kms in excess of the 114,644 kms displayed on the vehicle's odometer at the time of its sale to Ajoko.
- 4) Sasson sold a 1990 Acura Integra motor vehicle to Heather MacLashen in August 1999 at which time Sasson knew that the distance travelled by that vehicle as displayed on the vehicle's odometer was false and that the true distance was at least 70,000 kms in excess of the 132,112 kms displayed on the vehicle's odometer at the time of its sale to MacLashen.
- 5) Sasson sold a 1992 Mazda Protégé motor vehicle to Tanveer Sayed in April 1999 at which time, Sasson knew the distance travelled by that vehicle as displayed on the vehicle's odometer was false and that the true distance travelled by the vehicle was at least 60,000 kms in excess of the 120,116 kms displayed on the vehicle's odometer at the time of its sale to Sayed.

- 6) Sasson sold a 1993 Honda Civic motor vehicle to Kenneth Cutler at which time Sasson knew that the distance travelled as displayed on that vehicle's odometer was false and that the true distance travelled by that vehicle was at least 100,000 kms in excess of the 111,578 kilometers displayed on the vehicle's odometer at the time of its sale to Cutler.
- 7) Mathew McKenzie an inspector with OMVIC obtained certain books and records from Sasson relating to the various allegations made by the Program in its Proposal.
- 8) Sasson, having bought a 1990 Honda Accord motor vehicle at a dealers auction held by Canadian Auction Group on or about June 2, 1999, sold such motor vehicle to Michel Constantino on June 8, 1999 without disclosing to Constantino that he had purchased the vehicle at an auction as "branded rebuilt".
- 9) Sasson failed to provide purchasers Jennifer Gibson, Heather MacLashen and Kenneth Cutler with a copy of their respective Bills of Sale relating to the motor vehicle each had purchased from Sasson.

DECISION AND REASONS:

The onus of proof in this matter rests upon the Registrar to prove that the past conduct of the Applicant constitutes reasonable grounds for the Registrar's belief that the Applicant will not carry on business in accordance with law and with integrity and honesty and that, accordingly, the Registrar is entitled under Section 7 of the Act to revoke the Applicant's registration as a motor vehicle dealer under the Act.

The Registrar bases his proposal to revoke registration principally, but not solely, on allegations that Sasson falsely represented to various purchasers that the odometer readings on the motor vehicles they purchased from Sasson were to the knowledge of Sasson, false in that they did not reflect the true distance the vehicles had travelled.

There are numerous allegations of the above nature in the Registrar's Proposal. A brief analysis of such allegations is set out hereunder.

1) JENNIFER GIBSON

The evidence of Jennifer Gibson and her father, Donald Gibson was clear and given in a straightforward manner. The Tribunal accepts that Jennifer Gibson purchased a Toyota Tercel from Sasson believing that it had travelled a distance of 115,000 kilometers whereas in truth and in fact it had travelled over 174,000 kms. The evidence leaves no doubt in the Tribunal's mind that Sasson not only knew that the Tercel had travelled 174,000 or more kilometers, but that he deliberately suppressed this information from the Gibsons and was intent on misleading them. Sasson did not dispute that he had misled the Gibsons and there was no evidence before the Tribunal that contradicted the Gibson's evidence. The additional 60,000 kms that the vehicle had been driven was significant. There is no doubt in the Tribunal's mind that Sasson knew that the vehicle he was selling to Jennifer Gibson had an odometer reading of 174,293

kilometers when he purchased that vehicle on an auction. It is clearly stated on the auctioneer's Bill of Sale. By Sasson suppressing that information he committed a fraud on Jennifer Gibson and on all possible subsequent buyers of the vehicle.

2) KENIWEIMO AJOKO

The evidence of Ajoko was given in a forthright manner. He was clearly distressed and indignant at what had occurred. He believed he bought a vehicle that had travelled 114,644 kms. That was not the truth. Apart from the evidence of Ajoko being acceptable and credible the documentary evidence tendered by the Registrar supports Ajoko's version of events. The Lubrico application form for warranty coverage for the vehicle's power train was signed by Sasson as the selling dealer. The application form was also prepared as to detail by Sasson. At no time did he deny that he signed or prepared the application form. The application form states quite clearly that the vehicle in question had a "current" odometer reading of 114,644 kms. The disclosure of this figure is in direct contradiction to what is noted on the auctioneer's Bill of Sale when Sasson bought the vehicle. The auction Bill of Sale recorded an odometer reading of 148,029. Sasson did not deny having attempted to buy back the car from Ajoko for \$4,500.00. Had Sasson believed that he was innocent of the allegations levelled against him, regarding the distance the car had been driven there would have been no reason for Sasson to attempt to buy back the vehicle.

3) HEATHER MACLASHEN

The evidence of Ms. MacLashen was not disputed by Sasson. Here again Sasson, as in the other deals that came before the Tribunal, deliberately tried to mislead MacLashen as to the true position of the distance travelled by the vehicle she purchased. Because MacLashen works in a motor vehicle Licence office, she was alert to the fact that she could obtain information from the Ministry of Transportation as to the history of the vehicle she was purchasing from Sasson. She was tenacious in her endeavours to attain the truth of how far the vehicle had been driven. Her efforts yielded results, for it was evident that when Sasson discovered from another dealer that MacLashen was investigating, he immediately offered to buy back the vehicle which he ultimately did repurchase.

Investigations undertaken by OMVIC revealed to investigator McKenzie that on the auctioneer's Bill of Sale when the vehicle was purchased at auction by Sasson, it was clearly written that the vehicle had travelled 197,000 kms. That purchase by Sasson took place on August 8, 1999. Sasson signed the auctioneer's Bill of Sale which revealed the vehicle's odometer reading at 197,000 kms. There is no doubt in the Tribunal's mind that Sasson was cognizant of that odometer reading and yet, some twelve days later he sold the vehicle to MacLashen with its odometer reading 132,112 kms. The only inference the Tribunal can draw from the evidence is that Sasson caused the odometer to be turned back after he had purchased the vehicle.

4) TANVEER SAYED

Sayed, who was represented by his brother, bought a Mazda Protégé vehicle. At the time of the signing of the Bill of Sale, that document did not contain any reference to "distance travelled". The portion of the Bill of Sale that referred to the distance travelled had been left blank. However, as with so many other Bills of Sale, this Bill stated "buyer is not interested in how many kilometers are on the car". Nevertheless, on inspecting the vehicle, Sayed's brother maintains he had observed the odometer's reading at 120,116 kms and it was this low figure that influenced Sayed to purchase the vehicle. However, as a result of OMVIC's investigation, it was discovered that Sasson had purchased the vehicle on March 31, 1999 at a motor dealer's auction conducted by Canadian Auction Group. The Bill of Sale issued by the auctioneer disclosed the odometer reading as 179,375 kms. Approximately three weeks later on April 22, 1999, Sayed's brother observed the odometer reading to be 120,116 kms. The clear inference to be drawn is that the odometer had been turned back after Sasson purchased the vehicle and before Sayed's brother inspected it. This inference is further strengthened by virtue of the fact that when Sayed confronted Sasson after he found out the true picture regarding the odometer reading, Sasson repurchased the vehicle and repaid the purchase price paid by Sayed.

5) KENNETH CUTLER

Cutler did not personally attend and testify before the Tribunal but McKenzie of OMVIC did testify. While McKenzie's evidence was to a large extent hearsay, the Tribunal is entitled to allow such evidence, subject to the appropriate weight being attached by the Tribunal to such evidence.

The evidence advanced in regard to this allegation once again reflects a pattern of actions and conduct by Sasson in his dealings with purchasers. As in the allegations of Jennifer Gibson, Cutler was directed to write in the words "doesn't matter" where the distance travelled by the vehicle should have been recorded by Sasson. Once again, as with other Bills of Sale, this Bill contains the sentence "buyer not interested in how many kilometers on the car". Again, Cutler contends as did other purchasers that he was not given a copy of the Bill of Sale by Sasson after it had been signed. And, again, the vehicle involved in this transaction was bought by Sasson at a dealer's auction and the vehicle's odometer reading was disclosed on the auction Bill of Sale as 211,000 kms.

As with other allegations made by various purchasers against Sasson, the distance travelled by the vehicle since Sasson acquired the vehicle had gone down. In this case, that distance diminished from 211,000 kms when Sasson purchased the vehicle at auction to some 110,000 kms when Sasson sold the vehicle to Cutler. Such evidence leaves no doubt in the Tribunal's mind that Sasson caused the vehicle's odometer to be turned back after he purchased it and before he sold it to Cutler.

6) MICHEL CONSTANTINO

Sasson did not dispute that when he bought the 1990 Honda Accord it was noted on the auctioneer's Bill of Sale that the vehicle was "Branded Rebuilt". Sasson had been in the industry for some ten years. From the many purchases of vehicles he had made at auction sales as reflected in the evidence adduced at this hearing, he was familiar with

salvage or damaged vehicles that are sold at dealer's auction. Equally, there is either doubt that Sasson knew that the words "Branded Rebuilt" indicated damage to the vehicle and that this information should be brought to the attention of the buyer of that vehicle when he resells it. The resale Bill of Sale makes no reference to the condition of the car. Failure to do so deprived the purchaser of relevant information so as to enable such purchaser to make an informed decision as to whether or not to purchase and whether the asking price is a reasonable one. Non-disclosure reflects a lack of honesty and integrity on the part of Sasson.

SECTIONS 16(2) AND 16(7) OF REGULATION 801

In addition to the odometer allegations and the allegations under the Constantino heading above, which all involve the question of carrying on business in accordance with honesty and integrity, there are also allegations against Sasson that he failed to comply with the Act and its regulations.

Section 16(2) of Regulation 801, to the Act specifies what information shall appear on a sale or purchase order including the distance travelled by the vehicle at the time of sale. It is clear from copies of the Bills of Sale of vehicles sold to Jennifer Gibson, Tanveer Sayed and Kenneth Cutler that there was no disclosure by Sasson of the distance travelled by such vehicles.

Further Sasson failed to comply with Section 16(7) of Regulation 801 to the Act when he failed to give to various purchasers a duplicate original copy of sale orders. From the evidence of Jennifer Gibson, Heather MacLashen, Keniweimo Ajoko and Tanveer Sayed, it is apparent that Sasson failed to give these purchasers their copies of the Bill of Sale relating to the vehicle each had purchased.

The Tribunal therefore finds that Sasson breached Sections 16(2) and 16(7) of Regulation 801 to the Act in the instances mentioned above.

As to the various allegations of odometer tampering, the Tribunal is satisfied from the evidence placed before it that the allegations are true and have been proven. The question that now has to be answered is whether the past conduct of Sasson including the proven odometer tamperings and breaches under the Act and Regulation 801 affords reasonable belief that Sasson will in the future not carry on business in accordance with law and with integrity and honesty. It is not sufficient for the Tribunal to conclude that it would have exercised its discretion differently from the Registrar, but for the Tribunal to set aside the Registrar's decision. For this to occur, the Tribunal must conclude that the conduct of the Applicant does not afford reasonable grounds for his belief and the Registrar was wrong in his decision.

The above principle was enunciated in the matter of Brenner and the Registrar of Motor Vehicles and Salesman, heard in the Divisional Court on March 9, 1983 and subsequently affirmed by the Divisional Court in the matter of Faccenda (1994) 26 CRAT Part II, 1050.

Based on the evidence placed before the Tribunal at the hearing of this matter, the Tribunal believes the Registrar was not wrong in proposing to revoke Sasson's registration. The evidence of misconduct regarding odometer tampering is clear and compelling. There were a string of odometer tampering incidents. Viewed cumulatively

the incidents reflect a course of conduct by Sasson. The odometer tamperings were recent in time albeit that they occurred after a period of nearly ten years of unblemished record of Sasson.

Sasson expressed his remorse at what he has done. However, the Tribunal is mindful of the decision in Herman Motor Sales et al (1980) 19 CRAT which was affirmed on appeal by the Divisional Court. In that case there were a number of proven odometer frauds and the Registrar proposed to revoke the dealer's registration. Cory J. stated, when affirming the Tribunal's decision, as follows:

It was next argued that the penalty which it imposed was inappropriate under the circumstances. Reliance was placed upon the past good behaviour and the evidence given as to the very fair deals and exemplary business conduct of the appellants. However, the Act and Regulations stress importance of odometer readings. There can be no doubt that the readings form the basis for the assessment in value of most vehicles. To tamper or interfere with the odometer readings must be considered seriously and must constitute a grave breach of the duty of the dealer.

No matter how sincere Sasson may be in his remorse, the Tribunal is bound to assess the situation in the light of his recent past conduct. There can be little doubt that odometer offences are serious. Such offences do not only harm the immediate purchaser of the vehicle but have the real potential to harm future purchasers of the vehicle.

The intent of the Act, is the protection of consumers when dealing with motor vehicle dealers and salespersons. For that reason it is considered consumer legislation. The Registrar is entrusted with the obligation and duty to ensure that the Act and its regulations are complied with and that innocent purchasers are protected from the actions of errant dealers and salespersons. To fail to ensure compliance with the Act and regulations would be an abrogation by the Registrar of his duties. The Tribunal believes that the Registrar properly carried out his duties and obligations in this matter and is not wrong in proposing that Sasson's registration be terminated.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the Act, the Tribunal directs the Registrar to carry out his proposal to revoke Sasson's registration as a motor vehicle dealer.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: April 14th, 2000

150-EXHP

(MVIA/00/150)

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

Applicant

Agent for the Applicant

DATE OF HEARING: April 10, 2000

DECISION RELEASED: April 13, 2000 Toronto

REASONS FOR DECISION

A hearing was held on April 10, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Applicant
Motor Vehicle: 1990 GMC SIE, Plate # (plate no.) (the "vehicle")
Date of Appeal: March 17, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Board (the "Board") (which as of April 1, 2000 is known as the Licence Appeal Tribunal) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Board on April 10, 2000 and proceeded as a teleconference hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing. The Respondent submitted copies of their submissions bearing original certification seals.

All documents were entered into evidence with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Board (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

DEAR SIR/MADAME:
ENCLOSED PLEASE FIND A RENTAL AGREEMENT FROM (name of company #1) AND P.O. #(no.) FROM (name of company #2) TO ERECT SCAFFOLDING FOR DICESTERS #11 AND 16 AT KIMBERLY-CLARK TERRANCE BAY, ONTARIO. WE ARE TRYING TO MAKE DO WITH THE RENTAL VEHICLE, BUT REQUIRE THE IMPOUNDED VEHICLE WITH HEAVY FRAME AND CUSTOM RACKING FOR MOVEMENT AND HOISTING OF MATERIAL. (The Applicant) IS A SMALL FAMILY-

OWNED BUSINESS; OUR WORK IS SEASONAL THESE JOBS ARE CRITICAL AND OUTLET UNDER BINDING PURCHASE ORDERS. OUR CONTINUED SOLVENCY DEPENDS ON THESE JOBS: THIS WORK IS DONE ANNUALLY FOR A PERIOD OF TWO MONTHS. OUR VEHICLE WAS TAKEN BY MY SON WITHOUT MY PERMISSION AND SUBSEQUENTLY IMPOUNDED. WE LIVE 28KM FROM THE CONSTRUCTION SITE. THIS VEHICLE IS NORMALLY DRIVEN ONLY BY MYSELF, TO AND FROM THE WORKSITE. WE REQUEST A TELEPHONE HEARING AS WE LIVE 10 KM FROM THE COMMUNITY AND 250 KM EAST OF THUNDER BAY. HOPING YOU FIND THIS SATISFACTORY.

The Applicant's representative stated that the Applicant is involved as a subcontractor to an insulation company that has been hired to insulate two large digester units at the Kimberly Clark mill. The vehicle is a full size four wheel drive pick up truck that has a custom built frame assembly that it carries permanently fixed to it. This frame has been specially prepared so that the vehicle can accommodate scaffolding materials, including large (20') lengths of scaffolding leg tubing that extend over the cab of the vehicle. Among the items that the contract that the Applicant has with the insulation company, is to supply and erect the scaffolds around the digester unit so that the insulation company can apply insulating material to it.

Witness #1 testified that the Applicant has managed to rent a smaller substitute vehicle to move the smaller components of the scaffold, however without the custom framing installed in the impounded vehicle, the Applicant is unable to transport the larger lengths of material. Without these 20' length scaffold legs, the first of the two digesters cannot be scaffolded, and the Applicant is in jeopardy of not being able to fulfil its contractual obligations.

Witness #1 stated that the scaffolding materials arrive from Thunder Bay by transport truck, and are deposited in the yard at the Kimberly Clark facility in a storage area assigned to the Applicant. The impounded vehicle is used to transport these materials, as needed, to the scaffold erection site which is approximately half a mile away from the storage area. The vehicle is used to traverse the uneven and muddy ground of the facility, and bring the material into the mill on a timely basis, and so as not to interfere with the other trades working on the digester. A vehicle larger than a pick up truck would not fit into the restricted space around the digester in the mill. Due to the scheduling of other trades that must work in the same area of the mill, the earliest that the Applicant could get to the first digester to begin erecting the scaffolding for it would be April 13th, 2000.

Witness #1 testified that the area of northern Ontario that the Applicant is located in is sparsely populated, and that subcontracting the scaffold transportation or other vehicles as alternatives, are not an option. Witness #1 said that *"I know that there are no alternatives...I know who is here and who is available"*. Furthermore, Witness #1 stated that since he had been given the contract, he believed that it was up to his firm only to fulfil it. The Applicant had rented another pickup truck, however it was insufficient to meet the needs of the Applicant, and it would not have been possible to mount the custom frame in it due to the fact that mounting holes must be drilled into the bed of the vehicle to attach it.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by (name of driver);
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence "*driving or having care or control of a motor vehicle while ability impaired*" under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 14th, 2003. The copy was only provided to clarify Witness #1's suspension since he is a young offender and which foregoing charge does not show up on his driving record.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Board with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Board is precluded from considering other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under Section 22(2)(a), (b), and (c), they must have demonstrated that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Applicant has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

The Applicant has not presented the Board with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required by Section 22(4) of the Regulation. The Applicant's testimony that they know that there are no alternatives, and so they chose not to explore any possible alternatives is insufficient in meeting the onus. Furthermore no attempt was made to demonstrate to the Board that other than the rented vehicle, no other alternatives to the impounded vehicle existed to transport the 20' scaffolding tubes the distance of approximately one-half mile at the mill site.

The Board also noted that due to the scheduling of the work required by the Applicant and the vehicle, and the scheduled release date of the vehicle from impoundment, the Applicant is claiming exceptional hardship as a result of the impoundment for a period of five days. However the Applicant has not presented the Board with any evidence that would indicate that this loss of the vehicle would be immediate significant and lasting as per Section 22(3)(b) of the Regulation.

The Board finds that the Applicant has failed to meet the onus under the Section 22(3) and 22(4) of the Regulation, and is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

Stuart Cork, Presiding Member

RELEASED: *April 13, 2000*

SKYVIEW GENERAL CONTRACTING LTD. O/A SKYVIEW HOMES

SKYVIEW GENERAL CONTRACTING LTD. O/A SKYVIEW HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel representing the Applicant
KENNETH ROSENBERG, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATES OF

HEARING: April 10 and 12, 2000

Toronto

ORDER

FOLLOWING attendances on April 10, 2000 before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) of Brian M. Campbell, Counsel for Skyview General Contracting Ltd. o/a Skyview Homes (the "Applicant") and Kenneth Rosenberg, Counsel, on behalf of the Registrar, Ontario New Home Warranty Program (the "Program");

AND FOLLOWING further attendance of Kenneth Rosenberg before this Tribunal on April 12, 2000, when the Tribunal was advised by Kenneth Rosenberg that on the consent of counsel for both parties this matter was to be adjourned to enable the parties to attempt to conclude settlement of all outstanding issues;

TAKE NOTICE, by and with the agreement of the parties, the Tribunal *peremptorily* adjourns the hearing *against both parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m. on Tuesday May 23rd, 2000, and to continue May 24th and 25th, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: April 12, 2000

HUGHES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PETER CHARLES HUGHES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 13th, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PETER CHARLES HUGHES

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on March 2nd and 3rd, 2000;

AND WHEREAS, upon consent the matter was adjourned to April 12th and 13th, 2000, before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal);

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Thursday, October 12th, 2000, and to continue Friday, October 13th, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: April 12th, 2000

PREHEARING

RICHARD McCABE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

RICHARD McCABE, appearing on his own behalf
NETANUS RUTHERFORD, Counsel, representing
the Ontario New Home Warranty Program
ARNOLD MACLAUHLAN, Agent, on behalf of 604842 Ontario
Inc., Added Party

DATE OF
PREHEARING: March 30, 2000
By teleconference

Toronto

ORDER

Following attendances on March 30, 2000 at the prehearing by teleconference before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) of Richard McCabe (the "Applicant") and Netanus Rutherford, Counsel, on behalf of the Ontario New Home Warranty Program (the "Program"), and Arnold MacLauchlan, Agent on behalf of 604842 Ontario Inc. (the "Added Party");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on September 11, 2000 at a location to be selected by the Tribunal in Kingston, Ontario and to continue if necessary on September 12, 13, 14 and 15, 2000 at 9:30 a.m. at the same venue;

1. Within 14 days of the prehearing the Applicant will send to the Program and the Added Party full copies of the Applicant's experts' reports received by the Applicant from his Engineer(s) and also from his Foundation consultant in relation to the basement and/or foundation of the Applicant's home as referred to in claims 1 or 2 of the Program's decision letter of November 12, 1999.
2. In addition to the above reports and accompanying such reports shall be copies of photographs in the Applicants' possession in regard to the Applicant's complaints regarding the foundation and/or basement of the home.

3. On reasonable written notice from the Program the Applicant shall permit access to the Program and/or its experts and advisors to enable the Program to inspect Applicant's home and assess Applicant's complaints in relation to claims 1 and 2 in the Program's decision letter of November 12, 1999.
4. Prior to the inspection by the Program of the Applicant's home, Applicant shall advise both the Program and the Added Party whether or not he is prepared to permit the Added Party's presence when the Program attends the Applicants home in terms of paragraph 3 above.
5. On reasonable prior written notice to the Applicant, the Program's Philip Mayhew shall be permitted to enter upon the Applicant's home to inspect and assess the Applicant's complaint referred to as Claim 3 in the Program's decision letter of November 12, 1999.
6. Applicant withdraws his complaint and appeal regarding his claim against the Program and the Added Party referred to in claim 4 of the Program's decision letter of November 12, 1999.
7. Insofar as claims 5 through 12 inclusive are concerned which are referred to in the Program's decision letter of November 12, 1999, the Applicant undertakes to sign, execute and immediately return to the Program the cash settlement document in the sum of \$2,165.00 sent to him by the Program. Upon receipt of the signed and executed cash settlement document, the Program undertakes to forward its cheque for \$2,165.00 to the Applicant. The Applicant, the Program and the Added Party agree that claims 5 through 12 inclusive referred to in the Program's decision letter have been settled on the above basis and the Applicant's claims 5 through 12 and his appeal in regard thereto are withdrawn and settled on the above basis.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: *April 3, 2000*

DHAWAN, OM PARKASH O/A T & D AUTO SALES

OM PARKASH DHAWAN O/A T & D AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ANTHONY E. BAK, Counsel representing the Applicant
MITCHELL GOLDBLOOM, Counsel representing the Registrar
under the *Motor Vehicle Dealers Act*

DATE OF
HEARING: April 27, 2000 Toronto

ADJOURNMENT

WHEREAS Anthony E. Bak, Counsel for Om Parkash Dhawan o/a T & D Auto Sales (the "Applicant") and Mitchell Goldbloom, Counsel, for the Registrar, *Motor Vehicle Dealers Act* (the "Act") appeared before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) on April 27, 2000;

AND WHEREAS the hearing of this matter did not proceed on April 27, 2000;

IT IS ORDERED on consent of the parties, that the hearing is hereby adjourned *peremptorily against both parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m. on Friday May 19th, 2000.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 1st, 2000

DHAWAN, OM PARKASH o/a T & D AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
OM PARKASH DHAWAN O/A T & D AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: January 25th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

OM PARKASH DHAWAN O/A T & D AUTO SALES

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Om Parkash Dhawan o/a T & D Auto Sales, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 16th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Om Parkash Dhawan
O/A T & D Auto Sales
1345 Martingrove Rd
Etobicoke ON M9W 4X5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Om Parkash Dhawan O/A T & D Auto Sales (hereafter the "Dealer") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Dealer agrees not to invite the public to deal at a place other than his approved location.
2. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer further agrees to store all his books and records at the location approved by the Registrar.
3. The Dealer agrees to maintain an office, separate from any other business, at the location approved by the Registrar.
4. The Dealer acknowledges and understands that he will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
5. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
6. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to store his books and records at the location approved by the Registrar.
7. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify his registered name and the address of the location approved by the Registrar.
8. The Dealer will not knowingly purchase a vehicle from a dealer who is unlicensed.

9. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
10. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
11. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
12. The Dealer agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to customers. The Dealer agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
13. The Dealer agrees that he will not knowingly breach the Act or engage in an illegal activity.
14. The Dealer agrees to enrol into and successfully complete the certification course within 60 days of the issuance of this order.
15. The Dealer agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to, and shall carry out, the proposal and the Dealer's registration shall be revoked.
16. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
17. The Dealer hereby withdraws the appeal to the Licence Appeal Tribunal.
18. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke their registrations, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
19. The Dealer acknowledges that he has had obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out herein.

Signed in the City of Toronto, this day of March 2000

(Signature) Om Parkash Dhawan o/a T&D Auto Sales

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar

MackAY, EDWARD ROBERT

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
EDWARD ROBERT MACKAY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 28th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

EDWARD ROBERT MACKAY

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Edward Robert MacKay, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 10th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Edward Robert MacKay
3191 Stockton Drive
Gloucester ON K1T 1S3

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Edward Robert MacKay (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under the Criminal Code, Provincial Offences Act, or with an industry specific offence, to immediately notify the Registrar, *Motor Vehicle Dealers Act*, in writing, of the charges laid against him.
2. The Applicant agrees, if he is convicted in the future, under the Criminal Code, Provincial Offences Act, or with an industry specific offence to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer. Should he wish to transfer his registration, he shall submit a new application for registration to the Registrar.
4. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
5. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
6. The Applicant agrees that his registration will automatically be revoked if he provides any false or misleading information on any document or statement provided to the Registrar either orally or in writing.
7. The Applicant agrees that his disclosure to the Registrar is accurate. Should the Registrar discover that the circumstances surrounding the convictions differ materially from the Applicant's disclosure, the Applicant's registration will automatically be revoked.
8. The Applicant agrees to make full written disclosure to his employer with regards to his criminal history and to provide the Registrar with a copy of this written notification signed by his employer within 30 days of the issuance of this Order.
9. The Applicant agrees to provide his employer with a copy of this Order.
10. The Applicant acknowledges that should he breach any of the terms and conditions contained in this Order, in whole or in part, the Registrar is directed to, and shall carry out the proposal to revoke, and the Applicant's registration will automatically be revoked.
11. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

12. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
13. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

(Signature) Edward MacKay

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar

PUNZO, EMANUELE and 1351849 ONTARIO INC. o/a DREAMWORX AUTO SALES INC.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
1351849 ONTARIO INC. O/A DREAMWORX AUTO SALES INC.
AND EMANUELE PUNZO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 24th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1351849 ONTARIO INC. o/a DREAMWORX AUTO
SALES INC. and EMANUELE PUNZO

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1351849 Ontario Inc. o/a Dreamworx Auto Sales Inc. and Emanuele Punzo, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 30th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: 1351849 Ontario Inc
O/a Dreamworx Auto Sales Inc
B - 1251 Kennedy Rd
Toronto ON M1P 2L4

And From: Emanuele Punzo
355 Regal Briar Street
Whitby ON L1N 2P4

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, 1351849 Ontario Inc O/a Dreamworx Auto Sales Inc (hereafter the "Dealer") and Emanuele Punzo (hereinafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees to give full and complete disclosure on all future applications submitted to the Registrar.
2. The Applicant agrees that he has now given complete disclosure to the Registrar. Should the disclosure provided by the Applicant materially differ from actual circumstances, the Applicant agrees that his registration will automatically be revoked.
3. The Applicant agrees to provide to the Registrar, proof that he has a valid driver's licence and agrees that until said proof has been presented, he is not allowed to take consumers on test drives.
4. The Dealer and Applicant agree to remit all retail sales tax when due
5. The Dealer and Applicant acknowledge and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
6. The Dealer and the Applicant further acknowledge that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
7. The Dealer and Applicant agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Dealer further agrees to store his books and records at the location approved by the Registrar.

8. The Dealer and Applicant will ensure that all advertisements placed by or on behalf of the Dealer will identify their registered name and the address of the location approved by the Registrar.
9. The Dealer and Applicant agrees not to invite the public to deal at a place other than their approved location.
10. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in employment location in the form required by the Registrar.
11. The Dealer and Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the *Motor Vehicle Dealers Act*.
12. The Dealer and Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
13. The Dealer and Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
14. The Dealer and Applicant agree to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
15. The Dealer and Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Dealer and Applicant agree to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer and Applicant agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer and or Applicant has sold, the Dealer and Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
16. The Dealer and Applicant acknowledge and understand that its registration will not be used to buy or sell motor vehicles where the Dealer or Applicant knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
17. The Dealer understands that its registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.
18. The Dealer and Applicant acknowledge that if the Registrar has evidence that the Dealer and or Applicant has failed to comply with any of the requirements noted above, the Dealer will terminate its registration under the Motor Vehicle Dealers Act and will immediately return its registration certificate to the Registrar.
19. The Dealer and Applicant acknowledge that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
20. The Applicant and Dealer hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
21. The Applicant and Dealer agree that should they breach any of the terms and conditions set out herein, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke, and their registration will automatically be revoked.

22. The Dealer acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of _____, 20____.

(Signature) Emanuele Punzo

(Signature) Emanuele Punzo
On behalf of 1351849 Ontario Inc o/a Dreamworx Sales Inc
I have authority to bind the corporation

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton, Registrar

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RICHARD SHEPHERD O/A SUN CITY R.V. CENTRE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 17th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RICHARD SHEPHERD O/A SUN CITY R. V. CENTRE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Richard Shepherd o/a Sun City R.V. Centre, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 3rd, 2000

TO: The Registrar
Motor Vehicle Dealer and Salespersons Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Commercial Registration Appeals Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Richard Shepherd
O/A Sun City R.V. Centre
7807 Highway 11 North, Unit 1
Orillia, ON L3V 6H3

RE: Richard Shepherd O/A Sun City R.V. Centre

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Richard Shepherd O/A Sun City R.V. Centre (hereinafter referred to as "the Dealer") hereby consents to the following terms and conditions to his registration as a motor vehicle dealer:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Commercial Registration Appeal Tribunal based upon the following Terms and Conditions;

1. The Dealer acknowledges and understands that when the Dealer receives funds towards the purchase of a motor vehicle prior to the delivery of the motor vehicle, the entire amount received will be deemed to be trust funds.
2. The Dealer agrees to maintain a ledger account into which shall be entered the names and addresses of all persons from whom trust funds are obtained with details of the amounts retained and a record of all disbursements from them.
3. The Dealer agrees to maintain, in respect of all funds that come into the Dealers hands, in accordance with clause 1 of this Order, a separate trust account into which the Dealer shall deposit the funds and the Dealer shall, at all times, keep the funds secure and make disbursements from the trust account, in accordance with the terms of the trust.
4. Where trust funds are paid to the Dealer in accordance with clause 1 of this Order, whether by way of deposit, down payment or otherwise, the Dealer agrees to retain the funds in trust for the purchaser until,
 - a. the motor vehicle is delivered;
 - b. the contract is mutually cancelled; or
 - c. direction or authority is received from the Registrar concerning disbursements
5. The Dealer agrees to provide free access to his books and records to any authorized representative of the Registrar.
6. The Dealer agrees to comply with the Retail Sales Tax Act with respect to the collection of tax and remittance when due.
7. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
8. The Dealer acknowledges that its registration as a motor vehicle Dealer will be revoked if it breaches any of the terms and conditions set out herein.
9. I hereby consent to an order of the Commercial Registration Appeal Tribunal, which may include the Terms and Conditions set out herein.

10. I hereby withdraw my appeal to the Commercial Registration Appeal Tribunal.

11. I hereby acknowledge that I have obtained or have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2000.

Signature Richard Shepherd

Carl Compton
Registrar, *Motor Vehicle Dealers Act*

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JEFFREY LEE, D.C., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for the Applicant

DATE OF HEARING: May 26, 2000

ORDER

FOLLOWING attendance on May 26, 2000 before the Licence Appeal Tribunal of Counsel for the Applicant, Applicant and Ms. Kim Beintema, Agent on behalf of the Registrar of Motor Vehicles;

Take notice upon consent of both parties, the Tribunal orders that:

- (1) This matter is adjourned until August 25, 2000;
- (2) The Applicant's counsel is to provide additional medical documentation prior to August 25, 2000 to the representative of the Ministry of Transportation;
- (3) In the event of this matter being settled, both parties will in writing immediately notify the Tribunal, the Applicant's counsel shall in writing withdraw the Applicant's request for a hearing, and this matter shall thereby be concluded; and
- (4) In the event that the parties have not arrived at a settlement by August 25, 2000, the Tribunal shall issue its decision and order based upon the evidence already received by the Tribunal on May 26, 2000.

THE LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C., Presiding Member

Roy Melvin, M.D., Member

RELEASED: May 31, 2000

MED/00/196

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: SANDRA QUADRINI, Respondent
Representative for the Registrar of Motor Vehicles

Applicant

Solicitor for Applicant

DATE OF
HEARING: May 23, 2000

Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal, by way of Teleconference, by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated March 22, 2000
- b) Exhibit #3 Letter from Physician # 1 – dated November 28, 1999

By the Respondent:

- a) Exhibit #3 Ministry of Transportation submissions – tabs 1 – 14
- received May 15, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a final written summation with respect to this matter.

FACTS:

The Applicant is appealing the suspension of his driving privileges effective "98 05 15" as per Exhibit # 1.

A Medical Report prepared November 28, 1999, by neurologist Physician # 1, concludes "...His neurological examination is normal and he had an normal EEG and CT Scan last year. At this point, it would be reasonable for him to drive...he is now seizure free for one and half years... The diagnosis is still unclear whether he had a seizure or whether the blackout was related to a faint from getting up quickly. I don't think this will ever be resolved, but even if we assume that he had a seizure, it is a long enough period of observation now that it is reasonable for him to return to driving." (Exhibit # 1)

An unsolicited report, dated "18 March 1998", from Physician # 2 advises: "I recently saw this gentleman with a presumed seizure and have advised to not drive until he is reviewed by a neurologist." (Exhibit # 2 Tab 1)

Letter dated April 29, 1998 from Physician # 1, neurologist, states "...He had a blackout on March 11, 1998...unconsciousness could not have been more than 1/2 minute. It took several minutes before he came to a normal state of consciousness. There was no tonic clonic movement. He had been incontinent of urine and had weakness in the right arm, leg and face for several hours. He had also bruised his right face which felt numb for sometime afterwards. His wife also commented that he was in a stare when she arrived.... He has had headaches occurring almost daily since that time. ... He has another blackout on March 14 when he was riding his bike. ... no history of medical problems...used alcohol up to 12 ounces per day... has not missed work as a welder on account of drinking...Neurological examination was completely normal except for mild tremor of his outstretched hands and fingers. Muscle tone was normal. Fundi were normal. No evidence of intracranial pressure. An electroencephalogram... was normal.. . probability of seizure is high... I advised him not to use any alcohol...If he stays away from alcohol, I think it is reasonable not to treat him with anti convulsants provided he does not drive... After a period of 3-6 months it would be reasonable to return to ...usual activities provided he remains seizure free and of course, provided that the CT Scan is also negative..." (Exhibit # 2 Tab 2)

Under the letterhead of the Dingwall Medical Group, Physician # 2 informs the Ministry on June 22, 1998 that the Applicant's "...observation period of three to six months has lapsed. ... has not had further seizures and I would ask that you re-instate his driver's licence." (Exhibit # 2 Tab 4)

A Department of Radiology, dated April 28, 1998, indicates that other than a "...moderate allergic reaction to the contrast... The scan appears unremarkable. There is no evidence of infarction, mass lesion or hemorrhage." (Exhibit # 2 Tab 4 A)

Electroencephalogram Report, dated April 28, 1998, as interpreted by Physician # 1 reads: "This is a normal electroencephalogram." (Exhibit # 2 Tab 4 C)

MEDICAL ADVISORY COMMITTEE CASE STUDY, dated July 23, 1998, recommends the Applicant's licence "Remain suspended. Reconsider with a detailed neurologist's report assess and the completion of the alcohol assess form by G.P. or specialist in addiction medicine one year period seizure free and fully abstinent...". (Exhibit # 3 Tab 5)

A MINISTRY OF TRANSPORTATION ALCOHOL ASSESSMENT FORM was prepared by Physician # 3, the Applicant's physician, on February 16, 1999. Physician # 3 reports as follows:

"YES" is checked under "Personal Health History" for "Cardiovascular Diseases and Neurological Diseases" and "Days absent from work within the past two years - 67"

Under "Medical Consequences Related to Alcohol Use", Physician # 3 checked "YES" for "Seizures and Liver Disease".

According to the "PHYSICAL ASSESSMENT AND LABORATORY EVALUATION," "Blood Pressure - ABNORMAL 148/94; COMMENTS BP has been up in past but he has never been treated for water retention; LIVER - not palpable - elevated enzymes; NEUROLOGICAL.... negative - sensation to light - touch normal, very slight tremor of fingers - knee reflexes brisk - tongue protruded slightly to the right; GGT ABNORMAL 102 u/l... normal up to 55 u/l; MCV ABNORMAL 98.7 fl... normal 80.0 to 96.0".

Under the heading "DSM-IV CRITERIA FOR ALCOHOL DEPENDENCE," "Yes" was the reply for numbers "2, 7" respectively "Withdrawal, Continued drinking despite knowledge of alcohol related physician or psychological problems."

The Applicant "...denies addiction to alcohol.. has not been through a treatment program..."

"ABSTINENCE" is the "RECOMMEND GOAL FOR ALCOHOL CONSUMPTION." Physician # 3 notes that the Applicant "...has decided on reduced drinking and believes he has already accomplished his goal." (Exhibit # 2 Tab 7 B)

MDS Laboratory Service report shows, for tests performed on "22-FEB- 99 ... GGT 102 HI UP TO 65" (Exhibit # 2 Tab 9 D). MDS Laboratory Services report shows tests performed on "22-FEB- 99" which show " GGT 102 HI UP TO 65" (Exhibit # 2 Tab 7 D).

Dynacare Laboratory report shows tests performed on "04/12/95.... GGT 147" (Exhibit # 2 Tab 7 F)

MDS Laboratory Service report shows tests performed on "13-MAR- 98 ... MCV 98.9 (Exhibit # 2 Tab 7 I)

MEDICAL ADVISORY COMMITTEE CASE STUDY, dated May 20, 1999, recommends the Applicant's licence "Remain suspended. (Exhibit # 3 Tab 8)

Exhibit # 2 Tab 12, Ministry of Transportation driving Record for the Applicant since 1970, shows no infractions.

The Respondent, at the hearing, relied on the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 14, and on the standard guidelines for driver's.

The Applicant, confirmed that he has been seizure free for over twelve months. He believes there is still a question as to whether he suffered a seizure or a blackout.

As for drinking, the Applicant does not consider himself to be an alcoholic but a social drinker, who has never had any drinking and driving incidents. The Applicant affirmed his adherence to the requirements of the law and his belief that drinking and driving do not mix. He believes that his GGT and MCV levels are high due to being afflicted with hepatitis as child. Although there were no records available for the hearing, the Applicant stated that such records could be easily obtained from the hospital in Sault Ste. Marie.

The Applicant attested to the fact that he is a welder who works with heavy forestry equipment. There are very strict rules in place, concerning the use of alcohol, for someone in his position. The Applicant has never encountered any problems at work due to drinking.

The Applicant stated that the "12 oz per day " notation was in error. He has never had that much to drink. The doctor told him that he could have up to 12 oz. per day without noticing any effects.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "any...sufficient reason...". The Applicant came to the attention of the Registrar as a result of an unsolicited report from Physician # 2 communicating: "I recently saw this gentleman with a presumed seizure and have advised to not drive until he is reviewed by a neurologist." (Exhibit # 2 Tab 1)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation.

The Respondent's primary concern appeared to be the apparent seizures suffered by the Applicant. As early as June 1998, the Ministry was informed by Physician # 2 that the Applicant's "...observation period of three to six months has lapsed ... has not had further seizures and I would ask that you re-instate his driver's license." (Exhibit # 2 Tab 4)

The Applicant's evidence that there is still controversy over the seizures is supported by the undisputed statement of Physician # 1, "... The diagnosis is still unclear whether he had a seizure or whether the blackout was related to a faint from getting up quickly. I don't think this will ever be resolved." (Exhibit # 1)

Further, Physician # 1's letter of November 28, 1999, notes that the Applicant's "... neurological examination is normal and he had an normal EEG and CT Scan last year... At this point it would be reasonable for him to drive...he is now seizure free for one and half years...". (Applicant's Exhibit # 1; Respondent's Exhibit # 2 Tab 10 A)

The Respondent eloquently expounded the policies contained in the; "Physician's Guide to Driver's Examination; the National Safety Code and considered by the Ministry of

Transportation Medical Advisory Committee. The Tribunal notes that these policies are to be used as guidelines and are not legislation.

The Applicant denied abuse, and emphasized his awareness of the dangers of drinking and driving. The Tribunal was not presented with testimony to contradict this affirmation. In fact, the driving history of the Applicant is clear as to any drinking and driving offences.

The Tribunal finds that the Respondent has not proven that the Applicant is currently suffering from a medical condition or an alcohol addiction which is likely to significantly interfere with his ability to drive a motor vehicle as described by Regulation 340/94 section 14 (a) & (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated May 15, 1998 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

Roy Melvin, M.D., Member

RELEASED: May 30, 2000

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: SANDRA QUADRINI, Respondent
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF HEARING: May 23, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated April 25, 2000
- received April 26, 2000

By the Respondent:

- a) Exhibit #2 Ministry of Transportation submissions – tabs 1 – 8
- received May 11, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a final written summation with respect to this matter.

FACTS:

The Applicant is appealing the suspension of his driving privileges effective January 22, 2000 as set out in Exhibit # 1.

An unsolicited report from The Credit Valley Hospital dated "23/11/99", prepared by Physician # 1 informs the Ministry that the Applicant *"...has a problem with alcohol and ... the Ministry should review his license to drive a motor vehicle"* (Exhibit # 2 Tab 1).

A MINISTRY OF TRANSPORTATION ALCOHOL ASSESSMENT FORM which was prepared on "00/02/02", by the Applicant's physician since "13 Nov 1980", indicates as follows:

"YES" is checked under "Personal Health History" for "Addictions" and "Hospitalisations within the last 12 months" and "Days absent from work within the past two years ~ 6 weeks - 3 weeks Rehab - 3 weeks detox ...".

Under "Medical Consequences Related to Alcohol Use", shows "ocass. Morning shakes".

According to the "PHYSICAL ASSESSMENT AND LABORATORY EVALUATION," all categories are marked "NORMAL - Blood Pressure "110/60"; Liver - enlarged 4 cm."

Under the "DSM-IV CRITERIA FOR ALCOHOL DEPENDENCE," a positive reply was noted for numbers "1,3,4,6" respectively *"Tolerance.Taking larger amounts than intended, Unsuccessful efforts to reduce alcohol use, Reduces important activities because of alcohol"*.

"ABSTINENCE" is the "RECOMMEND GOAL FOR ALCOHOL CONSUMPTION." The Applicant attended the "RENASCENT CENTRE - Jan 7/2000 - Jan 28 2000" and *"...has not had NO ALCOHOL SINCE NOV.22, 1999"* (Exhibit # 2 Tab 3).

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS, dated "April 7, 2000", completed by H. A., details the Applicant's history as explained by the Applicant. The Applicant discloses that he *"...had a big drinking binge in the privacy of own home... needed help... called boss... arranged ...to go to Credit Valley hospital..."* (Exhibit # 2 Tab 5).

MEDICAL ADVISORY COMMITTEE CASE STUDY, dated February 24, 2000, recommends the Applicant's driver's licence *"Remain suspended"* (Exhibit # 2 Tab 6).

Exhibit # 2 Tab 8, Ministry of Transportation driving Record for the Applicant since 1978 shows no infractions.

The Respondent, at the hearing, relied on the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 8, and on the standard guidelines for driver's.

The Respondent disputed the normalcy of the MCV and GGT, as indicated by the Applicant's physician in the MINISTRY OF TRANSPORTATION ALCOHOL ASSESSMENT FORM, as no actual laboratory tests were introduced as evidence.

The Applicant testified that he does not consider himself to be an alcoholic but a social drinker. He has in the past and is currently, voluntarily seeking to control his drinking habits. At present the Applicant is attending AA as an observer. As AA is a life long commitment, one has to attend a number of meetings as an observer, prior to considering joining.

The Applicant affirmed his adherence to the requirements of the law and his belief that drinking and driving do not mix. He has made a written promise to his children that he would never drink and drive, and intends to keep that promise. The Applicant noted his spotless driving record.

The Applicant is employed as a General Manager for a trucking company.

Witness #1, the Applicant's employer, was the first of three witnesses to testify on behalf of the Applicant. Witness #1 has known the Applicant for "fifteen years" and has never known him to drink and drive.

Witness #2 is a member of the Board of Truckers. Witness #2 attested that the Applicant is well respected in the community and within the Association. Witness #2 confirmed he attends social functions with the Applicant, at least once a year, and on occasion has seen the Applicant take cabs if he had been drinking.

The final witness was Witness #3, who has known the Applicant for 8 to 10 years. Similarly to his predecessors testified that he has never been aware of the Applicant drinking and driving, not even after social events.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "*any...sufficient reason...*". The Applicant came to the attention of the Registrar as a result of an unsolicited report from Physician # 1, that the Applicant "*... has a problem with alcohol and ... the Ministry should review his license to drive a motor vehicle*" (Exhibit # 2 Tab 1).

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation.

Prior to setting out the reasons for the decision, the Tribunal would like to address the Respondent's objection regarding the MCV and GGT results as stated by the Applicant's physician. The Respondent did not suggest any improprieties with respect to the validity of the document as a whole. The Tribunal has no reason to believe that a reputable physician would falsify test results in order to favour his patient. The Respondent eloquently expounded the policies contained in the; "*Physician's Guide to Driver's Examination; the National Safety Code and considered by the Ministry of Transportation Medical Advisory Committee*". The Tribunal notes that these policies are to be used as guidelines and are not legislation.

The applicable legislation can be found in Section 14 (b) which states that:

"An applicant for or a holder of a driver's licence must not,

...

b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

There is little or no evidence to substantiate this premise that the Applicant is addicted to the use of alcohol. The evidence before the Tribunal consists of a heavy drinking episode, during which the Applicant was driven to the hospital. The Applicant by his own admission confessed that he drinks but denied being addicted to the use of alcohol. It is commendable that the Applicant has sought assistance on his own volition.

Further, were one to concede that the Applicant is an alcoholic, one must recognize that there have been no drinking and driving incidents in the past. The Tribunal notes that the Applicant's record is in fact spotless (Exhibit # 2 Tab 8).

The Tribunal found the Applicant to be a credible witness, who is apparently well respected in the community. The Applicant emphasized that he is well aware of the dangers of drinking and driving. This statement is corroborated by the Applicant's three witnesses who took time off their schedules to support the Applicant in this matter.

The Tribunal finds that the Respondent has not proven that the Applicant is currently suffering from an alcohol addiction which is likely to significantly interfere with his ability to drive a motor vehicle as described by Regulation 340/94 section 14 (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 22, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside and the Applicant's driver's licence be reinstated.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Roy Melvin, M.D.
Member

RELEASED: May 30, 2000

LOUCKS-TIME

BRUCE E. LOUCKS

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by Bruce E.
Loucks seeking an extension of the time
requirements for this Applicant to commence
this appeal from an impoundment order of the
Registrar under Section 55.1 of the Highway
Traffic Act;

AND IN THE MATTER of

BRUCE E. LOUCKS

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: Elizabeth Sproule, Presiding Member

APPEARANCES: Alana Best
Representative for the Registrar of Motor Vehicles

Bruce E. Loucks
Applicant by teleconference call

DATE OF
MOTION: April 26th, 2000

ORDER

A motion was heard on April 26th, 2000, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the Highway Traffic Act, R.S.O. 1990. c.H.8 amended ("HTA").

Submissions of Written Material

The Applicant submitted the following documents:

1. Copy of Impound Order effective February 11, 2000.
2. Original Notice of Appeal/Owner's Position received March 17, 2000.
3. Copy of driver's licence of driver of impounded vehicle.
4. Request for motion received April 7, 2000.

The Facts

The Applicant is the owner of a motor vehicle which was impounded for a period of 45 days pursuant to an order of the Registrar issued under section 55.1 of the Highway Traffic Act R.S.O. 1990, c. H.8 as amended (the "Act").

The motor vehicle was impounded on February 11th, 2000.

The Applicant's Notice of Appeal to the impoundment was dated March 14th, 2000 and was received by the Board on March 17th, 2000, 35 days from the date of impoundment. The motion presently before the Board is for an order, in terms of section 20(7) of regulation 632/98, for an extension of the time for the filing of the Notice of Appeal.

In his oral submissions to the Board, the Applicant first indicated that the reason he did not proceed sooner with the appeal was because he was under the impression that he could not do anything about it. He formed this impression after talking to friends, family and the impounding officer. He conceded that he received correspondence from the Ministry of Transport regarding the impoundment, but he did not bother opening it until the 22nd of February. The Applicant also stated that he did not have the funds required to proceed with the appeal.

In his written submissions dated March 14th, 2000, the Applicant states "*I have not started this appeal until now because I was only recently able to obtain Mr. Descroches driver's licence*". Mr. Descroches is the driver of the vehicle when it was impounded. The Board notes no mention is made of financial difficulties. When asked by the Board why he waited until he was in possession of the driver's licence to appeal, he responded that he did not believe that he had a basis for a successful appeal until then and therefore did not appeal. It was not clear to the Board as to why he had formed this conclusion other than by his own deduction.

The Law

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Board under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Board within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Board may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
 - (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions that it considers proper as a result of extending the time.

The Order

THE BOARD RULED TO REFUSE TO GRANT an extension of the time to commence this appeal for the following reasons.

REASONS FOR ORDER

Section 20(7) of Regulation 632/98, provides the Board with the specific criteria that the Applicant must meet to satisfy the Board that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that acting in good faith, he was unable through accident, illness or other cause beyond his control to bring the appeal within the prescribed 15 days.

The evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle, under Section 55.1 of the Highway Traffic Act, was the result of accident, illness or other cause beyond the Applicant's control as required by section 20(1) as read with section 20(7) of Regulation 632/98. Further, the Applicant has not satisfied the Board that there are reasonable grounds for applying for the extension and for granting relief. Accordingly, the requirements under section 7 of the Licence Appeal Tribunal Act have not been met.

The Board is not convinced that the lack of funds was a cause of delay as no mention was made of this in the 'Owner's Position in Appeal' in which the Applicant explains why he had not started the Appeal earlier (quoted above). The evidence before the Board

indicates that the Applicant did not appeal because he concluded either there was nothing he could do or that he would not be successful in appealing. He based this conclusion apparently on the comments of family, friends and on comments allegedly made by the police officer at the time of impoundment. The Applicant chose to act upon these comments and ignore the information provided to him by the Registrar of Motor Vehicles. In doing so, it is the Board's opinion that the Applicant did not act in a manner which supports his request for an extension of time.

The motion herein of the Applicant requesting an extension of time to appeal, pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574 R.R.O. 1990, is dismissed.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule
Presiding Member

RELEASED: *May 1, 2000*

SHANAHAN CARRIAGE CO. LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK, Presiding member
CLARKE WALLACE, Member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

ROBERTO SANTARELLI, Agent for Applicant

DATE OF HEARING: April 25, 2000

DECISION RELEASED: May 1, 2000 Toronto

REASONS FOR DECISION

A hearing was held on April 25, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Shanahan Carriage Co. Ltd. (the "Applicant")
Motor Vehicle: 1999 Ford Van, Plate #876 SEK (the "vehicle")
Date of Appeal: April 5, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on April 25, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted copies of their submissions bearing original certification seals.

All documents were entered into evidence with the consent of both parties.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

LICENCE APPEAL TRIBUNAL
1 St. Clair Avenue West, Suite 1200
Toronto, Ontario M4V-1K6

April 3, 2000

RE: NOTICE OF APPEAL.

As per the instructions on how to file a Notice of Appeal to the Licence Appeal Tribunal, please find the following documents as material which is been submitted by the owner of the Vehicle, 'Natcon Sewer & Watermain Ltd.'

MATERIAL:

- Copy of authorization From Shanahan Leasing given to Roberto Santarelli form Natcon Sewer and Watermain Ltd.
- Copy of Permit for the Impounded Vehicle.
- Copy of the Ministry's order impounding the vehicle,
- Copy of Valid Driver's License submitted to employer upon employment.
- Copy of Personal Tax Credits Return for Driver of Vehicle showing date of employment.

GROUND FOR THE APPEAL:

The vehicle owner exercised due diligence to determine that the drivers license was not suspended. Also, due to the lose of the vehicle will result in exceptional hardship for the employer, and the impact of the loss of the vehicle will be upon persons who ordinarily are the workers of the company.

Trusting that the information is satisfactory, if anything with the enclosed package has to be corrected, or explained, please do not hesitate to contact me at the above office number.

Yours Truly,

Roberto Santarelli
President.

Mr. Santarelli stated that he is the owner of Natcon Sewer and Watermain Ltd, which leases the vehicle from the Applicant. The driver of the vehicle whose driver's licence was then under suspension was Mr. Luis Masa, an employee of Natcon Sewer and Watermain Ltd. The impounded vehicle is the only vehicle that this company operates, and it is used to transport employees to and from job sites, as well as to haul small tools.

Mr. Santarelli stated that each driver of his company vehicle has their name and driver's licence submitted to his insurance company, and that he relies upon his insurer to verify the status of each driver's licence. At the time of the impoundment, Mr. Santarelli believed that Mr. Masa was in possession of a valid driver's licence.

When the vehicle was impounded, two of the four employees that work for Natcom Sewer and Watermain Ltd. left the company, though there was the possibility that they would return after the vehicle had been released. These employees had been

transported by this vehicle to various job sites, and were unwilling to continue their employment with the company unless transportation was provided for them. Mr. Santarelli offered to transport them with his own personal vehicle, but his offer was declined.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Luis Massa;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 26, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Mr. Santarelli stated that Mr. Masa's driver's licence was not inspected at the time of the lease agreement being entered into by the Applicant, or at the time of the impoundment. In fact, if any verification of Mr. Masa's driver's licence was done, it would have been performed by Mr. Santarelli's insurer, and not by the Applicant. Indeed, there would have been no reason for Applicant to have done so, for it did not or could not have known that Mr. Masa would drive their vehicle. However, the legislation under Section 50.2(3)(c) is clear and unambiguous. It is the driver's licence of the driver of the vehicle that must be looked into to attempt to determine that it was not under suspension, and this must be done by the owner of the vehicle. This the Applicant failed to do.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has also appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself.

In order for the Applicant's claims to be considered under Section 22(2)(a), (b), and (c), they must have demonstrated that all of Section 22(3) has been met. Furthermore, Section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Applicant

has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required by Section 22(4) of the Regulation. In fact, Mr. Santarelli has stated that he has an alternative to the impounded vehicle, but its use was some how declined by those employees that were normally transported by the impounded vehicle.

The Applicant has not presented the Tribunal with any evidence that would indicate that the loss of the vehicle would be immediate significant and lasting as provided in Section 22(3)(b) of the Regulation. There was no evidence as to the significance the loss of this vehicle would have upon the company that has leased it from the Applicant.

The Tribunal finds that the Applicant has failed to meet the onus under the Section 22(3) and 22(4) of the Regulation, and is therefore precluded from considering the Applicant's claim of exceptional hardship under Section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Clarke Wallace, Member

RELEASED: *May 1, 2000*

WHITE

PREHEARING

GEORGIA WHITE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

G. MARTIN ROSEN, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
RICK McCONNELL, Agent, for Lorne Park Townhomes Inc.,
Added Party

DATE OF
PREHEARING: May 1, 2000 Toronto

ORDER

Following attendances on May 1, 2000 at a prehearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) of

G. Martin Rosen, counsel for Georgia White (the "Applicant") and Netanus Rutherford, counsel, for the Ontario New Home Warranty Program (the "Program"), and Rick McConnell, agent for Lorne Park Townhomes Inc. (the "Added Party");

The Tribunal makes the following Order;

- 1) The Parties to this proceeding agreed that the Added Party shall forthwith obtain the services of a plumber to investigate the probable cause of the alleged blockage of the floor drain in the laundry room of Applicant's home in Mississauga, Ontario.
- 2) The Program and the Applicant shall be advised immediately of the time and date of the investigation so as to enable them to arrange to be present during the investigation.
- 3) The plumber shall pursuant to the investigation furnish the Added Party with a written report as to the probable cause of the alleged blockage of the floor drain and the nature of the suggested remedy and cost. The Added Party shall

forward a copy of the plumber's report to the Program and the Added Party immediately it receives same.

- 4) The reasonable and necessary cost of rectification of the alleged blockage to the drain, as well as the cost of the plumber's labour and materials in determining the probable cause of the alleged blockage and his written report will be paid for by the Added Party if the plumber's report indicates that the reason for the alleged blockage is due to a defect in work, materials or design by the Added Party. If the report indicates no defect in design, materials used or workmanship of the Added Party then the cost of rectification of the blockage shall be for the sole cost of the Applicant.
- 5) Should this matter not be settled the hearing set for July 17, 2000 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario will proceed. The parties however, undertake to advise the Tribunal in writing, as soon as a settlement is concluded.
- 6) No other issues were dealt with at the prehearing.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 2nd, 2000

WILLIAM IKKERS

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

WILLIAM IKKERS, Applicant
unrepresented

DATE OF HEARING: April 25, 2000 Ottawa

DECISION RELEASED: May 2, 2000

REASONS FOR DECISION

A hearing was held on April 25, 2000, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: William Ikkers (the "Applicant")
Motor Vehicle: 1988 Lincoln Town car Limousine, Plate #AEJY 854
(the "vehicle")
Date of Appeal: April 6, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 25, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted an affidavit from Police Constable David Walter Lamont and the original certified documents of copies on file, from the Ministry of Transportation. Said documents were filed on consent as Exhibits # 5 and 6 respectively.

The Applicant and the Respondent agreed that the above mentioned documents be filed at the hearing as evidence.

There being no other preliminary matters and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"I AM APPLYING FOR THIS APPEAL UNDER THE EXCEPTIONAL HARDSHIP GUIDLINE. WHEN I STARTED THIS COMPANY A YEAR AGO, SIGNIFICANT AMOUNTS OF DOLLARS WAS BORROWED FROM MY SILENT PARTNER PETER DUMAS. IF SAID VEHICLE IS NOT RELEASED IN APRIL OF "2000", MANY BUSINESS CONTRACTS WILL BE LOST AND BANKRUPTCY WILL FOLLOW."

The Applicant opted not to testify at the hearing but rather to file a statement with the Tribunal.

The Applicant explained the he started the company and owns it "...on paper..." that is why the vehicle in question is in his name. However, Mr. Dumas borrowed money on his credit card to invest in the business

The Applicant admits that his driver's licence was under suspension and that he was the driver of the vehicle when he was stopped by police. He feels that the suspension will cause undue hardship because unless the vehicle is released by April, it may become necessary to file for bankruptcy.

Mr. Peter Dumas testified on behalf of the Applicant. Mr. Dumas confirmed that he had borrowed \$15,000.00 on his credit card to start the business, which he loaned the Applicant and that the Applicant still owes him \$ 3,500.00.

Mr. Dumas would like the car released due to the many engagements the company has for the month of May.

Under cross-examination, the witness verified that the Applicant has made partial repayment of the loan.

Mr. Dumas also attested that the business operating as Alfman Limousine is still making an income from the other services provided as indicated on his business card.

Mr. Dumas testified that he has lost several thousands of dollars, in that, the company has been forced to pass on the contracts to other firms for only a 10% commission.

In closing, the Applicant suggested that he could transfer the ownership to Mr. Dumas in order that the vehicle be returned.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant, William Ikkers, as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by William Ikkers;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 4, 2002.

The evidence of the Registrar consisted of the documents presented for the hearing and filed as Exhibit # 3.

Tendered in evidence by the Respondent, at the hearing, and filed as Exhibit # 6, is a certified copy from the Ministry of Transportation setting out the driving record of William E. Ikkers, Ministry of Transportation vehicle ownership search document, Notice to the Registrar, and Order to Impound.

The Registrar also entered an Affidavit from PC David Walter Lamont detailing the events that led to the impoundment and filed as Exhibit # 5.

In closing, the Respondent contended that the Applicant had an alternate method in place to fulfill his contracts, and that the situation did not meet the criteria under exceptional hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in

section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act. The Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant has ensured that his clients are provided for, by referring the bookings to other businesses. There is no evidence that no alternative to the impounded vehicle is available.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant did not satisfy the Tribunal that any losses incurred are significant or lasting.

Is the loss upon a person ordinarily transported in the motor vehicle?

There is no evidence to establish that there will be impact of a loss borne by any person or persons who may be transported in the impounded vehicle. Therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are not met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

- i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle and...
- ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant is one and the same as the person who was found to be "*Driving Disqualified*", and does not, therefore, meet the criteria set out in 22(3)(d)(i)(ii). The Tribunal may not consider any such loss.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship as required as a ground of appeal under subsection 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

Antoine Aouad, M.D.,
Presiding Member

RELEASED: May 2, 2000

LAGACE, GAETAN O/A GATER'S AUTO REFINISHING AND AUTO SALES AND
1302734 ONTARIO INC.

PREHEARING

GAETAN LAGACE O/A GATER'S AUTO REFINISHING AND AUTO SALES
AND 1302734 ONTARIO INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE THE REGISTRATION OF GAETAN LAGACE and TO
REFUSE THE APPLICATION FOR REGISTRATION OF 1302734
ONTARIO INC.

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

JILL COPELAND, counsel representing the Applicants
MITCHELL GOLDBLOOM, counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: May 1, 2000 Toronto

ORDER

Following attendances on May 1, 2000 at a prehearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000, is known as the Licence Appeal Tribunal) of Jill Copeland, counsel for Gaetan Lagace and 1302734 Ontario Inc. (the "Applicants") and Mitchell Goldbloom, counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, on May 29, 2000 and to continue on May 30, 31, and June 1, 2000, if necessary.

1) The Registrar intends to call to testify at the hearing the following police officers:

- (a) Detective Brian Smith
- (b) Detective John Thorne

- (c) Detective Doug Couseus
- (d) Detective Dave Robinson
- (e) Detective Mac Barber

- 2) The Registrar shall by no later than Friday May 5, 2000 furnish the Applicant's counsel with either
 - a written statement by each of such officers containing such officer's observations and opinions based on the worksheets of the officer who prepared same relative to the motor vehicle(s) examined by such officer(s);or
 - the actual worksheets prepared by the officer(s) relative to the motor vehicle(s) examined by such officer(s).
- 3) The Registrar intends to call to testify at the hearing Bruce Crocker, a member of the Insurance Crime Prevention Bureau of Canada and shall by no later than Friday May 5, 2000 furnish the Applicant's counsel with a written statement by Crocker explaining or defining such terms and/or phrases commonly used peculiarly within the motor industry in Ontario.
- 4) The Registrar intends to call to testify at the hearing either Mary Jane South or Amanda Leedempsey who are employed by the Ontario Motor Vehicle Industry Council and shall by no later than May 5, 2000 furnish the Applicant's counsel with a written statement by either South or Leedempsey detailing the evidence they will give at the hearing insofar as the Act or Regulations under the Act are concerned. The written statement of either South or Leedempsey shall also contain her opinion of the potential harm that may be caused to a consumer when purchasing a motor vehicle that had previously been involved in a collision and thereby suffered damage.
- 5) The Registrar also intends to call as a witness to testify at the hearing, one Bill Arthur, an investigator with the Ontario Motor Vehicle Industry Council and shall by no later than May 5, 2000 furnish the Applicant's counsel with a written statement by Arthur as to the evidence he will give at the hearing relating to the obligations imposed upon a registered motor vehicle dealer under the Act to maintain and keep a garage register. The written statement of Arthur shall also disclose the nature of his conversations to which he intends to testify that took place between him and consumers and police officers relative to the allegations made in these proceedings against the Applicants.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

NELSON-EXHP

DIANA NELSON

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

DIANA NELSON, Applicant

DATE OF HEARING: April 26, 2000

DECISION RELEASED: May 3, 2000 Hamilton

REASONS FOR DECISION

A hearing was held on April 26, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Diana Nelson (the "Applicant")
Motor Vehicle: 1988 Ford COF, Plate #206 IHB (the "vehicle")
Date of Appeal: April 7, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 26, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I AM APPEALING THE IMPOUNDMENT OF MY TRUCK ON THE GROUNDS OF EXCEPTIONAL HARDSHIP.

ON THE DAY OF THE IMPOUNDMENT I HAD TO GO TO WORK EARLY AT 7 AM. (I USUALLY DRIVE MY HUSBAND AND HIS EMPLOYEES TO WORK WHEN I DON'T HAVE TO WORK MYSELF.) THE USUAL DRIVER, MIKE, WAS SICK AND UNABLE TO DRIVE THIS DAY. MY HUSBAND HAD TO GET HIMSELF AND HIS OTHER EMPLOYEES TO WORK SO HE TOOK THE CHANCE AND DROVE HIMSELF. (NONE OF THE OTHER EMPLOYEES HAVE A DRIVER'S LICENSE.)

MY HUSBAND STARTED HIS OWN BUSINESS LAST YEAR AND RELIES ON THE TRUCK TO GET HIMSELF AND HIS EMPLOYEES TO WORK MOST DAYS AND TO MOVE THEIR HEAVY EQUIPMENT FROM JOB SITE TO JOB SITE.

HE IS IN THE CONSTRUCTION BUSINESS AND NEEDS THE TRUCK TO MOVE HIS SCAFFOLDINGS, PLANKS, BRACES, HANGARS AND TO PULL HIS MORTAR MIXER FROM JOB SITE TO JOB SITE, USUALLY ABOUT EVERY OTHER WEEK.

WE DO HAVE A MINI VAN AS WELL THAT I USE TO GET TO WORK AND TO RUN THE KIDS AROUND IN, BUT IT IS NOT BIG ENOUGH TO MOVE HIS EQUIPMENT.

WE HAVE TRIED TO FIND ANOTHER TRUCK TO MOVE EQUIPMENT BUT WE HAVE BEEN UNSUCCESSFUL.

WE HAVE THREE CHILDREN TO SUPPORT AND A MORTGAGE TO PAY. WE DEPEND ON HIS INCOME FROM THE BUSINESS TO PROVIDE FOR THESE EXPENSES.

WE ALSO HAVE EMPLOYEES WHO WILL BE WITHOUT WORK AND AN INCOME IF WE CANNOT GET THE EQUIPMENT MOVED TO THE NEXT JOB SITE.

DUE TO THE FACT THAT WE HAVE A REGULAR DRIVER FOR THE TRUCK WHEN I CANNOT DRIVE THEM TO WORK. I FEEL THAT WE SHOULD BE ALLOWED TO HAVE IT BACK SO THAT WE CAN CONTINUE OUR BUSINESS AND PROVIDE OUR EMPLOYEES WITH AN INCOME TO SUPPORT THEIR FAMILIES.

I WOULD APPRECIATE THAT THE HEARING BE SCHEDULED AS SOON AS POSSIBLE BECAUSE WE NEED TO MOVE EQUIPMENT RIGHT AWAY.

APPLICANT'S EVIDENCE: Mrs. Nelson did not call any witnesses. She testified and her evidence did not differ from her written appeal.

She advised that she had to go to work for 7.00 a.m. that day, and that her husband took the chance to drive the vehicle because the regular driver was sick. She indicated that the impounded vehicle was only used to move heavy equipment from site to site. This was only done approximately once every two weeks. The vehicle remained parked when not required. It was never used to transport the employees from site to site.

Her husband continues to operate the business. The employees have not missed a day of work; her children walk to school; and Mrs. Nelson continues to drive her van to work. The only expense incurred thus far is the rental of a UHaul van to move equipment, which is a cost of \$ 150.00.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Royden Nelson;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving with more than 80 mgs. alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 21, 2000.

The Registrar called no witnesses.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the issue filed, the evidence established does not fit any of the provisions set out under Section 50.2 (3) of the Act.

The Tribunal finds that on the evidence given by the Applicant, exceptional hardship has not been established. The business continues to operate. The employees have not experienced a loss of wages.

An alternative to the vehicle has been found. A U-Haul van was rented at the nominal rate of \$150.00 to move the heavy equipment. This satisfies Section 22 of Regulation 632/98 which requires the Tribunal to consider the ground of exceptional hardship only where no alternative to the impounded vehicle is available.

Neither the Applicant nor her children have been inconvenienced in any way. Mrs. Nelson has a van that she uses to drive to work. The children walk to school.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

Malcolm Fealing, Presiding Member

RELEASED: *May 3, 2000*

SOMEN

ANDREW SOMEN

APPEAL FROM A DECISION OF THE BOARD OF TRUSTEES
OF THE ONTARIO MOTOR VEHICLE DEALERS
COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

LOUIS M. FRIED, Counsel representing the Applicant
LARRY BANACK, Counsel representing the Ontario Motor Vehicle
Dealers Compensation Fund

DATE OF
HEARING:

April 19, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) from a written decision of the Board of Trustees of the Motor Vehicle Dealers Compensation Fund (the "Board") dated December 14, 1999. The decision of the Board was to deny Andrew Somen (the "Applicant") compensation in respect of his claim of \$6,150.00.

The Applicant entered in a written agreement dated September 28, 1997 with Auto Capital Inc. ("Auto Capital"). While there is no dispute between the parties that the Applicant and Auto Capital's sales manager signed the agreement there is no consensus as to the nature of the agreement.

The Applicant contends the agreement was a purchase agreement whereby the Applicant purchased a second-hand 1996 Ford Windstar Wagon (the "vehicle") from Auto Capital; that each monthly payment in terms of the agreement was effectively a payment towards increasing his equity in the vehicle and that he is entitled to be compensated for the installments he paid when he was deprived of possession of the vehicle through no fault of his own. The Board on the other hand contends the agreement between the Applicant and Auto Capital was a "lease to own" agreement; that the Applicant paid for the use of the vehicle on a monthly basis and that when payments under the lease ceased there was no further obligation on the Applicant to make payments and that there no pecuniary loss suffered by the Applicant.

There is no dispute between the Applicant and the Board that:

(i) the Applicant paid to Auto Capital eleven monthly payments of \$550.00 each commencing on September 25, 1997 with a final payment on July 1, 1998.

(ii) that on October 24, 1996, Marigold Lincoln Mercury Sales Ltd. entered into a written agreement styled "Lease With Purchase Option" with Paul Szymanowski in regard to the vehicle which was then new and that that agreement was assigned to Ford Credit Canada Limited ("Ford") who became the owner of the vehicle.

(iii) that on August 14, 1998 upon demand being made to him by Ford, Applicant voluntarily surrendered the vehicle to it.

(iv) that the Applicant pursuant to a claim he filed in the Small Claims Court, obtained a default judgment against Auto Capital for \$5,800.00 plus costs of \$200.00 and that this judgment remains unsatisfied.

THE ISSUE:

The issue for determination is whether the Applicant is entitled to compensation from the Fund and if so the amount of such compensation.

THE EVIDENCE:

At the hearing, the Applicant and the Board based their respective cases on documentary and oral evidence. Insofar as the Applicant's case is concerned, no person other than the Applicant testified and the only persons to testify for the Board were Michael Kavanagh and Yvonne Hallitt.

The testimony of the Applicant was as follows.

In September 1997, he was managing a restaurant in Etobicoke when a customer, one Peter Ingster, who frequented that restaurant told the Applicant that he had a motor vehicle in which the Applicant might be interested. Ingster was the manager of a second-hand motor vehicle dealer which operated under the name of Auto Capital. The Applicant attended at Auto Capital, viewed the vehicle and a deal was struck between the Applicant and Auto Capital represented by Ingster. Applicant believed he was purchasing the vehicle from Auto Capital and he was presented with a document for his signature by Ingster. The document had printed upon it on the right hand top corner the words "Bill of Sale". This document (Exhibit 5) contains:

- the vehicle's information such as the VIN number
- the distance travelled by the vehicle which was noted as 54,311 kms
- the following statement under the heading "Comments":

"This is a lease to own agreement total of 15 payments of \$550.00 insurance inclusive. Payments start on October 1, 1997 and each first of the month until December 1, 1998 for a total of \$8,250.00. Then the ownership will be transferred upon payment in full for the amount of \$17,741.00."

- the following under the heading "Terms of Settlement"

Selling Price	\$26,190.00
Third Party Warranty	\$ 790.00
Administration fee	\$ 199.00
Lien Registration fee	\$ 398.00
Net amount to be financed	<u>\$ 8,250.00</u>
 Total balance due	 <u>\$17,741.00</u>

- the signature of the Applicant as Purchaser and Peter Ingster, Sales Manager of Auto Capital as Vendor.

The Applicant stated he believed he was purchasing the vehicle when he signed the above document and when he paid the monthly installments of \$550.00 to Auto Capital over a period of eleven months commencing September 25, 1997 until his last payment on July 1, 1998. He had not at any stage been given the vehicle's registration papers that reflected that he was the owner of the vehicle. He had been given a copy of the vehicle's insurance slip (Certificate of Insurance) which indicated the insured to be "Paul Szymanowski". The period of that certificate of insurance was from December 1996 to December 1997. He did not ask why Szymanowski was noted as the insured on the certificate. When this insurance expired, the Applicant went to Auto Capital to obtain a further certificate of insurance which he obtained. This certificate was for the period December 1997 to December 1998 and reflected the insured as Auto Capital. In July 1998 he asked Ingster when he would obtain ownership documents to the vehicle. He was advised by Ingster that he was to return the vehicle to Auto Capital when it would be replaced with another vehicle.

The Applicant did not return the vehicle to Auto Capital but contacted someone at Ford who advised him that Ford was the owner of the vehicle and that it had been reported stolen; that the Applicant had better "park the vehicle" immediately and return it to Ford. Applicant did return the vehicle to Ford on August 14, 1998. He was not able to recollect the odometer reading at that time. Neither before nor after surrendering the vehicle did the Applicant attempt to ascertain how much it would cost him to replace the vehicle with another of the same model. While he had possession of the vehicle he used it to travel to and from work. He also used it on a daily basis, to pick up and transport supplies for the restaurant and to use it for pleasure, which included travelling to and from a farm on weekends.

The Applicant confirmed that he attended at the Small Claims Court on July 23, 1998 and there completed in his handwriting claim documents in respect of his claim against Auto Capital. He further confirmed that on the claim document under "reasons for claim and details" he had written as follows:

End of September 1997, I Andrew Somen leased a Ford Windstar VIN # 2FMDA5147TBC47897 from Auto Capital Inc. I made an oral agreement with Peter Ingster that he would provide me with a leasing contract between myself and Auto Capital Inc. October 1st, I took possession of the vehicle upon agreeing with Peter Ingster that I would be paying each 25th of the month, \$550.00 taxes and insurance included for the next 12 (twelve) months. After making 9 (nine) payments and security deposit of \$550.00 dollars for a total of \$5,500.00 dollars. Peter Ingster has not provided me with a lease to own contract. On each 25th of the month plus security deposit I paid Peter Ingster cash for what I never received a receipt. Before making a payment on July 25th I phoned Ford Credit Canada on the 22nd July, 1998. I spoke to Lee Meadows customer service rep. Telephone no. (905) 850-3722. I asked if he could provide information in regards of this vehicle and why the lease to own contract was not transferred to my name. I was told that the vehicle was owned by Ford Credit Canada and the vehicle was leased to

Szymanowski, Paul M., and it can not be transferred to my name. I was instructed by Mr. Lee Meadows not to make any more payments and not to return the vehicle to Auto Capital Inc., until this matter would be solved.

The Applicant went on to state that when he filed his claim for compensation with the Board he attended at its offices and met with Ms. Hallitt an employee. He handed his claim documents to Ms. Hallitt together with supporting documents. Among the supporting documents was a letter he received from Auto Capital at the time of entering into the agreement with Auto Capital. This letter reads as follows:

September 25, 1997

Re: 96 Ford Windstar V.I.N. 2FMDA514TBC47897

This is to confirm the sale of the vehicle described above to Mr. Andrew Somen for the amount of \$26,190.00. We acknowledge the deposit of \$1,100.00, invoice no: 497958. This document stands as proof of purchase until the bill of sale will be issued.

General Manager

Buyer

"Peter Ingster"
Somen"

"Andrew

(Exhibit 4)

The Applicant further stated that Ingster told him that Auto Capital purchased vehicles in Szymanowski's name.

The testimony of Michael Kavanagh who testified on behalf of the Board follows.

Mr. Kavanagh has been involved in the motor industry for approximately the past 20 years and is presently the owner of a car and truck rental company which has twelve locations and owns 700 vehicles. He is and has been for the last 10 years, a Director of the Used Car Dealers Association (UCDA).

Mr. Kavanagh was shown the letter of Auto Capital dated September 25, 1997 (Exhibit 4) and in regard thereto stated that it is not a bill of sale in that it does not comply with the Motor Vehicle Dealers Act (the "Act"). From his perusal of that letter he cannot determine the deal that may have been envisaged as there is no reference, among other things, to taxes, charges and licences and whether paid by the purchaser or the vendor.

Mr. Kavanagh noted that on the "Bill of Sale" document issued by Auto Capital to the Applicant in respect of the vehicle (Exhibit 5), the distance travelled by the vehicle was recorded as 54, 311 kms. He was also shown a copy of "Lease with Purchase Option" dated October 24, 1996 between Marigold Lincoln Mercury Sales Ltd. and Szymanowski (Exhibit 3, Tab 7). He pointed out to the Tribunal that the vehicle was originally leased to Szymanowski for 24 months at \$467.71 per month. This amount according to the lease agreement included G.S.T. & P.S.T. but excluded insurance on the vehicle. He also noted that there was a 50,000 kilometer allowance for travel by the vehicle over the 24 months of the lease whereafter 6 cents per kilometer would be levied against the leasee. He stated that it was accepted in the industry that a vehicle

on an annual basis will average between 20,000 and 25,000 kms. If the vehicle is used commercially a higher annual average would apply.

Mr. Kavanagh was asked to comment on his understanding of the "Bill of Sale" document (Exhibit 5). He stated that upon reading the "comments" section of that document his opinion was that the contract was not one of purchase and sale but rather a lease program. The monthly payments of \$550.00 under that contract "was a bargain" as this amount not only includes G.S.T. and P.S.T. but also includes insurance on the vehicle as well as the "vehicles cost" to the owner. On the type of vehicle in the present instance, the monthly cost of insurance at that time would have been between \$100.00 and \$150.00 per month depending on whether the vehicle was to be used in business. The latter figure would have been a closer approximation of insurance cost when the vehicle is used for business.

Ms. Hallitt's evidence was as follows.

Ms. Hallitt stated she is employed by the Board as an Administrator. She confirmed that she met the Applicant when he called at the offices of the Board to file his claim and that she received his claim and certain documentation. She next met with the Applicant in the week of April 10, 2000 when he called at the Board's office to pick up certain documents left by him with the Board. During this visit, he asked Ms. Hallitt why his claim had been denied by the Board and she replied that it was on the basis of the transaction being a "lease to own" transaction. The Applicant thereupon stated that the "Bill of Sale" document between Auto Capital and him (Exhibit 5) was not the originating document but that another document was the transaction's originating document. This latter document was, the Applicant claimed, given to him by Ingster prior to the Bill of Sale (Exhibit 5). Ms. Hallitt informed the Applicant that the Board had not seen such document and that she had not received same from the Applicant among the documents in support of his claim. She asked to see this document and was told by the Applicant that it was with his lawyer. The Applicant informed Ms. Hallitt that this document was given to him by Auto Capital in February 1998, and it was at that time that it was backdated to September 1997.

Ms. Hallitt when shown the document (Exhibit 4) during her testimony, stated that it was the first occasion that she had seen that document.

Under cross-examination Ms. Hallitt recounted what documents she remembered receiving from the Applicant when he filed his claim and that Exhibit 4 was not among those documents. She did concede that she could possibly have overlooked Exhibit 4 as being one of the documents handed to her by the Applicant at the time he filed his claim with the Board.

FACTS FOUND PROVEN:

- 1) On October 24, 1996, Marigold Lincoln Mercury Sales Ltd. ("Marigold") entered into a lease agreement with Paul M. Szymanowski whereby Marigold leased a new 1996 Ford Windstar Wagon (the "vehicle") to Szymanowski.
- 2) The terms of the lease agreement were that the vehicle was leased to Szymanowski for a period of 24 months commencing October 24, 1996 at \$467.71 per month inclusive of G.S.T. and P.S.T. but excluding insurance.

Szymanowski at the end of the 24 month term of the lease had the option to purchase the vehicle for \$17,133.06. Upon the expiration of the 24 month term of the lease, Szymanowski was obliged to pay Marigold 6 cents per kilometer for each kilometer in excess of 50,000 kilometers travelled by the vehicle.

- 3) The aforesaid agreement was assigned to Ford who thereupon became the owner of the vehicle and to whom lease payments were then to be made by Szymanowski.
- 4) On or about September 28, 1997, Auto Capital entered into an agreement with the Applicant in relation to the vehicle. The agreement was a "lease to own" agreement in terms of which Auto Capital was to lease the vehicle to the Applicant for a term of 15 months commencing October 1, 1997 at a monthly lease rate of \$550.00 per month inclusive of G.S.T., P.S.T. and insurance. At the end of the term of the lease, subject to due payment of the 15 lease installments totalling \$8,250.00 and subject to payment of a further \$17,741.00, Auto Capital undertook to transfer ownership of the vehicle to the Applicant.
- 5) The distance travelled by the vehicle as at September 28, 1997 was 54,311 kms.
- 6) The Applicant paid Auto Capital monthly lease payments of \$550.00 for a total payment of \$6,050.00.
- 7) On August 14, 1998, the Applicant, on demand made to him by Ford, surrendered the vehicle to the latter.
- 8) On July 23, 1998, the Applicant made a claim in the Small Claims Court against Auto Capital for \$5,800.00. On August 3, 1998, Applicant obtained default judgment against Auto Capital for \$5,800.00 plus \$200.00 costs.
- 9) Applicant filed a claim for compensation with the Board and supported such claim with certain documents which did not include Auto Capital's letter of September 25, 1997 (Exhibit 4).
- 10) At no time prior to the hearing did the Applicant produce Exhibit 4 to the Board. Applicant produced it for the first time during the hearing of this matter.
- 11) The cost of insuring the vehicle during the period 1997/1998 was between \$100.00 and \$150.00 per month.

THE LAW:

The law relating to the Applicant's claim can be found in the Schedule to Regulation 801 under the Act and in particular to:

Section 1, which reads as follows:

In this schedule "claim" means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

Section 12(1) which reads as follows:

The Fund is established as of the 1st day of July, 1986, to stand in the place of a participant for the payment out of the Fund of claims of customers of the participant where the transactions occurred during the period when the participant was registered under the Act and where the participant has refused after demand or is unable to pay the claims.

Section 12(3) which reads as follows:

A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements.....

DECISION AND ORDER:

The onus of proof rests upon the Applicant to prove on a balance of probabilities that he is entitled to payment of the amount claimed from the Fund.

From the evidence placed before the Tribunal it is clear that the owner of the vehicle at all relevant times was Ford. At the date the Applicant entered into the agreement of September 28, 1997 with Auto Capital the latter had no rights in and to the vehicle.

Based on the evidence before it, the Tribunal believes that the true agreement between Auto Capital and the Applicant was a lease agreement and was not a purchase and sale agreement. The Applicant knew at the time he signed that agreement (Exhibit 5) that it was a "lease to own agreement" for it stated so on the face of the agreement. Applicant acknowledge under cross-examination that he read the agreement including what was stated therein under the "comments" section. The Tribunal's belief is reinforced by what the Applicant in his own handwriting stated in his claim filed with the Small Claims Court (Exhibit 3, Tab 1, pages 19 & 20). In that document he clearly referred to a "lease" and "a leasing contract" between Auto Capital and him.

The Tribunal places no credence in the contents of Exhibit 4, which is Auto Capital's letter of September 25, 1997. The Tribunal accepts the evidence of Ms. Hallitt that she was not handed this letter by the Applicant when he filed his claim with the Board in October 1999. Ms. Hallitt stated that when she advised the Applicant that the letter was not with the Board and asked the Applicant for it, she was told by the Applicant that he did not have it with him and that it was with his lawyer. If this letter was with his lawyer, as he claims it was, the Applicant can not also claim in his discussion with Ms. Hallitt that he had given it to her for the Board's consideration when he filed his claim.

The Tribunal therefore finds that the true agreement between the Applicant and Auto Capital is that which is reflected in the "comments" section of Exhibit 5 namely a "lease to own" agreement. The Tribunal accepts that Ms. Hallitt was told by the Applicant when he called at the Board's offices in April, 2000 that Auto Capital's letter dated September 25, 1997 (Exhibit 4) was given to him in February 1998 at which time it was backdated to September, 1997.

The Tribunal therefore finds that all monthly payments of \$550.00 made by the Applicant to Auto Capital were lease payments and to exercise the option to own the vehicle, the Applicant was obliged after payment of his lease payments to pay a globular sum of \$17,741.00.

The Tribunal accepts that as at September 1997, the probable cost of having insurance coverage over the vehicle was between \$100.00 and \$150.00 per month and in addition G.S.T. and P.S.T. payable on each monthly installment was approximately \$80.00 per month. On the basis that the vehicle was partly used as a business vehicle, its insurance premiums would have increased. The premiums plus the taxes would have amounted to approximately \$200.00 per month.

It is not reasonable that the Applicant would use the vehicle without cost. The Tribunal finds a net monthly amount of about \$350.00 is a reasonable sum for the Applicant to pay for his use of the vehicle.

Kavanagh's statement that payments of \$550.00 per month "was a bargain" for this type and model of wagon was based on the monthly insurance and tax components amounting to about \$200.00 per month. Based on the above calculations the Tribunal accepts that the Applicant in paying the \$550.00 per month was obtaining a bargain for this vehicle.

The Applicant is, therefore, not entitled to claim repayment of the installments made by him.

The Applicant claims that he was establishing equity in the vehicle with each installment that he made and that he has been deprived of this equity due to his not being able to obtain ownership of the vehicle on payment of \$17,741.00. The Applicant produced no evidence to indicate the vehicle's retail value when he surrendered it to Ford. The Applicant has not established any equity value or any loss in that regard.

ORDER:

Pursuant to the authority vested in it by the Motor Vehicle Dealers Act and the regulations made thereunder, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 4th, 2000

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF

1329331 ONTARIO INC. O/A SYPRUS SALES AND REZA ALIZADEH
SAFA AND MAHMOUD ALIZADEH SAFA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 26th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1329331 ONTARIO INC. o/a SYPRUS SALES and REZA ALIZADEH
SAFA and MAHMOUD ALIZADEH SAFA

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1329331 Ontario Inc. o/a Syprus Sales and Reza Alizadeh Safa and Mahmoud Alizadeh Safa, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

-

G. Kent McClure, Q.C.
Chair

Released: May 4th, 2000

TO: Licence Appeal Tribunal
 Registrar
 1 St. Clair Avenue West, 12th Floor
 Toronto, Ontario, M4V 1K6

AND TO: The Registrar
 Motor Vehicle Dealers Act
 Ontario Motor Vehicle industry Council
 36 York Mills Rd, Suite 110
 North York, Ontario
 M2P 2C5

FROM: 1329331 Ontario Inc.
 O/A Syprus Sales
 665 Millway Ave, Unit 29
 North York, Ont, L4K 3T8

AND FROM: Reza Alizadeh Safa
 Mahmoud Alizadeh Safa
 7 Sabrina Crt, Richmond Hill
 Ont, L4C 5P8

RE: 1329331 Ontario Inc O/A Syprus Sales and Reza Alizadeh Safa and Mahmoud Alizadeh Safa

In accordance with section 4.1 of the Statutory Powers and Procedures Act, the parties hereto hereby waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal based upon the following Terms and Conditions;

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, 1329331 Ontario Inc O/A Syprus Sales, Reza Alizadeh Safa and Mahmoud Alizadeh Safa hereby consents to the following terms and conditions to their registration as a motor vehicle dealer;

1. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by Motor Vehicle Dealers Act, Regulation 801 Section 16 The Dealer further agrees to store his books and records at the location approved by the Registrar.
4. The Dealer will ensure that all advertisements placed by or on behalf of the

Dealer will identify his registered name and the address of the location approved by the Registrar.

5. The Dealer agrees not to invite the public to deal at a place other than his approved location.
6. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer shall maintain an office and a sign, visible to the public, at his registered location. The Dealer will maintain a lot adjacent to his office for retail sales. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in his business location in the form required by the Registrar. The Dealer further agrees to provide the Registrar with a municipal permit for the registered premise within 60 days of registration.
7. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
8. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
9. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
10. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
11. The Dealer agrees that it is under a positive obligation to disclose all material facts about the vehicles it sells to its customers. The Dealer agrees to make reasonable efforts to research the history of all its vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact, concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser. The Dealer agrees to keep a copy of all Safety Certificates he receives for all vehicles that are sold "fit". The Dealer further agrees to keep notes, records and other documentation related to the research of any vehicle he purchases and subsequently sells. Said research shall be maintained as part of the Dealer's books and records and kept in accordance with Motor Vehicle Dealers Act Regulation 801 Section 15.
12. Reza Alizadeh Safa and Mahmoud Alizadeh Safa agree not to transfer their registration to another dealership without receiving prior written authorization from the Registrar.
13. Mahmoud Alizadeh Safa agrees to provide the Registrar with proof of successful completion of the Automotive Certification Program through Georgian College within six months of registration.
14. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke his registration, arising from any matters

that have occurred or may occur related to honesty and integrity or financial position.

15. In the event that any of the Terms and Conditions set out herein are breached, the parties agree that the Registrar is authorized and directed to carry out the Proposal and shall revoke the registrations of 1329331 Ontario Inc, Reza Alizadeh Safa and Mahmoud Alizadeh Safa.
16. The Dealer hereby withdraws his appeal to the Licence Appeal Tribunal.
17. The Dealer acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of _____, 2000

Reza Alizadeh Safa
On behalf of the Dealer; 1329331 Ontario Inc..
I have authority to bind the Corporation..

Mahmoud Alizadeh Safa
On behalf of the Dealer, 1329331 Ontario Inc O/A Syprus Sales
I have authority to bind the Corporation.

The Terms and Conditions set out herein are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton
Registrar
Motor Vehicle Dealers Act

MED/00/195

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JEFFREY M. LEE D.C. Presiding Member
ROY MELVIN M.D., Member

APPEARANCES: KIEL BIEL
Representative for the Registrar of Motor Vehicles

Applicant
Agent for Applicant

DATE OF
HEARING: April 25, 2000

DECISION AND REASONS

This is an appeal to the Licence Suspension Appeal Board (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

The following documents were entered into evidence as exhibits with the consent of both parties.

By the Applicant:

Exhibit # 1 Notice of Appeal - dated March 06, 2000

Exhibit # 2 32 Page submission

By the Respondent:

Exhibit # 3 Ministry of Transportation submissions, tabs 1-24 with
Addition of true and certified copy of driver's record search.

PRELIMINARY MATTERS:

There were no preliminary matters and the hearing proceeded as scheduled.

FACTS:

The Applicant was brought to the attention of the Ministry of Transportation by way of a random update of his driver's licence. The Ministry's update indicated that the Applicant was required to file an updated medical report in order to maintain his classified driver's licence. This was to be filed with the Ministry in June 1997 and was to reference his alcohol consumption. The request was apparently not sent to the Applicant at that time. It appears, however coincidentally, that the Applicant received a 90 day ADLS on April 12, 1999 and notification was given on the April 21, 1999 requiring the Applicant to file a detailed report from a physician specializing in addictions medicine, confirming successful completion of a treatment program, participation in relapse prevention, period of abstinence and laboratory test results. The report was to be received by June 16, 1999. Failure to do this would result in further licence suspension.

The Applicant submitted documentation to the Board from his family Physician #1, Physician # 2, Gastroenterologist and Physician # 3, specialist in alcoholism and drug dependencies. In summary, these letters confirmed that the Applicant has a history of alcohol use, participation in relapse prevention programs on an on-and-off basis. The report submitted by Physician # 3 dated March 22, 2000 supports the diagnosis of Substance Related Disorder/Alcohol Dependence.

The Applicant followed the recommendations of Physician # 3 and completed a 28-day residential inpatient program for rehabilitation from his alcohol dependence. According to this report, the Applicant continues to be abstinent from alcohol since July 5, 1999. The Board accepts the report as confirmation of the diagnosis.

The Board also accepts that the blood tests submitted are not a true indicator of whether or not the Applicant continues to drink as the Applicant is suffering from Hepatitis C which can alter the levels of specific liver enzymes to resemble alcoholic hepatitis.

The Applicant provided testimony to this Board. The Applicant testified that he was not aware of what the criteria for his driver's licence were and what was required to have his driver's licence re-instated. It was pointed out to this Board by his Agent that the Applicant is a simple man and would have taken everything said to him literally and would not have known what steps to take, such as being abstinent for a period of one year as the Ministry had previously only requested a follow-up medical report referencing his alcohol use. According to the Applicant, if he had known this in April 1999, he would not have consumed alcohol in July 1999.

The Applicant testified that he is attending AA meetings regularly and his witness, Witness #1 has confirmed under oath that the Appellant has been regularly attending the AA meetings.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's driver's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.
- (2) The Board may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Board finds that on the basis of the evidence presented, the Applicant was suffering from an addiction to alcohol as described by regulation 340/94, Section 14(a) and (b).

The Registrar relies on Section 47(1)(g) to suspend the Applicant's driving privilege. The Registrar also relies on the medical standards of the C.M.A. and N.S.C.

The Board accepts the date of last alcohol consumption as July 5th, 1999 and not the 23rd of July 1999 as indicated by the Respondent. By applying the medical standards, the Applicant must confirm successful treatment for alcohol abuse, one-year total abstinence supported by MCV and GGT laboratory tests and participation in a relapse prevention program. The Applicant has provided the Board with a detailed history of relapse after attendance at previous programs. The Applicant has also admitted that he has a chronic alcohol problem.

The Board believes that the Applicant is aware of the gravity of the situation and is attempting to comply with the recommendations of the Ministry. The Board recognizes that the Applicant has attended a relapse prevention program and is attending an after-care program.

The Applicant has admitted to his past use/abuse of alcohol.

The Board accepts the evidence presented, however, the recommended one-year abstinence period has not been met.

The Registrar has provided sufficient evidence to this Board to show that the Applicant suffers from alcohol addiction and that it is likely to significantly interfere with his ability to drive a motor vehicle. The Registrar has met the onus of establishing this condition as described in Regulation 340/04 Section 14(a) of the HTA. The Board supports the recommendation of the M.A.C. and the Registrar that the Applicant must remain alcohol free for one year from the date of July 5th 1999 to support reinstatement of his driver's licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated September 29, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Board, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE BOARD that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.
Presiding Member

Roy Melvin, M.D.
Member

RELEASED: May 5, 2000

MED/00/197

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: JEFFREY M. LEE D.C., Presiding Member
ROY MELVIN M.D., Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: April 27th, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Suspension Appeal Board (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

The documents filed with the Tribunal were entered into evidence with the consent of both parties.

For the Applicant:

Exhibit # 1 Notice of Appeal dated March 9th, 2000

For the Respondent:

Exhibit # 2 Ministry of Transportation Submissions, tabs 1-6 received April 14, 2000

PRELIMINARY MATTERS:

There were no preliminary matters and the hearing proceeded

FACTS:

The representative for the Respondent, Kim Beintema was sworn and proceeded to give testimony. The testimony given was not challenged by the Applicant and accepted by this Tribunal as factual. Upon questioning from the Applicant of Miss Beintema, the Applicant was made cognisant of what the Ministry was requiring for licence reinstatement. He said that he was not aware of what was actually required and thought that he had complied enough to get his driver's licence back. Once Miss Beintema outlined the requirements for reinstatement, the Applicant was satisfied. The Ministry's representative and the Applicant agreed on the date of last consumption to be October 24, 1999. According to the Applicant, he has not consumed any alcohol since that time and has clearly stated that he is a recovering alcoholic. He provided supportive documentation from Physician # 1, Neurologist. Physician # 1 stated that "if he continues on the same path he would represent a reasonable candidate for reinstatement."

The Applicant and the Respondent have agreed that the Applicant will continue with ongoing AA meetings and that the Applicant will forward to the Ministry the appropriate laboratory test results that will substantiate his abstinence from alcoholic intake.

The Respondent has indicated that if the Applicant complies and submits the aforementioned documents, licence reinstatement will occur on the 24th of October 2000.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's driver's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.
- (2) The Board may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Applicant has admitted to this Tribunal that he is a recovering alcoholic and, accordingly, is suffering from an addiction to alcohol as described by Regulation 340/94 Section 14(a) (b). The Applicant has admitted to his abuse of alcohol.

The Board commends the Applicant for his efforts and accepts that the Applicant has stopped drinking. The effective date of this was agreed to as October 24th, 1999. This is supported by the medical evidence submitted by Physician # 1, Neurologist.

By applying the medical standards, the Applicant must confirm successful treatment for alcohol abuse, one-year total abstinence supported by MCV and GGT laboratory tests and participation in a relapse prevention program.

The Registrar has provided sufficient evidence to this Board to show the Applicant suffers from alcohol addiction and that it is likely to significantly interfere with his ability to drive a motor vehicle.

The Registrar has met the onus of establishing this condition as described in Regulation 340/94 Section 14(b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated December 12, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's Licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Board, and the submissions of the Registrar and of the Applicant.

IT IS THE DECISION OF THE BOARD pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee D.C.
Presiding Member

Roy Melvin, M.D.
Member

RELEASED: *May 5, 2000*

FORD CREDIT CANADA LTD.-DUDI

FORD CREDIT CANADA LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

FORD CREDIT CANADA LTD.
Applicant

MICHAEL LINDSAY, Representative for the Applicant

DATE OF HEARING: April 27, 2000

DECISION RELEASED: May 2, 2000 Toronto

REASONS FOR DECISION

A hearing was held on April 27, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Ford Credit Canada Ltd. (the "Applicant")
Motor Vehicle: 1997 Ford F250, Plate #484 OCL (the "vehicle")
Date of Appeal: April 7, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance (**Exhibit 2**).

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act (**Exhibit 2**).

This matter came before this Tribunal on April 27, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (**Exhibit 2**) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

FORD CREDIT CANADA LIMITED is the owner of the vehicle which is the subject matter of this appeal. The vehicle was leased to Christopher J. Kennedy on December 31, 1996.

In order to ensure that the customer complies with law relation to use of the motor vehicle, the lease contains the following provision:

"(21) Vehicle Use: You will obey all laws in using the Vehicle".

Failure to comply with clause (21) of the lease is a breach which entitles Ford

Credit Canada Limited to terminate the lease. Because the Ministry of Transportation advises us that Christopher Kennedy was driving while his licence was suspended, Ford Credit Canada Limited has terminated the lease and now wishes to take possession of the vehicle. A copy of this lease is attached to this Schedule.

Under the circumstances, Ford Credit Canada Limited has done everything it conceivably could to ensure that its customer complied with the law. Because the lease is now terminated, the driver, Christopher Kennedy, will not have the vehicle returned to him by Ford Credit Canada Limited. His loss of the vehicle is therefore permanent, a result more harsh for him than intended by the statute under which the vehicle is impounded.

The representative of the Applicant, Michael Lindsay who is employed by Ford Credit Canada Ltd, gave oral evidence.

On December 31, 1996, Christopher Kennedy (the "Lessee") entered into a 4-year written lease agreement with Sheridan Mercury Sales Limited (the "Dealership") in Mississauga with regard to leasing a 1997 Ford Pick-up truck. Upon signing the lease agreement, the Dealership obtained from the Lessee a photocopy of his driver's licence as well as a photocopy of his insurance coverage.

The Dealership thereafter assigned this lease agreement to the Applicant. The Applicant received the file which contained a copy of the Lessee's executed lease agreement, a copy of his driver's licence, a copy of his insurance coverage, pre-payment authorization form as well as lease-end options just to name a few.

Once the Applicant received this file, the Lessee's insurance information was outsourced to a company in San Francisco, which runs checks on each lessee's insurance coverage to determine its validity. Its turnaround time is approximately 60 days. At no time prior to or after the lease was entered into was a driver's record requested.

Mr. Lindsay did testify that the Applicant does perform due diligence on lessees, but only occasionally. Their practice mainly relies on the findings of the insurance check through the San Francisco company.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record as Exhibits 4 on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Christopher Kennedy;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of

impoundment had been convicted of the offence of failing to provide a breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 17, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the Lessee's driver's licence at the time in respect of which the order was made was not then under suspension.

Mr. Lindsay testified that the Applicant is the owner of the vehicle that has been impounded and at the time of impoundment the vehicle was being driven by the Lessee whose driver's licence was then under suspension.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

Mr. Lindsay testified that the branch where he is employed receives between 100 to 400 lease agreements per week. The Applicant's primary concern is whether the lessees can meet the financial requirements of their lease; a valid driver's licence and insurance coverage are secondary. If, for example, a lessee fails to meet its financial obligations under its lease agreement, that is about the only time that an in-depth investigation is done on that particular lessee wherein a driver's record would be requested.

Mr. Lindsay did make the argument and referred to clauses 16 and 21 of the lease agreement, which state:

“(16) **Default:** If You fail to make any payment under this Lease when it is due, or if You fail to keep any other agreement in this Lease, Lessor may terminate the Lease and take back the vehicle.

(21) **Vehicle Use :** You will obey all laws in using the Vehicle.”

Therefore, the Lessee was in default of the lease. The Applicant is entitled to have the vehicle returned to it and/or repossessed.

Unfortunately, neither the Dealership nor the Applicant took any measures any time after the execution of the above-mentioned lease agreement to ensure that the Lessee had a valid driver's licence. Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

The evidence before the Board is that the Applicant has not demonstrated that it made any attempts to satisfy the requirements of Section 50.2(3)(c) the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: *May 2, 2000*

THE HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V0500523 OWNED BY: Joey Pierre Desrochers of: Lot 5 Con 6 Stock Tp BX68, Val Gagne, Ontario P0K 1W0 made pursuant to section 55.1 of the Highway Traffic Act, effective on: April 14, 2000.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the Highway Traffic Act

JOEY PIERRE DESROCHERS

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Joey Pierre Desrochers, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the Statutory Powers Procedure Act, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: May 1, 2000

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

JOEY PIERRE DESROCHERS

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the Statutory Powers Procedure Act, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound # V0500523** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on April 14, 2000.
2. The applicant, **JOEY PIERRE DESROCHERS**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the Highway Traffic Act, stating **that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.**
4. Having received and reviewed the police information, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

NEWPORT LEASING LTD. -DUDI

NEWPORT LEASING LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: MALCOLM FEALING, Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Kirsten Hughes, Agent for and Representative of
Newport Leasing Ltd.

DATE OF HEARING: April 26, 2000

DECISION RELEASED: May 3, 2000 Hamilton

REASONS FOR DECISION

A hearing was held on April 26, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Mike Hughes (the "Applicant")
Motor Vehicle: 1996 Chev Van, Plate #866 8A7 (the "vehicle")
Date of Appeal: April 7, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 26, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

In response, the Applicant produced an order dated April 25, 2000, signed on behalf of the Licence Appeal Tribunal by Mr. Stuart Cork, Member.

This order was based upon a Motion, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's ground of appeal of exceptional hardship as a ground to be heard at a hearing to take place on April 26, 2000. On reading the exhibits and hearing submissions, the Tribunal found that the ground of exceptional hardship [section 50.2 (3) (d)] upon which the Applicant relied on the appeal did not apply by virtue of section 50.2 (4), as a previous order to impound under section 55.1 had been made with respect to another vehicle then owned by the Applicant.

The ground of exceptional hardship was dismissed, and did not form part of the hearing of April 26, 2000.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

The owner appeals based on section 50.2(c) and (d).

- (c) Under the first ground the owner submits that he exercised due diligence by pulling motor vehicle records for all of its drivers including Ian McMillan. On December 8, 1999 the driver in question showed as licenced.

In support of the motor vehicle record check please find enclosed a letter from our insurance agent dated March 20, 1999.

- (b) It is submitted that under s.22(2) the board may consider subsections (a) (b) (c) as the owner will demonstrate that subsection (3) is satisfied. The resulting hardship is upon the owner of the vehicle and several other employees, that make us a crew, and would use that vehicle which is impounded.

Mrs. Kirsten Hughes began by informing the Tribunal that she was involved in running the business.

Mr. Ian McMillan, was the driver whose driver's licence was under suspension when he was pulled over by the police on the 28th of March 2000, at which time the vehicle was impounded. He had been hired by the Company in mid-April 1999. Mrs. Hughes advised the Tribunal that her husband interviewed prospective employees. She was unable to state if her husband asked the Applicants to show their driver's licences at the time of the interview.

It was not company practice to check the validity of employees' driver's licences until the company's insurance was due for renewal. In this case, the renewal date was December 8, 1999. Mrs. Hughes was sure that it was company practice to provide the insurance company with all employees' driver's licence numbers. The insurance company then checked the validity of all licences prior to renewing the Insurance Policy.

The Tribunal was provided with the copy of a letter dated March 30, 2000, signed by Nina Welch of W.R. McCallum Insurance Limited, which states that at the time Mr. McMillan's record was pulled on December 8, 1999, his driver's licence was valid. There was no reason for the insurance company to inform Mr. Hughes of any concerns regarding McMillan's driving record.

Mr. McMillan was driving for three and a half months before the incident occurred. The Applicant did not find it unreasonable to presume that the driver continued to have a valid driver's licence. Her question to the representative for the Registrar was that if the onus was on the company to be sure that all drivers had valid licences, how often should a company check the drivers' records to demonstrate due diligence?

The Applicant informed the Tribunal that the company was at its busiest between March and September. Things became very quiet during the autumn and stopped altogether during the

winter. She emphasised that at the start of each season the staff were asked whether their driver's licences were in good standing.

The Applicant also expressed grave misgivings about the impoundment of the vehicle for 90 days. The vehicle was leased, and she had no control whatsoever over the actions of any of Newport Leasing's other lessees. She was very upset that her company was being penalized for actions that were entirely out of her control, and accordingly requested that if the Tribunal did not find that her company had exercised due diligence, then a reduction of the impoundment order from 90 days to 45 days should be considered.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mr. Ian McMillan.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of ability impaired, suspension no. 0045070 under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until 17 March 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3.

Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The only issue to be considered in this appeal is that of due diligence. The grounds of appeal under section 50.2 (3)(c) of the Act requires that the Applicant show the Tribunal that Newport Leasing Ltd. exercised due diligence in attempting to determine that Mr. McMillan's driver's licence was not suspended at the time of the impoundment of the Applicant's vehicle.

The agent for the Applicant did demonstrate that the company owned by the lessee had made an effort to confirm the validity of the driving licence. The company did receive a letter from the insurance company stating that the driver's licence was valid on December 8 1999. The Applicant also advised that the company asks every employee whether their driver's licences are valid at the start of every season. However, it is clear that the company relied on the insurance company to verify Mr. McMillan's driver's licence. The grounds of appeal under section 50.2 (3)(c) of the Act requires that it is the responsibility of the owner to exercise due diligence. This responsibility cannot be delegated to a third party.

The Tribunal, therefore, finds that the Applicant has failed to establish that due diligence was exercised as required by the Act.

With respect to the Applicant's plea to reduce the period of the impoundment from 90 days to 45 days, it must be pointed out that the Tribunal has no jurisdiction under the law to make such a ruling on humanitarian grounds. Section 50.2 (5) of the Act states, " the Tribunal may confirm or set aside the order to impound," and here the Act's requirements to stipulate a 90 day suspension are not in dispute.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

Malcolm Fealing, Presiding Member

RELEASED: May 3, 2000

BLAGA-DUDI & EXHP

ANA BLAGA

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK, Presiding member
CLARKE WALLACE, Member

APPEARANCES: F. C. ROWETT
Representative for the Registrar of Motor Vehicles

ANA BLAGA, Applicant
unrepresented

DATE OF HEARING: April 26, 2000

DECISION RELEASED: May 2, 2000 Toronto

REASONS FOR DECISION

A hearing was held on April 26, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Ana Blaga (the "Applicant")
Motor Vehicle: 1987 Cevro Celebrity, Plate #564 ZSF (the "vehicle")
Date of Appeal: April 6, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Board on April 26, 2000 and proceeded as an oral hearing.

The Board asked the parties if they wished to make any submissions prior to the Board commencing the hearing.

All documents tendered by the Appellant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The Applicant asked that her son, act as translator for her, as she had difficulties with the English language. Mr. Sanu Blaga, was administered the oath for a translator and proceeded to translate the proceeding for his mother into Romanian.

ISSUE:

The Applicant's request for a hearing filed with this Board (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Board heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Board in support of appeal states:

DID NOT KNOW THAT MY SUN WAZ OWER MEDICATED AND HAD BEEN DRINKIN 3 BEER. TAKE KEY WENT DOWN. WHAT HAPPEN IS THE POLICE FOUND MY SUN BEHIND CANADA TRUST BANK WITH CAR PARKED SORRY CAN NOT WRITE EVERY THING GOOD ON PAPER WILL EXPLAIN MORE IN PERON
THANK YOU

The Applicant testified that having this vehicle impounded has created hardships for her as she is transported by her husband in this vehicle to various medical appointments on a weekly basis. Without the vehicle her ability to attend doctors appointments and buy groceries and perform other household errands has been seriously affected. The Applicant, unlicensed herself, gave the vehicle keys to her son (the driver of the vehicle at the time of the impoundment) and his friends to conduct banking business. Her son's driver's licence was under suspension at the time, and was charged and the vehicle was impounded.

The Applicant testified that she had on occasion entrusted the keys to her vehicle to a friend of her son's, whom she believed to be responsible, and to have a valid driver's licence. Furthermore, she had known prior to the impoundment that her son did not possess a valid driver's licence.

The Applicant testified she suffered from a variety of health problems necessitating doctors appointments every two weeks and a doctors report put in evidence that the Applicant was hospitalized for the period April 2-6, 2000.

Because of her health condition she testified she was unable to use public transportation and that she could not get assistance from her husband who also suffered health problems and was generally unwilling to help.

Her son lives separately from her parents, is at school five days a week and is unable to assist the Applicant.

The Applicant also stated she could not afford taxicabs.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
3. Doctors letter regarding hospitalization of the Applicant.
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of a variety of driving offences.

The Registrar questioned the Applicant regarding seeking assistance to utilize public transport to attend doctors appointments and to grocery shop and the viability of taking taxicabs.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Board. The Board on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Board is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Board where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's

licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

The Applicant's testimony did not show that the Applicant made any inquiry as to the status of her son's driver's licence being valid because she knew it was under suspension. She made no inquiry as to the status of his friends' driver's licences. Accordingly, with no evidence of inquiry on her part, she has not established due diligence as required as a ground of appeal under section 50.2 of the Act.

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Appellant has appealed on the grounds of exceptional hardship, in accordance with Section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Board with the specific criteria the Appellant must meet to determine if in fact exceptional hardship will result from the impoundment.

In order for the Appellant's claims to be considered under Section 22(1)(a) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Appellant has made no specific claims of exceptional hardship as described by Section 22(1)(a) or (b).

The Board is bound by section 22 of Regulation 632/98 which requires an Applicant to establish that alternatives to the impounded vehicle be considered when the Applicant appeals on the basis of exceptional hardship under section 50.2 of the Act. The Applicant failed to show serious consideration of alternatives to the impounded vehicle, such as, gaining assistance from relatives or others to help her to attend medical appointments, using public transportation or considering other means of help.

DECISION:

After considering the evidence, pursuant to the authority vested in the Board under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Board confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Clarke Wallace, Member

RELEASED: May 2, 2000

CHARMAN-TIME

JAMES DOUGLAS CHARMAN

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by James
Douglas Charman seeking an extension of the
time requirements for this Applicant to commence
this appeal from an impoundment order of the
Registrar under Section 55.1 of the Highway
Traffic Act;

AND IN THE MATTER of

JAMES DOUGLAS CHARMAN

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: Elizabeth Sproule, Presiding Member

APPEARANCES: Kim Grosskurth
Representative for the Registrar of Motor Vehicles

James Douglas Charman
Applicant by teleconference call

DATE OF
MOTION: April 26th, 2000

ORDER

A motion was heard on April 26th, 2000, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the Highway Traffic Act, R.S.O. 1990. c.H.8 amended ("HTA").

Submissions of Written Material

The Applicant submitted the following documents:

1. Copy of Impound Order dated February 27th, 2000.
2. Original Notice of Appeal/Owner's Position received March 29, 2000.
3. Copy of owner's vehicle ownership permit.
4. Request for motion received April 11, 2000.

The Facts

The Applicant is the owner of a motor vehicle which was impounded for a period of 45 days pursuant to an order of the Registrar issued under section 55.1 of the Highway Traffic Act R.S.O. 1990, c. H.8 as amended (the "Act").

The motor vehicle was impounded on February 27th, 2000, while it was being driven by the Applicant's common-law spouse.

The Applicant's Notice of Appeal to the impoundment was dated March 23rd, 2000 and was received by the Board on March 29th, 2000, outside of the 15 days prescribed by Section 20(1) of Regulation 632/98 made under the Highway Traffic Act. The motion presently before the Board is for an order, in terms of section 20(7) of the above regulation, for an extension of the time for the filing of the Notice of Appeal.

The Law

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Board under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Board within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Board may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

The Order

THE BOARD RULED TO REFUSE TO GRANT an extension of the time to commence this appeal for the following reasons.

REASONS FOR ORDER

Section 20(7) of Regulation 632/98, provides the Board with the specific criteria that the Applicant must meet to satisfy the Board that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that the owner, acting in good faith, was unable through accident, illness or other cause beyond the owner's control to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. The Board is precluded under section 20(7) of Regulation 632/98 from considering other factors not arising from or directly related to these criteria. The Applicant's explanation for not filing within the required 15 days was that he was naïve about these kinds of proceedings and that he was very busy with work.

The evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle, under Section 55.1 of the Highway Traffic Act, was the result of accident, illness or other cause beyond the Applicant's control as required by section 20(1) as read with section 20(7) of Regulation 632/98. Further, the Applicant has not demonstrated to the Board that there are reasonable grounds for applying for the extension and for granting relief. Accordingly, the requirements under section 7 of the Licence Appeal Tribunal Act have not been met.

The motion brought by the Applicant to the Board for an extension of time to appeal is therefore dismissed.

LICENCE APPEAL TRIBUNAL

Elizabeth Sproule
Presiding Member

RELEASED: *May 1, 2000*

MURDOCH GROUP INC.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL:	JOE HEWITT Presiding member	
APPEARANCES:	KIM BEINTEMA Representative for the Registrar of Motor Vehicles Murdoch Group Inc. John Knight, representative	
DATE OF HEARING:	May 3, 2000	
DECISION RELEASED:	May 8, 2000	Sudbury

REASONS FOR DECISION

A hearing was held on May 3, 2000, at Sudbury, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar") made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Murdoch Group Inc. (the "Applicant")
Motor Vehicle: 2000 Chevrolet Impala, Plate # 676 WPO (the "vehicle")
Date of Appeal: April 13, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on May 3, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"The vehicle owner, Murdoch Group Inc., rents vehicles under the name "National Car Rental". The impounded vehicle was rented to a Michel McMahon. Mr. McMahon proceeded to lend the car to a Mr. Jason Lebreton (suspended licence) without Murdoch Group Inc. being informed and without consent from our office, which violates the terms and conditions of the rental agreement."

Mr. John Knight, vice-president of the Murdoch Group, appeared on behalf of the Applicant. Mr. Knight testified that on March 29, 2000 they rented a vehicle to Mr. Michael McMahon. The vehicle was rented for three days and Mr. McMahon was to be the only driver under the terms of the rental agreement filed as exhibit #4. The terms and conditions of the rental agreement were explained to Mr. McMahon at the time of the rental of the vehicle. Mr. McMahon produced a valid driver's licence at the time of the rental.

Mr. Knight stated that the Applicant exercised due diligence in attempting to ensure that no person other than the authorized driver, sign the rental agreement. The rental agreement was then explained to Mr. McMahon.

Mr. Knight did not know how Mr. Jason Lebreton became the operator of the rental vehicle whether it was stolen or loaned to Mr. Lebreton at the time of the impoundment. Mr. Lebreton did not have consent or authorization from the Murdoch Group to use its vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jason Lebreton;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 8, 2023.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

To succeed in this appeal, the Applicant must establish that it exercised due diligence to determine that Jason Lebreton's driver's licence was not under suspension at the time of the vehicle being impounded.

The Tribunal finds that Jason Lebreton's driver's licence was under suspension and further finds that he was driving the Applicant's motor vehicle at the time that it was impounded.

Section 50.2(3)(c) of the Act requires that the owner, Murdoch Group Inc., exercise due diligence in attempting to determine that Jason Lebreton driver's licence was not suspended at the time of the impoundment of the owner's motor vehicle.

The evidence does not establish that the Applicant made any inquiries with respect to the status of Mr. Lebreton's licence. The Applicant argues that Mr. Lebreton was unknown to the Applicant and, therefore, it is not to be expected that the Applicant would be required to make inquiries respecting Mr. Lebreton. However, the ground of appeal argued by the Applicant is subsection 50.2(3)(c) of the Act which requires that the Applicant making inquiries as to Mr. Lebreton's licence at the time of the impoundment. Meeting the requirements of subsection 50.2(3)(c) is the sole basis of this Tribunal's jurisdiction in this hearing.

The Tribunal finds that the Applicant has failed to establish that the owner of the vehicle exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joseph Hewitt, Presiding Member

RELEASED: May 8, 2000

RICHARD SALOMON

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: WILLIAM WARBURTON
Presiding member

APPEARANCES: K. M. BIEL
Representative for the Registrar of Motor Vehicles

RICHARD SALOMON, Applicant
unrepresented

DATE OF HEARING: April 28, 2000

DECISION RELEASED: May 2, 2000 Toronto

REASONS FOR DECISION

A hearing was held on April 28, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 as amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Richard Salomon (the "Applicant")
Motor Vehicle: 1987 Honda Accord, Plate # AHED 455 (the "vehicle")
Date of Appeal: April 7, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on April 28, 2000 and proceeded as a written hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

April 3, 2000

Dear Sir / madame

I am requesting a notice of appeal regarding the forty five day impoundment on my vehicle. The event leading to the impoundment was that I had a few drinks and did not want to drive my car. I had asked my friend to drive it to my residence and he could stay the night. When we were stoped by the police I was informed that he was under suspension and that my car would be impounded.

To explaine my situation, the car was bought for me to help my mother get to and from work. She does not drive and she works off hours and transportation is difficult for her.

I have created a difficult terrible situation for my mother and may have to give up her job because of it.

My mother and I leave our home at 5:45 in the morning to one of the elderly people she cares for from my place of employment.

I arrive at aproximetly 3:30 after my job to take her to another residence where she stays until until 7-8 pm. My mother helps theise elderly people by attending their needs, laundry, light house keeping, yard work, etc. She has grown to the people and they have likewise, they look forward of arival and depend on my mother very much.

I am writing in the hope that I can have my car released before the 45 days so that my mother does not have to give up her employment. I have put my mother in a tight situation because of my stupidty that I take responsibility for.

I thank you for your time and hope that this situation can be resolved as soon as possible.

I have included letters from the people that my mother cares for.

Richard Salomon

Attached to the above submission was the following written submission from Willa McMillan:

To Whom it may concern:

This letter is to confirm that Deborah Salomon is the caregiver to my mother three days a week. Mrs. Salomon has told me her situation ...that she may have to quit because of the travel difficulties her son has created.

If this letter helps in any way that this situation does not occur we (my 81 year old mother and I) would be forever grateful. I have interviewed many people. But no one has the capability Mrs. Salomon has shown.

She arrives at 6:30 p.m. until 3:30 three times a week. Mrs. Salomon cleans, prepares meals, takes my mother for walks and bathes her. (an unreplaceable friend to her)

I thank you for taking the time to read this letter and I hope it helps our situation.

My name is Willa McMillan and I can be reached at <telephone #>.

Thanks again

Willa McMillan

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Daniel T. Evans.
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs. alcohol in 100 millilitres of blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 12, 2000.
5. Copy of the Ministry of Transportation records indicating that the suspended driver, Daniel T. Evans, is the registered owner of a motor vehicle.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines Exceptional hardship as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3)(d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Tribunal may consider the criteria set out in clauses (2)(b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3)(a), the owner must demonstrate that every reasonable option has been considered and

inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds that the impoundment of his vehicle will result in exceptional hardship.

Under Section 22 of Regulation 574 of R.R.O. 1990, as amended by Ontario Regulation 632/98, the owner must establish that no alternative to the impounded vehicle is available as a prerequisite condition for a finding of exceptional hardship under subsections (1) or (3).

The Applicant does not discuss the issue of his attempts to secure alternative transportation for his mother. The Applicant does not mention, for example, the use of taxis, the renting of a vehicle, the use of public transportation, or the borrowing of the vehicle of the suspended driver, Daniel T. Evans. The Tribunal notes that the vehicle was impounded on March 23, 2000 and that the Applicant's Position in Appeal was written on April 3, 2000. The Applicant's statement indicates that as of April 3, 2000 the Applicant's mother was still employed. The statement does not indicate that the Applicant's mother had not attended at her workplace(s) since the impoundment of the vehicle. Therefore, it appears that the Applicant was able to arrange alternative transportation for his mother between March 23 and April 3, 2000. Presumably, these arrangements can be carried forward until the end of the impoundment period.

Therefore, the Tribunal finds that the Applicant has failed to establish that no alternative to the impounded vehicle is available. On the contrary, the Applicant's evidence suggests that a somewhat difficult alternative has been arranged.

Furthermore, the Applicant has also failed to establish any of the other conditions required for a finding of exceptional hardship. In addition to establishing that no alternative to the impounded vehicle is available, the Applicant must establish that the impoundment will result in:

- (a) loss of employment or economic loss that will be immediate, significant and lasting; or
- (b) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (c) a threat to the public health and safety...of a community in whose service the motor vehicle is ordinarily used.

Regarding condition (a), the Applicant does express anxiety that his mother "may have to give up her job." The Applicant's evidence does not establish that his mother is in danger of being terminated by her employer because of the situation. No evidence about the attitude of her employer has been placed before the Tribunal. The Applicant does not indicate whether or not the possibility of securing some form of accommodation by her employer has been explored. The Applicant does not indicate whether or not the options of having his mother take vacation time or a leave of absence have been considered.

Regarding condition (b), the health or safety of the Applicant or his mother is not at issue in this appeal.

Regarding condition (c), the Applicant's mother is said to prepare meals for, at least, some of the people that she serves. Since the consumption of meals is necessary to maintain good health, condition (c) may seem to warrant consideration. Although it is not explicitly stated in the evidence, it is likely that the Applicant's mother is employed by a home care agency. In the worst case scenario, where the Applicant's mother is unavailable for work, the agency would dispatch another employee to service her clients. Some alternative arrangements must exist when the Applicant's mother is sick, on vacation, or absent from work for any reason. Therefore, a threat to the public health and safety of a community could not exist as a result of the impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

William Warburton, Presiding Member

RELEASED: *May 2, 2000*

COUNTRY LANE HOMES

COUNTRY LANE HOMES LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: JOHANNE MORISSETTE, Vice-Chair

APPEARANCES:

No one appearing for the Applicant
MICHAEL BADER, Counsel, representing Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING: May 2, 2000 Kingston

ORDER

WHEREAS a written Notice of Proposal dated July 16, 1999, to refuse to renew the registration of Country Lane Homes Ltd. (the Applicant) was issued by the Registrar of the Ontario New Home Warranty Program (the Registrar) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant appealed the proposal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) which appeal was to be heard in Kingston on May 2, 2000;

AND WHEREAS prior to the commencement of the hearing, the Tribunal was advised by the Applicant in writing, that she wished to withdraw her appeal;

NOW THEREFORE by virtue of the authority vested in it under section 9(4) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Registrar to carry out his Proposal to refuse to renew the Applicant as builder under the Act, and therefore this matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

Johanne Morissette
Vice-Chair

Released: May 8th, 2000

200-ALCL

MED/00/200

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Antoine Aouad, M.D., Presiding Member
Howard Goldstein, M.D., Member

APPEARANCES: Sandra Quadrini,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: April 28,2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – received March 15, 2000

By the Respondent:

- a) Exhibit # 2 Ministry of Transportation Submissions tabs 1 – 4
- received April 18, 2000

PRELIMINARY MATTERS:

Respondent submitted File Summary.

FACTS:

The Applicant is appealing the suspension of his driving privileges effective 2000 02 12 as per Exhibit # 1 .

A Medical Report prepared in 96 05 09, by Physician # 1, the Applicant's physician of "7 years", informs the Ministry that the Applicant suffers from an addiction. In his handwritten comments, Physician # 1 notes *"No evidence of any recent alcoholism/no seizures. / ...Drinking problem last 5 months"*. (Exhibit # 2 Tab 1)

Physician # 2 submitted an unsolicited Medical Condition Report dated *"Jan19, 2000."* Physician # 2 advises: *"Truck Driver; Alcoholism; seen for assessment re treatment program; concerned re safety driving."* (Exhibit # 2 Tab 2)

At the hearing, the Applicant admitted to being an alcoholic who has been on and off treatment for addiction since 1990. In fact, in 1990 the Applicant took time off work to admit himself to Homewood, where he stayed for 54 days.

Since then, the Applicant has attended AA but continued drinking socially. More recently, 1999, the Applicant noted that he had become a binge drinker drinking approximately a *"...case and half of beer on weekends over a 3 – 4 day period..."*

After his physician recommended abstinence, the Applicant did not imbibe any alcoholic beverages from November to January. However, in January, he started to binge once again, and sought Physician # 2's assistance.

The Respondent explained that in 1996 the Applicant had his class "A" licence downgraded to a "D", with the further condition that a medical report be submitted every three years.

The Ministry overlooked the fact that no report was rendered in 1999, and took no action. No *"flags were raised"* until the Medical Condition Report from Physician # 2, was received.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "any...sufficient reason..." The Applicant came to the attention of the Ministry for failure to provide a medical report required every three years.

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, by suspending the Applicant's driver's licence.

The Respondent, contends that the Applicant is in violation of Section 14 (b) which states that:

"An applicant for or a holder of a driver's license must not,

- b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."*

The Applicant has elected not to provide the Tribunal with any reports from either of his physicians or of any of the rehabilitation programmes he is attending.

The Tribunal is left to consider, only, the Applicant's testimony. The Applicant, by his own admission acknowledged a drinking problem that has plagued him for years. He has checked himself into the hospital and/or rehabilitation programs on two occasions. Nonetheless, the Applicant claims that his drinking has not affected his driving since his previous convictions in 1990.

The N.S.C. (National Safety Code for Motor Carriers -13.2 recognizes habitual alcoholic intoxication as a serious disability. The standard applied is explicit

"...persons habitually dependent on alcohol should not drive any class of motor vehicle until evidence of alcoholism is no longer a problem."

The Tribunal recognizes, and has taken in consideration that the guidelines of the Ministry of Transportation Medical Advisory Committee and the National Safety Code for Motor Carriers are only policy not legislation. However, the guidelines are relevant to the determination of whether there is sufficient reason to suspend a driver's licence.

It is laudable that the Applicant is willing to continue receiving treatment for his condition. Nonetheless, all evidence corroborates the fact that the Applicant's previous endeavours to stop drinking were unsuccessful. Thus, while commending the Applicant for his efforts, the Tribunal feels that it is reasonable to allow at least the recommended one-year period of abstinence to elapse, prior to re-instatement of his licence.

In weighing the evidence presented, the Tribunal is satisfied that section 14(b) of Regulation 340/94 apply to the Applicant.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 12, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Howard Goldstein, M.D.
Member

RELEASED: *May 2, 2000*

TRAVEL TRAVEL INC. o/a THE STANDBY CLUB

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
TRAVEL TRAVEL INC. O/A THE STANDBY CLUB
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: March 3, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TRAVEL TRAVEL INC. O/A THE STANDBY CLUB

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by Travel Travel Inc. o/a The Standby Club, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 10th, 2000

B E T W E E N:

TRAVEL TRAVEL INC. O/A THE STANDBY CLUB

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Travel Travel Inc. o/a The Standby Club (hereinafter referred to as “the Registrant”) is a company incorporated pursuant to the laws of Ontario and registered as a travel agent (Registration No. 01246329/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as “the Act”). The Registrant was originally approved for registration as a travel agent on December 10, 1982.
2. On December 11, 1995, the Registrant signed an acknowledgement of Terms and Conditions of Registration, in which it agreed, among other things, to maintain trust accounting, maintain the required minimum working capital, and file financial statements within 3 months of its fiscal year end.
3. On March 3, 2000, the Registrar issued a Notice of Proposal to Revoke Registration for failure to file the Form 1 filing and make the requisite payment to the Ontario Travel Industry Compensation Fund (hereinafter referred to as the “Fund”) for the period ended October 31, 1999.
4. On March 7, 2000, the Registrant submitted the Form 1 filing for the period ended October 31, 1999, and made the corresponding payment to the Fund.
5. On March 23, 2000, the Registrant submitted the financial statements as required for the fiscal year ended October 31, 1999. The statements had been due by January 31, 2000.
6. On April 7, 2000, the Registrant provided evidence satisfactory to the Registrar that the working capital deficiency revealed by the financial statements as filed for the fiscal year ended October 31, 1999, had been addressed.

7. On April 27, 2000, the Registrar issued a Notice of Further and Other Particulars which set out further information which had come to the attention of the Registrar and which related to the fitness for registration of Travel Travel Inc. o/a The Standby Club including persistent late filing of financial statements, previous working capital deficiencies, persistent late filing of Form 1 and two previous Proposals to Revoke Registration.
8. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Commercial Registration Appeal Tribunal under s. 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated March 3, 2000, with respect to Travel Travel Inc. o/a the Standby Club;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - (a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation") and which it has acknowledged in its Terms and Conditions of Registration;
 - (b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - (c) The Registrant shall submit a renewable and irrevocable Letter of Credit to the Registrar in the amount of \$10,000.00 (Canadian) with the beneficial interest in favour of the Travel Industry Council of Ontario, on or before June 30th, 2000;
 - (d) The Registrant shall maintain the above-noted renewable and irrevocable Letter of Credit as submitted to the Registrar for so long as the Registrar shall so require;
 - (e) The Registrant shall maintain proper trust accounting pursuant to and in accordance with section 36 of the Regulation;
 - (f) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 28th day of each month for the preceding month, beginning on **May 28th, 2000**, for the month of April, 2000, for so long as the Registrar shall so require;
 - (g) If the above-noted trust account reconciliations as filed according to (ii)(f) are incomplete and/or reveal a customer deposit deficiency, the Registrant will have **five (5) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the

correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- (h) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended April 30th, 2000, on or before **June 14th, 2000**;
- (i) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended October 31st, 2000, on or before **December 15th, 2000**;
- (j) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending October 31st, 2000, on or before **January 31st, 2001**;
- (k) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- (l) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended April 30th, 2001, on or before **June 14th, 2001**;
- (m) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended October 31st, 2001, on or before **December 15th, 2001**;
- (n) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending October 31st, 2001, on or before **January 31st, 2002**;
- (o) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- (p) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended April 30th, 2002, on or before **June 14th, 2002**;
- (q) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended October 31st, 2002, on or before **December 15th, 2002**;
- (r) The Registrant shall file the financial statements as required by the Regulation for the fiscal year ending October 31st, 2002, no later than **January 31st, 2003**;
- (s) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **30 days** from the date of notice of the deficiency to fully and completely address any deficiency and produce proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- (t) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - (u) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - (v) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions **(ii) (c), (d), and (f) to (s)** inclusive, the Registrar **shall revoke** the Registrant's registration on five (5) days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of May, 2000.

Travel Travel Inc. o/a The Standby Club

Registrar, *Travel Industry Act*

Ms. Dolores Lawrence
Travel Travel Inc. o/a The Standby Club
I have authority to bind the corporation

Michael Pepper, Registrar
Travel Industry Act

BLOK

AMY JENNIFER BLOK

APPEAL FROM AN ORDER OF IMMEDIATE SUSPENSION

APPEAL FROM THE PROPOSED ORDER OF THE
REGISTRAR OF THE *GAMING CONTROL ACT*

TO REVOKE REGISTRATION

TRIBUNAL: BEVERLEY J. READE, Vice-Chair

APPEARANCES:

PATRICK DUCHARME, counsel representing the Applicant
KARIM KARSAN, counsel, representing the Registrar,
Gaming Control Act

DATE OF HEARING: May 3, 2000 Windsor

ORDER

PURSUANT to the provisions of the Gaming Control Act, S.O. 1992, Chapter 24, as amended, the Applicant, Amy Jennifer Blok appealed a Notice of Order of Immediate Suspension and Notice of Proposed Order to Revoke Registration as a Gaming Assistant of the Registrar, *Gaming Control Act* set out in an Order dated October 29, 1997;

AND WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for the hearing of the Applicant's appeal to be held on January 11 and 12, 2000, which did proceed and was to continue on May 3, 2000;

AND WHEREAS at the continuation of the hearing on May 3, 2000, the Tribunal was informed by the parties that a written settlement had been arrived at, where the Deputy Registrar, *Gaming Control Act* withdrew the Notice of Proposed Order and the Applicant hereby withdrew her request for a hearing; and

Having reviewed the signed Minutes of Settlement as to the disposition of these proceedings, which attached hereto as Schedule "A".

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Beverley Reade
Vice-Chair

Released: May 9th, 2000

SCHEDULE "A"

IN THE MATTER OF THE
GAMING CONTROL ACT, 1992
S.O. 1992, c. L. 24, as amended

AND IN THE MATTER OF THE
NOTICE OF PROPOSED ORDER
TO REVOKE THE REGISTRATION
OF AMY JENNIFER BLOK

MINUTES OF SETTLEMENT

The Registrant, through its Counsel, and Counsel for the Deputy Registrar agree that the Notice of Proposed Order to Revoke Registration dated October 29, 1997 be disposed of as follows:

1. The Deputy Registrar does hereby withdraw the Notice of Proposed Order.
2. The Registrant does hereby withdraw her request for hearing.

DATED THIS 3rd DAY OF MAY, 2000.

Patrick Ducharme
for the Registrant

A. Karim Karsan
for the Deputy Registrar

PREHEARING

GEORGE AND KATHERINE VALKANAS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE HILEY, Vice-Chair

APPEARANCES:

GEORGE & KATHERINE VALKANAS appearing on their own behalf
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
TREVOR BARNES, Agent, on behalf of Law Development Group
(Woodbridge) Limited, Added Party

DATE OF

PREHEARING: April 27, 2000

Toronto

ORDER

Following attendances on April 27, 2000 at the prehearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) of George and Katherine Valkanas (the "Applicants") and Netanus Rutherford, Counsel, on behalf of the Ontario New Home Warranty Program (the "Program"), and Trevor Barnes, Agent on behalf of Law Development Group (Woodbridge) Limited (the "Added Party"), the parties reached a settlement with respect to the Applicants' claims; and

The Tribunal makes the following Order incorporating the settlement between the parties with regard to the claims of Mr. and Mrs. Valkanas:

- 1) The Program is to pay Mr. and Mrs. Valkanas the sum of sixteen thousand three hundred dollars (\$16,300.00).
- 2) This payment is to be made no later than one month from the date of the prehearing of April 27, 2000.
- 3) The Applicants, Mr. and Mrs. Valkanas agree that the payment of \$16,300.00 is full and final settlement of their claims against the Program and the Builder.

NOW THEREFORE, upon consent of the parties, this Tribunal Orders that the proceedings in this matter are hereby concluded.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice-Chair

MAZDA CANADA CREDIT INC.-DUDI & EXHP

MAZDA CANADA CREDIT INC.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ALAN HEWSON, Presiding member
NORMAN MEALING, Member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

ANDREW HOPPER,
Agent for the Applicant

DATE OF HEARING: May 11, 2000

DECISION RELEASED: May 15, 2000 Toronto

REASONS FOR DECISION

A hearing was held on May 11, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Mazda Canada Credit Inc. (the "Applicant")
Motor Vehicle:	1998 Mazda B2500, Plate #YN3 936 (the "vehicle")
Date of Appeal:	April 17, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on May 11, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Friday, April 14, 2000

License Appeal Tribunal
1 St. Clair Ave. West, Suite 1200
Toronto, Ontario M4V 1K6

Below are my comments regarding a couple of different issues requested in the appeal process.

Late Filing:

The person who was driving and is the cause of the impoundment did not tell me that the vehicle was impounded for a full week. At the time I found out it was I started looking into the impoundment and I gathered all the information required to process. As I am leasing this vehicle I also had to contact Mazda and request a letter to allow me to process the appeal.

Request of an Electronic (Telephone conference)

As I run my own small business I am very busy and often on the road. A telephone conference will be the least intrusive.

Owners Position

While Byzantine Protection Services is not actually the owner it is the company that will suffer not the driver who has caused all these problems. Byzantine Protection Services is a small business which is run from my home at present and the loss of a service vehicle on top of the impound fees is going to be very difficult for us to survive. While every effort will be made to recoup all costs associated with this incident from the driver, there is a good chance we will not be successful as he is very deep in debt at present or it will take a very long time to be paid back, money we can not afford to wait for.

As to my responsibility to verify that a driver's license is valid and has no orders against the owner, I provided my Insurance company with a list of drivers last May, May 1999, when we started with this insurer, I made the assumption that since I had not heard from them that all was ok. I have been told there is an eight hundred number that can be used to verify drivers I had not heard of this number before this incident, if it exists I will find it and use it.

Regards,

Andrew A. Hopper
President / General Manager

The agent for the Applicant, Mr. Andrew Hopper, the lessee herein, stated that he owns and operates a small home-based business that involves fire safety and security systems. He stated that following a chance meeting with Mr. Michael St. Pierre at a Karate club, he offered to let him stay in a room at his home as Mr. St. Pierre did not have a permanent residence at the time.

Mr. Hopper stated that Mr. St. Pierre was the driver of the vehicle at the time of the impoundment, and he had been hired in December 1998. When the vehicle insurance policy for his home based business (Byzantine Protection Services) was to be renewed in May 1999, one of his employees gathered the driver's licence numbers of all his employees and subsequently submitted them to the insurance company. Mr. Hopper stated that he assumed the insurance company would check on each driver to see if they were acceptable from an insurance perspective for his company. He further stated that he actually did not know what the insurance company did regarding driver checks.

Mr. Hopper stated that he did not look at the individual licences nor did he do any other follow up of the drivers' licences. He has stated that he was unaware of the need for or even the availability of driver's abstracts. Mr. Hopper's verbal evidence was credible and presented as truthful.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael St. Pierre;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 16, 2002.

The representative for the Respondent further stated that in fact, Mr. Michael St. Pierre, the driver of the vehicle at the time of the impoundment, has never been licensed nor has he ever applied for a driver's licence. The Respondent's representative further stated that there was no due diligence performed by the Applicant or the lessee, Mr. Andrew Hopper.

The representative for the Respondent also stated that the current impoundment was for a period of 90 days as a result of a previous impoundment.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or

set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

There are two issues to be considered in this appeal and they are dealt with hereunder.

As to 1st. issue filed – Due Diligence

The Tribunal finds that Mr. Michael St. Pierre was driving the Applicant's vehicle at the time of the impoundment and that he was not appropriately licensed at the time. The grounds of appeal under section 50.2(3) of the Act require that the Applicant show the Tribunal that it exercised due diligence in attempting to determine that Mr. St. Pierre's driver's license was not suspended at the time of the impoundment of the Applicant's vehicle.

The evidence established that due diligence was not exercised by the Applicant. Also, the Tribunal notes that due diligence was not exercised by the lessee. Simply relying on the insurance company with coverage on the vehicle for verification is insufficient in demonstrating due diligence by the Applicant. The Tribunal also finds that the insurance company was under no duty to the Applicant to perform the tasks required of due diligence.

The Tribunal finds that the Applicant has failed to establish that due diligence was exercised as required.

As to 2nd. issue filed – Exceptional Hardship

Pursuant to the provisions of subsection 50.2(4), the Tribunal is unable to consider the issue of Exceptional Hardship as a ground of appeal in this hearing due to a previous impoundment.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Hewson, Presiding Member

Norman Mealing, Member

RELEASED: *May 15, 2000*

DEMOSTHENOUS

SOTOS AND DEBRA DEMOSTHENOUS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: G. KENT McCLURE, Q.C., Chair

APPEARANCES:

SOTOS DEMOSTHENOUS, appearing on his own behalf and on
behalf of DEBRA DEMOSTHENOUS
FIL CECE, Agent, on behalf of the Ontario New Home Warranty
Program

DATE OF
HEARING:

May 12, 2000

Toronto

ORDER

WHEREAS a written Decision Letter dated January 3, 2000, to deny the Applicants' claims (the Applicants) was issued by the Ontario New Home Warranty Program (the "Program") pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicants appealed the Decision Letter to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) where the appeal was to be heard in Toronto on May 12, 2000;

AND WHEREAS prior to the commencement of the hearing on May 12, 2000, the Tribunal was advised by the Applicants' in writing that they wished to withdraw their appeal for a hearing;

NOW THEREFORE this Tribunal orders on the consent of the parties that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 16th, 2000

Filename: Demosthenous.nhw

IZZARD

DARCY IZZARD

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

DARCY IZZARD, appearing on his own behalf
Aviva R. Harari, counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATE OF

HEARING: May 5, 2000

KINGSTON

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by the Applicant, Darcy Ross Izzard, to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) from a written Notice of Proposal dated January 13th, 2000 issued by the Registrar under the *Motor Vehicles Dealers Act* (the "Registrar") to refuse the registration of the Applicant under the provisions of the *Motor Vehicles Dealers Act* (the "Act").

The Applicant is 45 years old and once before in the late 1970s worked as a car salesperson. His criminal record started in 1978 and progressed to serious proportions ending in 1998 with a 3-year sentence in the penitentiary. He was addicted to alcohol and drugs, including heroin and cocaine but during his penitentiary sentence and since his release has somehow managed to break away from his addiction. He is intelligent and, to have come so far, is obviously determined. He now wishes to be registered again as a salesperson under the Motor Vehicle Dealers Act (the "Act").

ISSUE:

Has the Registrar erred in his decision to refuse registration to the Applicant as a salesperson under the Act?

FACTS:

The Registrar furnished the following particulars in support of his notice of proposal to revoke:

- 1) Mr. Darcy Izzard applied for registration as a motor vehicle salesperson on or about November 15, 1999.
- 2) On the application to become a registered salesperson, question 10 asks, "Have you ever been found guilty or convicted of an offence under any law or are there charges pending. This includes where a conditional discharge or an absolute discharge has been ordered.

The Applicant answered "yes" to this question indicating that he had been charged with "assault".

- 3) It came to the Registrar's attention that the Applicant in fact has several convictions which include but are not limited to: [There followed the list of 13 convictions, noted below].

THE EVIDENCE:

At the start of the hearing the Applicant and counsel for the Registrar agreed to a number of documents being entered as exhibits without the necessity of further proof. Without any prior disclosure, the Applicant also tendered four letters of support. As he was unrepresented, they were admitted subject to the insistence of the Counsel for the Registrar that the letters lacked weight because of the inability to cross-examine the authors.

Turning to the application form executed on November 15 1999, question 4 asked for the name and address of employer with dates.

In answer to this question the Applicant wrote:

"RETIRED From 96 11 11 to 99 11 10 "

In fact, this was a devious answer because these dates exactly covered the duration of the three-year sentence imposed in the federal penitentiary. This answer was part of the attempt by the applicant to conceal his criminal record from the Registrar.

As related by the Registrar, Question 10 on the form reads as follows:

Have you ever been found guilty or convicted of an offence under any law or are there charges pending. This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full particulars on a separate signed and dated statement.

Note: Where the Applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not been previously disclosed.

In answer to this question the Applicant wrote "Assault" and he attached a signed page reading as follows:

In the year 1995 a person assaulted my wife. I acted wrongly by taking the law into my own hands & I regret what I did, namely, causing bodily harm to such person.

I pleaded guilty in 406 Court Scarborough & received a 90-day weekend sentence, which I served two weekends & the rest in community service.

This was far from the truth. The Applicant had a criminal record stretching back to 1978. He had been convicted of the following offences:

<i>Date & Place</i>	<i>Charge</i>	<i>Disposition</i>
Feb 22, 1978 Toronto	Theft under \$200	3 months
Oct 31, 1978 Toronto	Possession of Property obtained by crime under \$200	\$200
Jan 30, 1995 Toronto	(1) Fail to comply with recognizance (2) Mischief over \$1000 (3) Assault sec 266 cc	(1) 45 days intermittent (2) 45 days intermittent con. (2) 45 days intermittent con
Jan 16, 1996 Toronto	Assault sec 266 cc	Susp sent & probation 1 year
Jul 25, 1996	Theft under \$5000	1 day & (time served 30 days)
Sep 10, 1996 Toronto	Robbery sec 344 cc	15 months & probation 2 years
Oct 2, 1996 Toronto	(1) BE & commit sexual assault (2) Forcible confinement (3) Sexual assault sec 271	(1-3-) 3 years on each charge conc & (5 months & 1 week pre- sentence custody) & prohibited firearms ammunition or explosives substance for 5 years
Sept 16, 1998	(1) Poss of Narcotic (2) Fail to comply with probation	(1 - 2) 5 days on each charge con

Oct 18,1999

Recognizance where fear personal
injury offence 810.2

Expiry Sept. 22, 2003

The answers to questions 4 and 10 could have seriously mislead the Registrar. The Applicant compounded this deceit when he obtained a certificate of his employer. The treasurer of Kingston Volkswagon Ltd. certified that he had personally discussed the answer to each question with the applicant prior to executing the document and was satisfied that the information given by the Applicant was to the best of his knowledge and belief true, and requested that the application be granted. Obviously, the treasurer had been duped.

Counsel for the Registrar called Linda Gordon as a witness. She stated that she was the director of compliance for the Ontario Motor Vehicle Industry Council ("OMVIC") and has been with OMVIC for three years. She made the point that disclosure is the first test of honesty and integrity and it is critical. The Applicant's record, she stressed, is very serious and recent, and his attempt to conceal it lacks the integrity and honesty required by section 5(1)(b) of the Act.

The Applicant also testified. He said that he did not lie on the application form but only failed to disclose. He stated the answer "retired" on question 4 meant retired to the penitentiary. This was an intentional false statement, which is how a lie is defined in the dictionary. The Applicant's repeated assertions that he knew the record would come to light and the Registrar would find out anyway does not reduce the impact of the deception about his criminal record. He said that until he saw the printout of his record, he did not remember all the things he had done as there were many things for which he had not been convicted. His motive was clear in the answers he gave. He said he had been out every day since his release in September 1998 looking for work but every attempt failed as soon as there was mention of the "pen" .

The Tribunal does not overlook the great credit due to the Applicant who has managed to be clean and sober from his addiction to alcohol and drugs for four years. This is an enormous achievement since he admitted he had an addiction for heroin and cocaine as well as alcohol, deeply imbedded in a life of crime. He obtained an early release from prison because he had an impeccable record in spite of there being more drugs available in the prison than outside. He takes his recovery seriously by going to AA and NA, once a week to a psychiatrist, keeps in touch with the Behavioural Assessment Section of the Toronto Police and helps with charity by taking released prisoners to AA.

The letters of support filed by the Applicant confirms this. According to the sales manager of Kingston Volkswagen, the Applicant impressed him both with a courteous and professional manner with their customers and with always being available when assistance was needed and never missing a day of work. In another letter, Ruth Warner, who apparently is a therapist in the sexual assault crisis centre but who writes without address or letterhead, clearly identifies the accomplishment of the Applicant rebuilding his life from scratch against all odds so that he now has a pro-social lifestyle including helping others deal with their own demons. The psychiatrist, Dr. Roberge, writes to the same general effect. Finally, his parole officer, Joanne Minnion, wrote there were no problems while she had him on parole.

The Applicant called a friend, Claude Plante, who is the RCMP, who knew the Applicant socially from meetings of Jehovah's Witnesses. Mr. Plante knew the Applicant's record. He noted the dramatic change and said he would trust the Applicant around his wife and kids.

The Applicant stressed that he was now a productive member of society.

THE LAW:

The Registrar bases his proposal to refuse to register the Applicant under sections 6(1) and 5(1)(b) of the Act which read as follows:

- 6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.
- 5(1) An applicant is entitled to registration...by the Registrar except where,
 - (b) The past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty;

The leading case of *Brenner* 19 CRAT SCO Decisions and Orders (1971-1989), page 59, is a decision issued on April 7, 1983 where the Divisional Court overruled a decision of this Tribunal. Southey J. states that the Registrar proposed to refuse registration because of the existence of the specific circumstances set out in Section 5(1)(b) of the *Motor Vehicle Dealers Act*:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honest. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed might have reformed himself.

Due to the particular facts in this case Southey J. sent it back for a rehearing, however, adding in the third last paragraph:

The proper question at the rehearing remains, however, whether the past conduct of the applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

Therefore, it is not sufficient for the Tribunal to reach a conclusion that it would have exercised the discretion differently from the way in which the Registrar did. Clearly, in order to overrule the Registrar the Tribunal must conclude that the Registrar was wrong in his decision and that the conduct of the Applicant does not afford reasonable grounds for his belief based upon it.

The above principle was affirmed by the Divisional Court in *Faccenda* [1994] 26 CRAT Part II 1050. In *Faccenda*, the Divisional Court, again on appeal from this Tribunal quashed a decision to direct a Registrar not to carry out his Proposal. At page 1051 the Court held:

It follows that the Tribunal should have refused to direct the Registrar to carry out his proposal only if it thought that the Registrar was in error in his belief.

APPLICATION OF LAW TO FACTS:

The Registrar has the onus of proving that the past conduct of the Applicant affords him reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

The grounds upon which the Registrar bases his proposal is that the Applicant answered "yes" to question 10 in the form indicating that he had been charged with assault. The question asked for full particulars, but the Applicant did not give these.

The Tribunal finds that the Applicant deliberately tried to mislead the Registrar about the seriousness and extent of his criminal record, although he was fully cognizant of it at the time that he completed and executed the application. He did so in three ways. The answer that he was "retired" when he was serving time was misleading and deceitful. The page of full particulars of his record showing only "Assault" was worse. Obtaining the treasurer's certificate by misstating the facts added another unfortunate dimension to a fraudulent scheme.

The Registrar has an obligation to protect people dealing in the motor vehicle industry. The standard is a high one involving public interest and consumer confidence, and it should not be modified in any way for applicants who bend the truth for personal gain.

The Tribunal therefore finds that the Registrar has acted reasonably in refusing to allow the Applicant to be registered as a motor vehicle salesperson. The case law is to that effect, for instance Re Moodie 1998 CRAT 120, Re Cook 1999 CRAT 4.

ORDER:

Accordingly, pursuant to the authority vested in it by section 9(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated January 13, 2000, to refuse the registration of the Applicant as a motor vehicle salesperson under the provisions of the Act.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: May 16th, 2000

V.I.P. IMPEX INC. O/A MAJOR MOTORS AND ALLY HEMANI

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
V.I.P. IMPEX INC. O/A MAJOR MOTORS AND ALLY HEMANI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: October 22nd, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

V.I.P. IMPEX INC. O/A MAJOR MOTORS AND ALLY HEMANI

- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by V.I.P. Impex Inc. o/a Major Motors and Ally Hemani, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 5th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

And To: Commercial Registration Appeal Tribunal
12th Floor
1 St Clair Ave. West
Toronto, ON M4V 1K6

From: VIP Impex Inc. o/a Major Motors
1296 Kennedy Road
Scarborough, ON M1P 2L5

Ally Hemani
1-69 Benson Ave
Richmond Hill, ON L4C 4E5

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, VIP Impex Inc. o/a Major Motors and Ally Hemani hereby consent to the following terms and conditions to their registrations as a motor vehicle dealer and salesperson, respectively, under the Motor Vehicle Dealers Act:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Commercial Registration Appeal Tribunal based upon the following Terms and Conditions:

1. The Dealer agrees to post a sign visible to the public, that is at least 8.5 by 11 inches which states "Any complaints or inquiries regarding this dealership may be directed to the Ontario Motor Vehicle Industry Council, 110-36 York Mills Road, North York, ON, M2P 2E9, 416-226-4500, 1-800-943-6002, fax 416-226-3208." Said sign shall remain posted at all times.
2. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
3. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
4. The dealer and salesperson agree that Peter Ingster a.k.a. Peter Johnson, and any of his immediate family shall have no interest or involvement, whatsoever, either directly or indirectly in the dealership. The Dealer and Salesperson further agree not to conduct any business whatsoever with Ingster or his immediate family.
5. The Dealer and Salesperson agree that no more than two times per calendar year the Registrar may request a financial audit of the dealer's books and records, which include but are not limited to all financial and banking information, to ensure compliance with the Terms and Conditions set out herein. Said audit shall be by a party selected by the Registrar and shall be at the expense of the Dealer and/or Salesperson.
6. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all original copies of books and records as required by the MVDA and its regulations. The Dealer further agrees to store its books and records at the location approved by the Registrar.

7. The Dealer and Salesperson will ensure that proper books and records, including bills of sale and consignment agreements will be maintained for all motor vehicles taken on consignment. This includes consignment contracts between the dealer and consignor, as well as bills of sale between dealer and consignor. Before taking a vehicle on consignment the dealer will confirm that the vehicle is properly registered in the name of the consignor. Prior to transferring the vehicle to a buyer, the Dealer will register the vehicle in the Dealer's name and then transfer same to the buyer.
8. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify its registered name and the address of the location approved by the Registrar.
9. The Dealer agrees not to invite the public to deal at a place other than its approved location.
10. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location in the form required by the Registrar.
11. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
12. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
13. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
14. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
15. The Dealer agrees that it is under a positive obligation to disclose all material facts, including but not limited to, the distance travelled of the vehicles it sells or leases to consumers. The Dealer agrees to make reasonable efforts to research the history of all its vehicles prior to sale and/or lease to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold and/or leased the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the consumer.
16. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
17. The Dealer and salespersons acknowledge that the Registrar may take further administrative action, including a proposal to revoke their registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
18. The Salesperson agrees to register and pass the certification course within 60 days from the date of this order.
19. The Dealer and Salespersons acknowledge that the Registrar may take further legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
20. In the event that any of the Terms and Conditions set out herein are breached, the Dealer and salespersons agree that the Registrar is authorized and directed to carry out the proposal and shall revoke the registration the Dealer and salespersons.
21. The Dealer and salespeople hereby consent to an order which may include the Terms and Conditions

set out herein.

22. The Dealer and salespersons hereby withdraw their appeals to the Commercial Registration Appeal Tribunal.

23. The Dealer and salespeople acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out herein.

Signed at Toronto this day of , 2000.

Witness

VIP Impex Inc. o/a Major Motors
I have authority to bind the corporation.

Witness

Ally Hemani

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton, Registrar

KUMPULAINEN

VAINO KUMPULAINEN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair, Presiding
TERENCE WARDROP, Vice-Chair
BILL McINTOSH, Vice-Chair

APPEARANCES:
No one appearing for the Applicant
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
DIERDRE LENNON, Agent, on behalf of 1072980 Ontario Ltd. o/a
Quality Homes of Barrie, Added Party

DATE OF
HEARING: May 16, 2000 Toronto

ORDER

Following attendances on May 16, 2000 at the hearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) no one appearing for the Applicant, Vaino Kumpulainen (the "Applicant") and Karen Jones, Counsel, on behalf of the Ontario New Home Warranty Program (the "Program"), and Dierdre Lennon, Agent on behalf of 1072980 Ontario Ltd. o/a Quality Homes of Barrie (the "Added Party"),

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chapter 0.31, as amended, Vaino Kumpulainen (the "Applicant"), appealed a decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated December 17, 1999;

WHEREAS at the commencement of the hearing Mr. Bill Thompson appeared seeking to act as Agent for the Applicant, but lacking written authorization to act as agent and stating that he had not spoken to the Applicant recently and without proof that Mr. Thompson was authorized to appear as agent for the Applicant, the Tribunal found that Mr. Thompson had no standing to act;

AND WHEREAS the Applicant had failed to appear before the Tribunal, with no one appearing for the Applicant, the Tribunal finds that the Applicant has abandoned these proceedings;

NOW THEREFORE, this Tribunal Orders that the appeal by the Applicant is dismissed and pursuant to the authority vested in the Tribunal under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Program is directed to disallow this claim.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair, Presiding

Terence Wardrop
Vice-Chair as member

Bill McIntosh
Vice-Chair as member

Released: May 17, 2000

RUSSELL

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CLIFFORD WILLIAM RUSSELL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 21st, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CLIFFORD WILLIAM RUSSELL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by Clifford William Russell, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 3rd, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Clifford William Russell
1 - 130 Lindsay Street South
Lindsay ON K9V 2M7

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Clifford William Russell (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under the Criminal Code, Provincial Offences Act, or any industry specific offence, to immediately notify the Registrar, Motor Vehicle Dealer's Act, in writing of the charges against him.
2. The Applicant agrees, if he is charged in the future, under the Criminal Code, Provincial Offences Act, or industry specific offence, to immediately notify his employer of the charges against him and to immediately give said notification, in writing to the Registrar.
3. The Applicant agrees if he is convicted in the future, under the Criminal Code, Provincial Offences Act, or industry specific offence, that his registration will automatically be revoked.
4. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
5. The Applicant agrees to give a copy of this order to his employer.
6. The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
7. The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
8. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
9. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

10. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.

11. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Lindsay, this day of 2000.

(Signature) Clifford William Russell

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

RYN

CHESTER RYN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BEVERLEY READE, Vice-Chair

APPEARANCES:

Chester Ryn, representing himself (the "Applicant");
Lucy McSweeney, Counsel, representing the Ontario New Home
Warranty Program (the "Respondent");
Simon Touma, Counsel, representing the Added Party, Salim
Concrete Inc. (the "Added Party").

DATE OF
HEARING: May 1, 2000 Windsor

ORDER

PURSUANT to the provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1990, Chapter 0.31, as amended, the Applicant, Chester Ryn appealed a decision of the Ontario New Home Warranty Program set out in a decision letter dated October 28, 1999;

AND WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for the hearing of the Applicant's appeal to be held on May 1 and 2, 2000;

AND WHEREAS the hearing commenced on May 1, 2000 and at the commencement of the hearing of the appeal on May 2, 2000, the Tribunal was informed by the parties that a written settlement had been arrived at in regard to the appeal; and

Having reviewed the signed Minutes of Settlement as to the disposition of these proceedings which is attached hereto as Schedule "A".

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Beverley Reade
Vice-Chair

Released: May 9th, 2000

The Licence Appeal Tribunal

CHESTER RYN

Applicant

- and -

THE ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

- and -

SALIM CONCRETE INC.

Added Party

MINUTES OF SETTLEMENT

IN CONSIDERATION OF the performance of the work described herein, Chester Ryn, his heirs, executors, administrators and assigns, or any of them (hereinafter collectively referred to as "RYN") DO HEREBY RELEASE AND FOREVER DISCHARGE the Ontario New Home Warranty Program, its successors and assigns, servants and agents, or any of them (hereinafter collectively referred to as "ONHWP") and DOES HEREBY RELEASE AND FOREVER DISCHARGE Salim Concrete Inc., its successors and assigns, servants and agents, or any of them (hereinafter collectively referred to as "BUILDER") of and from all manner of actions, causes of actions, debts, warranties, claims and demands whatsoever at law, in equity or otherwise, which RYN ever had, now have or hereafter can, shall or may have against ONHWP or BUILDER pursuant to the statutory warranties set out in the *Ontario New Home Warranties Plan Act* R.S.O. 1990, c.O.31 (the "Act") with respect to the home located at:

**1368 Pierre Avenue
Windsor, Ontario N8X 4P1**

In particular, RYN agrees to grant access to Soulliere Solutions Inc. to permit performance of the work described by Robert Soulliere in his letter of March 30, 2000 a copy of which is attached as Appendix "A".

The BUILDER agrees to pay Soulliere Solutions Inc. within 30 days of the receipt of an invoice for the work, failing which ONHWP will pay the invoice directly and charge the cost to the builder plus a 15% administration fee.

The work shall be performed by Soulliere Solutions Inc. and completed by May 30, 2000 and Chester Ryn shall have a one year warranty on the repair from the date of completion of the repair.

Chester Ryn agrees that a comprehensive solution to drainage on his property includes sodding and final grading of his property which is his responsibility.

AND IT IS UNDERSTOOD AND AGREED that the issues of “water penetration into the basement from under the porch” is hereby withdrawn.

AND IT IS UNDERSTOOD AND AGREED that the both the terms of this Release and the consideration for this Release shall be kept strictly confidential and will not be communicated to any person or body.

Executed at Windsor, this 2nd day of May, 2000.

Original signed by Chester Ryn
CHESTER RYN

ONTARIO NEW HOME WARRANTY PROGRAM

Per: Original signed by Ken Holtrop

I have the authority to bind the corporation

SALIM CONCRETE INC.

Per: Original signed by Joseph Salim

I have the authority to bind the corporation

AGREEMENT

1. The undersigned Ontario New Home Warranty Program (“ONHWP”) and Salim Concrete Inc. (“Builder”) and Chester Ryn hereby agree as follows with respect to the issue of sodding in front and side yards and rough grading of rear yard at the property known as 1368 Pierre, Windsor.

2. The builder agrees to arrange payment of settlement funds in the amount of \$1,000.00 to Mr. Ryn. The Builder agrees to forward to Mr. Ryn by May 9, 2000 the sum of \$1,000.00 in satisfaction of its obligation under the terms of the Agreement of Purchase and Sale between the builder and Chester Ryn re: sodding, rear yard grading.

3. Mr. Ryn acknowledges that these funds are paid to Mr. Ryn in satisfaction of the Builder’s contractual obligations described above and Mr. Ryn acknowledges that it is his responsibility to provide the municipality with a final grading certificate and to arrange a final inspection.

4. The Builder acknowledges that if it fails to forward funds to ~~ONHWP~~ as described above, ONHWP will pay Mr. Ryn directly by May 30, 2000 upon notification by Mr. Ryn and will take steps to enforce collection of its contribution which may be subject to an additional administration fee.

Executed at Windsor, Ontario this 2nd day of May, 2000.

ONTARIO NEW HOME WARRANTY PROGRAM

Per: Original signed by Ken Holtrop

I have the authority to bind the corporation

SALIM CONCRETE INC.

Per: Original signed by Joseph Salim

I have the authority to bind the corporation

CHESTER RYN

Original signed by Chester Ryn

MAHESWARAN, REHNU VASANTHAKUMAR and 1375088 ONTARIO INC. O/A H & ME FINE CARS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
1375088 ONTARIO INC. O/A H & ME FINE CARS AND
REHNU VASANTHAKUMAR MAHESWARAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 21st, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1375088 ONTARIO INC. o/a H & ME FINE CARS
and REHNU VASANTHAKUMAR MAHESWARAN

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1375088 Ontario Inc. o/a H & Me Fine Cars and Rehnu Vasanthakumar Maheswaran, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 2nd, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

From: 1375088 Ontario Inc
O/a H & Me Fine Cars
A - 1386 Kingston Rd
Scarborough ON M1N 1R2

And From: Rehnu Vasanthak Maheswaran
265 Main Street
Apt 1214
Toronto ON M4C 4X3

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, 1375088 Ontario Inc O/a H & Me Fine Cars (hereafter the "Dealer") and Rehnu Vasanthak Maheswaran (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Dealer and Applicant acknowledge and understand that they will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer and Applicant further acknowledge that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer and Applicant agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the MVDA Regulations. The Dealer and Applicant further agree to store books and records at the location approved by the Registrar. The Dealer agrees to provide free access to all books and records to any representative of the Registrar.
4. The Dealer and Applicant will ensure that all advertisements placed by or on behalf of the Dealer will identify their registered name and the address of the location approved by the Registrar.
5. The Dealer and Applicant agree not to invite the public to deal at a place other than the approved location.
6. The Dealer and Applicant agree to operate exclusively from the location approved by the Registrar. The Dealer and Applicant agree to apply for the Registrar's approval, by way of prior

written notice, of any change in business location in the form required by the Registrar.

7. The Dealer and Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.
8. The Dealer and Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
9. The Dealer and Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
10. The Dealer and Applicant agree to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
11. The Dealer and Applicant agree that they are under a positive obligation to disclose all material facts about the vehicles they sell to customers. The Dealer and Applicant agree that they are under a positive obligation to ensure that all salespeople also disclose all material facts about vehicles sold to consumers. The Dealer and Applicant agree to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer and Applicant agree that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer and Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
12. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
13. The Dealer and Applicant will comply with all aspects of the Retail Sales Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
14. The Dealer and Applicant will pay all amounts owing to the Minister of Finance in respect of all future audit assessments when due.
15. The Dealer and Applicant acknowledge that Arutselvan Pancharatnam will not have any interest whatsoever, either direct or indirect, and shall have no involvement whatsoever Applicant and the Dealer and the Applicant and Dealer will not buy, sell, or lease vehicles to, or from Arutselvan Pancharatnam, either directly or indirectly.
16. The Dealer and Applicant hereby acknowledge that in the event of a breach of any of the terms and conditions set out herein or if any information of the Applicant's involvement with S.P.A. Used Car Sales concerning any offences related to odometer tampering or misrepresentation, comes to the attention of the Registrar, the Registrar is directed to and shall revoke the registrations of the both the Dealer and the Applicant.
17. The Dealer and Applicant hereby acknowledge that in the event of a breach of any of the terms and conditions set out herein, the Registrar is directed to, and shall revoke the registrations of both the Dealer and Applicant.
18. The Dealer and Applicant acknowledge that the Registrar may take further administrative action, including a proposal to revoke both registrations, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.

19. The Dealer and Applicant acknowledge that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
20. The Dealer and Applicant hereby consent to an order of the Licence Appeal Tribunal, which may include the terms, and conditions set out herein.
21. The Dealer and Applicant hereby withdraw the appeal to the Licence Appeal Tribunal.
22. The Dealer and Applicant acknowledge they have read, understand and will comply with the above terms and conditions of Registration.
23. The Dealer acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of Toronto, this day of March 2000.

(Signature) Rehnu Maheswaran (Signature) 1375088 Ontario Inc
H & Me Fine Cars

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I have authority to bind the corporation

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

JAKOVLEV, OLEG o/a CAROLTA AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
OLEG JAKOVLEV O/A CAROLTA AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 1st, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

OLEG JAKOVLEV O/A CAROLTA AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Oleg Jakovlev o/a Carolta Auto Sales, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 16th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
1 St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Oleg Jakovlev O/A Carolta Auto Sales

RE: Oleg Jakovlev O/A Carolta Auto Sales ("the Applicant")

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Oleg Jakovlev O/A Carolta Auto Sales hereby consent to the following terms and conditions to its registration as a motor vehicle Dealer:

In accordance with section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Oleg Jakovlev O/A Carolta Auto Sales (hereafter the "Applicant"), and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement for a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Applicant further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of the Dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicant.
3. Without limiting the generality of the foregoing, the Applicant will advise the Registrar, by submitting the required Individual Application, of any person who: has a beneficial or other interest in the operations of the Dealership, has invested funds in the Dealership, exercises any management or supervisory responsibilities, or has control over the assets of the Dealership. The Applicant further agrees that no such person will be involved in the operation of the Dealership, either directly or indirectly, until the Applicant receives written confirmation from the Registrar that the person's Individual Application has been approved.
4. The Applicant agrees not to invite the public to deal at a place other than his approved location.
5. The Applicant agrees to operate exclusively from the location approved by the Registrar. The Applicant agrees to apply for the Registrar's approval, by way of prior written notice, of any change in business premises in the form required by the Registrar.

6. The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that he is registered as a Dealer or Salesperson under the Motor Vehicle Dealers Act.
7. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells. The Applicant agrees to make reasonable efforts to research the history of vehicles prior to sale to ensure all material facts are disclosed. The Applicant agrees that should any information come to light which the Registrar deems to be a material fact concerning a vehicle the Applicant has sold, the Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
8. The Applicant will comply with the Retail Sales Tax Act, including but not limited to, the collection of tax and remittance or monies to the Ministry of Finance, when due.
9. The Applicant will comply with all credit agreements and will make timely payments on all outstanding debts.
10. The Applicant agrees that all third party warranties sold by the Applicant will be registered with the warranty company in accordance with the requirements of the warranty company and funds submitted to warranty company when due.
11. The Applicant acknowledges that his registration as a motor vehicle dealer will be revoked if he breaches any of the terms and conditions set out herein.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2000.

Signature (Oleg Jakovlev)

These terms and conditions are accepted by the Registrar, Motor Vehicle Dealers Act
Mary Jane South
Registrar, Motor Vehicle Dealers Act

THE HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # 0601618 OWNED BY: Scotland Agromart Ltd. of: L3 C2 Oakland, Scotland R1, Ontario N0E 1R0 made pursuant to section 55.1 of the Highway Traffic Act, effective on: April 27, 2000.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the Highway Traffic Act

SCOTLAND AGROMART LTD.

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Scotland Agromart Ltd., Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the Statutory Powers Procedure Act, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: May 12, 2000

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

SCOTLAND AGROMART LTD.

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound #0601618** was impounded in accordance with subsection 55.1(3) of the *Highway Traffic Act*, RSO 1990, c. H. 8 as amended, on April 27th, 2000.
2. The applicant, **Scotland Agromart Ltd.**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. No other order to impound under section 55.1 of the Act has ever previously been made with respect to any motor vehicle then owned by the applicant.
4. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(d) of the Highway Traffic Act, stating **that the order will result in exceptional hardship.**
5. Materials provided to the Registrar indicate that the said motor vehicle is a highly specialized vehicle used for transporting 600 pound drums of toxic pesticides to farm fields. The impoundment of the said vehicle will pose a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used. Investigations indicate that there are no alternatives to the impounded motor vehicle.
6. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
7. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

MISSIOS

TIM and JENNY MISSIOS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice Chair, Presiding
TERENCE A. WARDROP, Vice Chair

APPEARANCES:

TIM MISSIOS, representing himself and Jenny Missios, the Applicants
KAREN V. JONES, Counsel representing the Ontario New Home
Warranty Program
JARVIS POSTNIKOFF, Counsel representing the Added Party,
Kansun Homes Limited

DATE OF
HEARING:

May 5, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1, 2000, is known as the Licence Appeal Tribunal) from a written decision of the Ontario New Home Warranty Program (the "Program") dated December 10, 1999 wherein the Applicants' claim was denied by the Program.

The Applicants claim that they and Kansun Homes Limited ("Kansun") entered into a written Agreement of Purchase and Sale regarding a home to be constructed in the City of Mississauga, Ontario, by Kansun for the Applicants. Pursuant to that agreement dated April 18, 1997 (the "agreement") Kansun constructed the home and the Applicants took possession on December 30, 1997. The purchase price of the home was \$207,310.00.

After taking possession of the home the Applicants complained to Kansun, that the staircase was damaged and poorly constructed. The Applicants complained in particular that nails were protruding, stains were apparent, sections were chipped and finishing was poor and demanded the staircase be replaced entirely or Kansun refund them the sum of \$1,400.00. The Applicants complaints were not resolved and a conciliation inspection by the Program was requested, arranged and held at Applicants' home. The Program issued its conciliation inspection report in which the Program stated that it considered the staircase complaint was not covered under warranty.

Following upon the Program's conciliation inspection report, the Program issued its decision letter of December 10, 1999. In that letter the complaint of Applicants was identified as:

- Complaint: Substandard workmanship on staircase. Defects in materials.
The above include and are/is not limited to the following:
- Poor finish/varnish (poor finishing job on staircase)
 - Squeaking/loose
 - Oak veneer risers should be solid oak
 - Chips and dents throughout staircase
 - Nails on railing
 - Stains on stairway
 - Seams are off (stairs and railings)
 - Railings do not match

The Program stated in its decision letter its reason for denying Applicants claim as follows:

Reason:

The complaint as described above, does not represent a defect in materials and/or workmanship nor is there a violation of the Ontario Building Code. As such, this item of complaint can not be covered under warranty. This issue is one of personal preference and beyond the scope of the Warranty Program.

THE ISSUES:

The issues to be decided in this matter are:

- 1) Does the claim made by the Applicants qualify as a warranty within the meaning of Section 13(1) of the Act.
- 2) Do the Applicants have a cause of action against Kansun for damages resulting from a breach of warranty in terms of section 14(1)(b) of the Act.
- 3) If the Applicants are entitled to damages what is the quantum of such damages.

THE EVIDENCE:

The only evidence adduced by the Applicants was that of Efthimious Tim Missios ("Missios") one of the two Applicants. His spouse, and Co-Applicant, Jenny Missios did not give evidence. Missios testified that he is a supervisor in a pharmaceutical company and has not worked in the building industry.

Missios stated that on December 30, 1997 when possession of the home was taken by the Applicants certain deficiencies were observed in the staircase of the home. Specifically he noted that:

- the staircase had not been varnished
- a nail was protruding from the staircase itself
- two further nails were visible in the space between the staircase and the wall
- two or three staples were embedded on the steps of the staircase
- chips, dents and gouges were visible on both the steps and risers

- stains that appeared to be from cement were visible on parts of the stairs
- colour variations existed in the oak used in the staircase railing.

In the fall of 1998 Kansun had the staircase manufacturer inspect the staircase and that manufacturer offered to make certain repairs. Missios disagreed with the method of repair suggested by the manufacturer and refused to allow repairs. At this time, Missios raised a further complaint regarding the stairs namely that he had learned from the manufacturer's representative that the stair's risers were of "oak veneer and not solid oak as indicated in our agreement of sale".

In March 1999, Missios agreed to the stair manufacturer doing repairs to the staircase. The repairs Missios agreed to were the same repairs he had refused to permit in the fall of 1998. The manufacturer replaced 2 treads and also addressed Missios' concerns regarding the protruding nails between staircase and wall as well as the other nail that was protruding from the staircase. The stairs were sanded and the staircase was revarnished although it had been originally varnished some one month after possession of the home.

Missios further testified that after the March 1999 repairs he noticed brush marks on the varnish. The manufacturer returned and revarnished the staircase. At this time Missios raised a further concern with Kansun. This concern involved the trim on the staircase. Kansun again returned to the home and addressed this concern.

Missios stated that he was still not satisfied with the staircase and continued to complain to Kansun who made him an offer of \$300.00 in settlement of all complaints. He refused the offer as he was insistent on payment of \$1,400.00 being the cost of the staircase or replacement of the entire staircase. Kansun suggested to Missios that a representative of the Program attend at the home so as to facilitate a possible settlement of the staircase. Missios rejected this suggestion and also advised Kansun that he would not permit access to the Program's representative. He reiterated to Kansun that the only method of resolving the staircase issue was replacing the entire staircase or payment of \$1,400.00. This Kansun refused to do.

Towards the end of July 1999, Missios agreed to have the Program conciliate the staircase issue and on November 24, 1999 a conciliation inspection took place at the home at which inspection Mrs. Missios was present as well as the Program's warranty representative Rob Rosset and Kansun's President Morris Kansun. A written conciliation report was issued by the Program on November 24, 1999.

Under cross-examination Missios stated that the complaint of the two protruding nails is no longer an issue. However, the one nail that was protruding from the stairs and was removed remains an issue in that the hole left by the nail's removal has been filled with a puttylike substance which has a different colour to the surrounding oak and is therefore visible. This complaint was later under cross-examination withdrawn by Missios. The hole that was filled is about the size of a person's nail on the small finger. The staining complaint is also no longer an issue as he accepts that there are now no visible stains.

Missios conceded under cross-examination that Schedule "B" to the Agreement of Purchase and Sale called for oak veneer to be used on the stair stringers and carpeted treads and risers. He also stated that Schedule "I" to the agreement listed eight options and extras one of which read "oak staircase stringers, steps riser, pickets and railings with carpet runner - \$1,400.00" and that the total cost of the listed options and extras came to \$6,410.00. That sum was included in the purchase price of the home.

Robert Rosset testified on behalf of the Program. He stated that he has been with the Program as a warranty representative for about eleven years and prior to that was active in the building industry as supervisor with a large builder of homes. In his capacity as a warranty representative, he has attended over one thousand conciliation inspections.

Rosset had carriage of the Program's file in this matter and attended the conciliation inspection and authored the conciliation inspection report and the decision letter of December 10, 1999. Rosset stated in evidence that Ms. Missios identified the Applicant's complaints on November 24, 1999 at the conciliation meeting.

In regard to the complaints identified by Ms. Missios, Rosset stated as follows:

- the colour variations brought to his notice are characteristic of oak and are within normal parameters. The grain within the oak gives rise to the difference in shade within the oak.
- the varnish applied to the staircase was satisfactory and had been applied in a workmanlike manner.
- no chips, dents or gouges were visible.
- the filler used to fill the hole left by the removal of the nail has been done in an acceptable and workmanlike manner and the result meets the accepted standard in the building industry.
- filler used in wood products does not generally absorb varnish as does wood. For this reason there may be a slight colour difference when filler is used in a wood product. The hole left by the removal of the nail and then filled was the diameter of a pencil and was barely visible. It was done in a workmanlike and acceptable manner.
- as far as the complaint of stains are concerned, same was not visible to Rosset.
- no staples were seen in the wood nor was any staple damage noticed.

Under cross-examination by Missios, Rosset stated that imperfections naturally occur in and are inherent in all wood products. Imperfections can also occur through damage to the wood. Imperfections are commonly satisfactorily addressed by using filler in the wood followed by sanding and revarnishing.

Morris Kansun testified for the Added Party. He stated that he is the President of Kansun and has held that office for the past 15 years. He is familiar with the issues in this matter. He stated that the original selling price of the home was \$204,990.00. The Applicants' required extras to be provided in their home and those extras amounted to \$6,410.00 and are referred to in Schedule "I" to the Agreement of Purchase and Sale. The selling price of the home was not increased by \$6,410.00 but by only \$2,300.00. Kansun absorbed the balance of the cost of the extras supplied. The purchase price of the home was arrived at by adding \$2,300.00 to the original selling price of \$204,990.00.

Mr. Kansun confirmed that the agreement called for the staircase to be constructed of both solid oak and oak veneer (Exhibit 3, Tab 1, Schedule "B" items 32, 33 and 34). Stair risers,

where there is no traffic, commonly utilize oak veneer rather than solid oak and this is the area where veneer was in fact used.

Although possession of the home was given on December 30, 1997 it was only in August of 1998 that the staircase became an issue with the Applicants who Kansun testified became "fixated" with that issue.

Mr. Kansun stated that it is common when a staircase is prefabricated that there is cardboard affixed by staples to the steps to protect them. Cardboard in the case of the Missios home was affixed to the staircase steps by staples. When the cardboard was removed three staples remained in the wood. This is not uncommon and such staples are easily removed. The three staples that remained in the steps were removed upon the cardboard itself being removed. The small holes left in the wood were filled with filler, a common practice. The stairs were then sanded and varnish was applied. This is normal procedure. No holes or filler were noticeable. There were no chips, dents and gouges noticeable on the staircase other than on one or two risers. These risers were replaced by Kansun and the replacement in no way interfered with the integrity of the staircase itself.

Mr. Kansun contended that as of November 1998 an impasse had been reached. Missios wanted payment of \$1,400.00 and did not want repairs to be made. It was only when the Program advised Missios that Kansun had to be afforded the opportunity to repair that Missios consented to repairs. Mr. Kansun contended that he repeatedly attempted to accommodate Missios but over time it became clear that he could never satisfy Missios. Kansun based this contention on the fact that Kansun had refinished the entire staircase and had two employees spend two to three days "making it sparkle". When the refinishing was complete, Mrs. Missios expressed her satisfaction with the staircase yet two days later Missios called and said the staircase was "junk".

FACTS FOUND PROVEN:

The following are the facts found to have been proved:

- 1) The Applicants and Kansun entered into a written Agreement of Purchase and Sale dated April 18, 1997 in terms of which Kansun undertook to construct a single family residential home for the Applicants in the City of Mississauga, Ontario.
- 2) Attached to and forming part of the Agreement of Purchase and Sale was a schedule marked "I" titled "Options and Extras" which listed several options chosen by the Applicants which were to be incorporated in the construction of their home.
- 3) An oak staircase, stringers, steps, risers, pickets and railings with carpet runner was one of the options and extras chosen by the Applicants at a stated cost of \$1,400.00. The total cost of all options and extras amounted to \$6,410.00. This cost was discounted by Kansun by \$4,110.00 resulting in the options and extras costing the Applicants \$2,300.00.
- 4) The purchase consideration payable by the Applicants in terms of the Agreement of Purchase and Sale was the sum of \$207,310.00 which included the discounted cost of \$2,300.00 of the options and extras referred to in Schedule "I" to the Agreement.

- 5) The staircase was to be constructed of solid oak as well as oak veneer.
- 6) The staircase chosen by the Applicants was constructed by Kansun and was incorporated in the Applicants home.
- 7) The staircase was constructed in a workmanlike manner, free from defects in materials and not in violation of the Ontario Building Code.
- 8) The finish/varnish relating to the staircase meets the normally accepted standards of the building industry.
- 9) Imperfections are naturally present in wood products and may also occur due to damage caused to the wood by external means. Imperfections in the wood used in the construction of the staircase have been satisfactorily and adequately dealt with by the use of filler, sanding and by varnishing.
- 10) There is no squeaking from the staircase or any part thereof. There are no stains on the staircase or any part thereof.
- 11) All staples or marks left by staples to the staircase have been removed and no defect in workmanship is visible in relation to such staples and /or their removal.
- 12) No stains, caused by cement or otherwise, are visible on the staircase. There is no colour mismatch between different sections of the oak used. There is a difference in the shade of the oak where the railing curves and this occurs naturally due to the grain in the oak.
- 13) The workmanship regarding the seams is proper and without defects.
- 14) The stair railings have been constructed in a good and workmanlike manner and are not defective in materials used.

THE LAW:

- (1) Section 13(1)(a) of the Act states:

Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

(2) Section 14(1)(b) of the Act states:

14(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(3) Section 6(3) of the Act limits the liability of the guarantee fund to \$100,000.00.

DECISION:

The onus of proof in this matter rests upon the Applicants to satisfy the Tribunal on a balance of probabilities.

The only evidence adduced by the Applicants was that of Missios himself who conceded that he has no knowledge regarding construction of homes. He brought no expert or other evidence to support his contentious.

Opposed to the evidence of Missios was that of Rosset and Morris Kansun. Rosset has had considerable experience in the home building industry and in the evaluation of claims by homeowners. He found the workmanship of Kansun and the materials used by it to be acceptable and satisfactory. Having regard to Rosset's experience in home construction and his evaluation of building contractors' work over many years, coupled with the credible manner in which he testified, the Tribunal accepts his observations and opinions.

The evidence of Morris Kansun also impressed the Tribunal. Kansun went to extraordinary lengths to satisfy Missios. Time and time again, Kansun attempted to accommodate the Applicants at considerable time, effort and expense to Kansun. This was to no avail as Missios insisted on what was tantamount to perfection in relation to both workmanship and materials. Missios was demanding to the extent of unreasonableness. His attitude was that nothing short of perfection was acceptable to him.

As was stated in MARK TEITELMAN (1987) 16 CRAT at page 181:

The Teitelmans were not the authors of the defects and the Tribunal understands that they are a constant source of irritation to them. However, they must accept the fact that no house new or old is perfect or is warranted to be perfect. Floors in stairs will squeak, wood will shrink and wall cracks will appear and paint will peel. All that can be done is to keep these imperfections at reasonable acceptable levels. The limited warranty provided by the *Ontario New Home Warranties Plan Act* recognize these facts and this Tribunal is obligated to make findings in accordance with the statutory provisions and not otherwise.

Furthermore as was stated in SAPORITA (1999) CRAT released July 28, 1999:

Perfection and nothing less than perfection is not a reasonable expectation when dealing with what can be termed as a standard home. One does not live in a perfect world and allowances must be made for minor imperfections. If imperfections exist in the Applicants' home they are, from the evidence tendered, minor in nature and do not result in aesthetically displeasing results.

The Tribunal believes that the Applicants are unrealistic in their expectations and the standards they seek are equally unrealistic.

Rosset's evidence, which is accepted by the Tribunal, was that wood products may manifest imperfections whether they occur naturally or due to trauma to the wood. Minor imperfections can be dealt with by the proper use of filler, sanding and varnishing. That is how Kansun dealt with the minor imperfections that manifested themselves on the oak staircase. The result was the imperfections were no longer visible.

The Tribunal also finds that whatever damage may have been caused to the staircase due to nails having been removed was adequately and satisfactory dealt with by Kansun by the use of filler, sanding and revarnishing. The hole in the wood where a nail was removed was no bigger than the diameter of a pencil and barely visible after Kansun had filled the hole with filler, sanded the area and then varnished. In fact at the hearing, Missios stated that as far as the complaint relating to the nails is concerned same is no longer an issue. Similarly, he stated that the stains of which he complained were also no longer an issue. As to the three staples left in the stairs, these were removed, and the slight puncture marks were adequately and satisfactory dealt with in the same manner as the hole left when the nail was removed. The Tribunal finds the integrity of the stairs was not compromised by the replacement of two steps and there is no squeak noticeable. All this was testified to by Rosset whose opinions and observations are accepted by the Tribunal.

The Tribunal therefore finds that the Applicants do not have a cause of action under Section 14(1)(b) of the Act as there is no breach that they have proven under Section 13(1) of the Act. Even if the Applicants had proven a breach of warranty, which they have not proven, the Applicants have placed no evidence before the Tribunal as to damages that may have been suffered by them.

Accordingly, pursuant to the authority vested in it under Section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicants' claim.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Terence Wardrop
Vice-Chair

RICH'S SERVICE CENTRE LTD. o/a A CAR AUTO BROKERS LEASING and
RICH'S SERVICE CENTRE LTD. o/a A CAR AUTO BROKERS LEASING (BRANCH)

APPEAL FROM A PROPOSAL OF THE REGISTRAR
MOTOR VEHICLE DEALERS ACT

TO REVOKE REGISTRATION

TRIBUNAL: STEPHEN J. KELLY, Vice-Chair

APPEARANCES:

JOCELYN BOISSONNEAULT, counsel, representing the Applicants
MARY JANE SOUTH, agent, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: May 15, 2000 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises out of a notice of proposal dated November 24, 1999, issued by the Registrar of the Motor Vehicle Dealers Act, (the "Act") to revoke a registration of the Applicant, Rich's Service Centre Ltd., as a motor vehicle dealer under the provisions of the Act.

The Registrar basis his proposal on the provisions of section 6 as read with subsection 5(1) of the Act.

The Tribunal heard from Mr. Dirk Voskamp, principle of the Applicant, as well as from Cindy Voskamp, daughter-in-law of Dirk Voskamp and administrator of the Applicant. Finally, the Tribunal heard evidence from Deborah Price, senior collections officer with the Ministry of Finance for the Province of Ontario.

FACTS:

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

- 1) Mr. Voskamp began in the automobile repair business in 1964. He became a registered motor vehicle dealer under the Act in or about 1984. Initially, he was not extremely active in the retail auto sales business, but became more active in the last four or five years.
- 2) Originally, Mr. Voskamp's wife looked after the business records, including the filings under the Retail Sales Act. In or about 1992, Mr. Voskamp's daughter, Renate Nap, assumed the task of maintaining the company's financial records, including filings under the Retail Sales Act. Approximately four years ago, Cindy Voskamp took over the maintenance of the daily business records, including the vehicle registry. Ms. Nap continued to assume responsibility for making the month end filings, including under the Retail Sales Act. Some time prior to August of 1998, there was a discussion between Ms. Nap and Ms. Voskamp regarding the possibility of Ms. Voskamp assuming responsibility for the monthly filings under the Retail Sales Act. Ms. Voskamp gave evidence that she did not understand that a decision had been made for her to assume this responsibility.
- 3) Monthly filings were not made between August 1998 and October 1999. During this period, approximately \$39,800.00 in retail sales tax was collected, but not remitted.
- 4) Extensive collection efforts were undertaken by the Province of Ontario. In response, the Applicant retained an accountant in the summer of 1999 to review the filings and to determine the amount outstanding. This process was completed in November of 1999, and all filings were made at approximately that time. A \$2,000.00 payment towards the debt was made in November of 1999.
- 5) No further payments were made to the debt between November of 1999 and the date of the hearing. The Applicant's bank account was frozen at the request of the Province of Ontario in February, 2000. The Applicant retained counsel, but no concrete discussions took place towards resolving the outstanding debt up to the date of this hearing. The Applicant missed four monthly filings. An explanation was given that, as there were no retail sales during those periods, it was believed that filings did not have to be made. This is despite the fact that a representative of the Ministry of Revenue for the Province of Ontario advised Ms. Voskamp in February, 2000, that the business must continue to make monthly filings.
- 6) The business had a number of wholesale transactions (between two and four) between January 2000 and the date of the hearing. As its bank account was frozen and any funds deposited would be made payable to the Province and applied to the debt, Ms. Voskamp arranged for the transactions to be made in cash so that funds would be available to pay the vendor of the vehicle. None of the profits from these transactions were deposited in the account or forwarded as payment towards the debt.
- 7) Mr. Voskamp was not familiar with the Retail Sales Act filing requirements. He did not know the precise reason why filing were not made between August 1998 and October 1999. He was not aware of the status of any dealings between the

Applicant and representatives of the Province of Ontario regarding late filings and repayments of amounts outstanding.

- 8) The Applicant sustained substantial losses in 1998 and 1999, although the annual loss was decreasing. Despite the fact that \$40,000.00 which should have been remitted, it remained in the company's account or was used to pay third parties. This was not noted by representatives of the Applicant.

ISSUE:

The issue to be decided in these proceedings is whether the Registrar had sufficient grounds for revoking the Applicant's Registration.

THE LAW:

Relevant portions of the Act that are applicable to these proceedings are:

- (a) Section 6, which gives the Registrar the power to revoke a registration, and subsection 5(1)(c)(i)(ii), which provides as follows:

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (c)(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

APPLICATION OF LAW TO FACTS:

The representative of the Registrar referred the Tribunal to the decision of the Divisional Court in the case of Brenner v. Ontario (Registrar of Motor Vehicle Dealers and Salesmen) (1983) 19 CRAT, 58. In the Brenner decision, the Court set out the standard for review by this Tribunal, which is that unless the Tribunal finds reasonable grounds do not exist to support the proposal of the Registrar, the Tribunal should not interfere with the proposal.

Mr. Voskamp was not in the past and is not at present on top of the finances of the Applicant's business. He relied upon others to maintain the Applicant's financial records and to ensure the Applicant complied with its statutory obligations. He continues to rely on others to address and rectify the current problem. While steps were made to bring the

filings up to date, no serious attempts were made to repay the trust funds or to make arrangements to do so. It is up to the Applicant to ensure that its representatives are aware of its filing obligation. One would think that, in light of the past breaches, the Applicant's representatives would ensure that they fully understood the filing requirements. Nevertheless, the last four filings remain outstanding, which by default, at best, is attributable to Mr. and Ms. Voskamp's continued misunderstanding of the Applicant's obligations. The business is not being operated with fiscal responsibility. Also, by failing to remit Retail Sales Tax, the business is not being operated in accordance with the law.

The Tribunal finds it very difficult to understand how a business that was losing money annually could retain \$40,000.00 improperly and not notice that these additional funds were being held. If this went unnoticed by the Applicant, then it merely confirms that the company was in disarray.

The Tribunal is also extremely troubled by the fact that the Applicant has not taken steps to repay the debt in any substantial way. Mr. and Ms. Voskamp expressed a wish to address the situation, but explained that the company is not financially able to address the debt in the short term. The Applicant proposed to pay 10 per cent of the debt immediately and the remainder over an extended period of monthly instalments. The Tribunal interprets this as demonstrating that the company would like to act in a financially responsible manner, but simply is not financially able to do so.

On the evidence, the Tribunal concludes that the Registrar was reasonable in concluding that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business and that there were reasonable grounds for the belief that the business would not be carried on in accordance with law, or with integrity and honesty.

DECISION:

Pursuant to the authority vested in it by subsection 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal dated November 24, 1999, to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Stephen J. Kelly
Vice-Chair

RELEASED: *May 25, 2000*

SKYVIEW GENERAL CONTRACTING LTD. O/A SKYVIEW HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel representing the Applicant
KENNETH ROSENBERG & NETANUS RUTHERFORD, Counsels,
representing the Registrar, Ontario New Home Warranty Program

DATES OF

HEARING: May 23 and 26, 2000

Toronto

ORDER

FOLLOWING attendances on May 23, 2000 before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) of Brian M. Campbell, Counsel for Skyview General Contracting Ltd. o/a Skyview Homes (the "Applicant") and Kenneth Rosenberg, Counsel, on behalf of the Registrar, Ontario New Home Warranty Program (the "Program");

WHEREAS the matter was recessed to May 26, 2000 on consent of the parties, in order for the parties to attempt to reach a settlement;

AND WHEREAS FOLLOWING further attendance before the Tribunal on May 26, 2000 of Brian M. Campbell, counsel for the Applicant and Netanus Rutherford, counsel for the Program, when the Tribunal was advised by Netanus Rutherford, that the matter had been settled and that by consent of both parties the Notice of Proposal was withdrawn by the Program;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are withdrawn and the matter is concluded.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 26, 2000

CONSBEC INC.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JOSEPH HEWITT
Presiding member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

NORMAN PAQUETTE, Solicitor for the Applicant

DATE OF HEARING: May 19, 2000

DECISION RELEASED: May 29, 2000 Sudbury

REASONS FOR DECISION

A hearing was held on May 19, 2000, at Sudbury, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Consbec Inc. (the "Applicant")
Motor Vehicle:	1998 International 9400, Plate # 799 8DE (the "vehicle")
Date of Appeal:	May 5, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on May 19, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"The owner had no knowledge that the driver's licence was under suspension. The driver had confirmed in writing that he was properly licenced.

The commercial vehicle described herein had no critical defects at the time of the inspection by the inspecting officer and ought not have been impounded.

The use of this vehicle is vital in the transportation of ammonium nitrate on the construction site and the loss of the vehicle, which is valued at \$125,000.00, creates an economic hardship in that the cost of a replacement vehicle is \$3,500.00 per month."

Mr. Norman Paquette, Solicitor for the Applicant, questioned Mr. Richard Walker, the General Manager of Consbec Inc. Mr. Walker testified that the company employs 125 to 150 people depending on the amount of business the company has. The company is based in Sudbury, and is in the construction, drilling and blasting business. The impounded vehicle was a truck tractor used to haul equipment on the companies float trailer. This vehicle was one of four tractors that the company owns, and the result of the loss of this unit will cost the company \$75,000.00 of lost profits. The cost of replacing the tractor is in the area of \$3,000.00 a week.

Mr. Jeff Walker, Operations Manager, stated that he hired Mr. Sylvain Laderoute three weeks before the impoundment took place. Mr. Laderoute was hired as a labourer to work in the back shop. He was not hired to drive a truck and that his resumé said, "I took the transport drivers course and got my A-Z licences". Mr. Walker said that this was a bonus to the company if he ever needed another driver. Mr. Laderoute was a good worker in the back shop but that was his only responsibility.

On April 13th, 2000, Mr. Dave Rose, an employee, was working in the Parry Sound area when he received word that his father was dying in a Sudbury hospital. The company arranged for Mr. Mark Perrault to take a car to Parry Sound and have Mr. Rose return to Sudbury. Mr. Perrault was instructed to drive the impounded tractor and trailer back to Sudbury. Mr. Sylvain Laderoute went with him to pick up the tractor and the empty ammonium nitrate trailer.

Mr. Laderoute told Mr. Perrault that he had an A-Z licence and could drive the truck back to Sudbury. There was an M.T.O. vehicle safety inspection programme operating that day. The vehicle was pulled over and passed the inspection. Mr. Laderoute was then taken away by the O.P.P. for failure to pay fines and for driving without a valid driver's licence. Mr. Perrault then phoned Mr. Walker to tell him what had happened.

Mr. Jeff Walker stated that at no time did he give permission for Mr. Laderoute to drive the company truck and that Mr. Laderoute was never employed or hired to drive a company vehicle.

Mr. Walker stated that since the impoundment, the company has put into place a policy to have driver abstracts done on all employees and any new employees they hire that use company vehicles.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Sylvain Landeroute;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 17, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

To succeed in this appeal, the Applicant must establish that it exercised due diligence to determine that Sylvain Laderoute’s driver’s licence was not under suspension at the time of the vehicle being impounded.

The Tribunal finds that Sylvain Laderoute’s driver’s licence was under suspension and further finds that he was driving the Applicant’s motor vehicle at the time that it was impounded.

Section 50.2(3)(c) of the Act requires that the owner, Consbec Inc., exercise due diligence in attempting to determine that Sylvain Laderoute's driver's licence was not suspended at the time of the impoundment of the owner's motor vehicle.

The evidence establishes that the Applicant made no inquiries with respect to the status of Mr. Laderoute's licence. Mr. Laderoute was known to and in the employment of Consbec Inc. and was required to make inquiries respecting the licence status of Mr. Laderoute. The ground of appeal argued by the Applicant in subsection 50.2(3)(c) of the Act requires the Applicant make inquiries as to Mr. Laderoute's licence at the time of the impoundment. Meeting the requirements of subsection 50.2(3)(c) is the sole basis of the Tribunal's jurisdiction in this hearing.

The Tribunal finds that the Applicant, having made no inquiries as to the status of Mr. Laderoute's driver's licence, has failed to establish that the owner of the vehicle exercised due diligence as required by subsection 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joseph Hewitt, Presiding Member

RELEASED: *May 29, 2000*

EDIE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JAMES ELVIN EDIE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 17th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JAMES ELVIN EDIE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by James Elvin Eddie, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 25th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: James Elvin Edie
309 Main Street West
Dunnville ON N1A 1P3

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, James Elvin Edie (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, MVDA, in writing of the charges against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer of the charges against him and to immediately give said notification, in writing to the Registrar.
3. The Applicant agrees if he is convicted in the future under the Criminal Code, Provincial Offences Act, or an industry specific offence, he will immediately notify his employer and the Registrar in writing.
4. The Applicant agrees if he is convicted in the future under the Criminal Code, Provincial Offences Act, or an industry specific offence, his registration will automatically be revoked.
5. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
6. The Applicant agrees to give a copy of this Order to his employer.
7. The Applicant will provide confirmation every 6 months from his sponsor that he is continuing treatment for his substance abuse.
8. The Applicant will answer all questions on any future application, renewal or transfer, truthfully.
9. The Applicant acknowledges that if the particulars surrounding his convictions differ materially from what which was previously disclosed to the Registrar, his registration will automatically be revoked.
10. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
11. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.

12. The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
13. The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
14. The Applicant hereby consents to an Order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
15. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
16. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.
17. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of 2000.

(Signature) James Edie

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

MEKONEN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
TADESSE FTIGU MEKONEN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 21ST, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TADESSE FTIGU MEKONEN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Tadesse Ftigu Mekonen, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: May 19th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Tadesse F. Mekonen
401 - 274 Sackville Street
Toronto ON M5A 3S7

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Tadesse F. Mekonen (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, *Motor Vehicle Dealers Act*, in writing, of the charges laid against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant will not provide any false or misleading information, verbally or in writing, to a representative of the Registrar.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer. Should he wish to transfer his registration, he shall submit a new application for registration to the Registrar.
5. The Applicant agrees to successfully complete the certification course within 60 days of the issuance of this Order.
6. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
7. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
8. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
9. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
10. The Applicant acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to, and shall carry out the proposal, and the Applicant's registration shall automatically be revoked.

11. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of March 2000.

(Signature) Tadesse F. Mekonen

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

DOWNING

JACKIE DOWNING

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: WILLIAM WARBURTON, Presiding Member
DINO BOTTERO, Member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

JACKIE DOWNING, Applicant
unrepresented

DATE OF HEARING: May 16, 2000

DECISION RELEASED: May 30, 2000 Toronto

REASONS FOR DECISION

A hearing was held on May 16, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 as amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Jackie Downing (the "Applicant")
Motor Vehicle:	1993 Pontiac Grand Prix, Plate # 543 ACL (the "vehicle")
Date of Appeal:	April 28, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on May 16, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Registrar's Agent inquired about three letters that had been faxed to her by the Applicant. The letters were essentially character references in support of the Applicant. The parties agreed that the letters should be entered in evidence as exhibits.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My vehicle was taken without my consent. I was not aware it was gone until the Constable Wainburger called to say it was being impounded and my husband was driving it. I am in the position right now that I have to sell my home of ~~19~~ years and also go to the bank for a loan to be able to afford to rent a car-plus pay the impoundment fee when I can finally get my car back. I have missed one week from my job of 26 years and have spent numerous hours during my working hours trying to obtain and complete numerous paperwork in order to come to a conclusion to this nightmare. I have two children that also depend on ~~only~~ me.

It was not my fault that the car was taken from me. My husband is now in jail and I am also in the position that I must obtain a lawyer for legal separation on top of just trying to get my car back. This is all I can say as evidence as that is the truth. Await your decision.

The Applicant testified that she lives with her husband of twenty years in a bungalow, where he lives in the basement and she lives upstairs with her two children. Her husband had a job for eighteen years, but lost it five years ago. Since that time, he has been mostly unemployed. He lost his most recent job in November, 1999. He has been an alcoholic for the last six years.

The Applicant outlined the pattern of her car utilization:

She drives both of her children to school in the morning. Her daughter has a part-time job and needs to be driven home from work in the evening.

2. She drives herself to work after taking her children to school. She lives in Whitby and works in Oshawa at Human Resources Development Canada. On occasion, she must drive to off-site locations for training sessions and conferences.
3. Her brother has multiple sclerosis. The Applicant attends upon him once a week to assist with his personal care. Her mother is receiving dialysis and has a serious liver disease. The Applicant attends upon her mother every week to assist with house cleaning and grocery shopping. Therefore, the Applicant must drive to Toronto several times a week.
4. She volunteers to assist her friend, Erin Matthews, at a youth shelter in Durham Region. This work often involves the use of her car.

On the day of the impoundment, the Applicant recounted that she returned home, placed her car keys on the kitchen table and then went into the washroom. Upon emerging from the washroom, she received a telephone call from Constable Wagenberg advising her that her husband had been arrested for impaired driving. Later, she learned that her car would be impounded for forty-five days because her husband was driving her car while his licence was under suspension. Subsequently, her husband was incarcerated and he is still in custody.

The Applicant discussed the issue of laying a charge of "stolen" against her husband with two lawyers, at least one police officer and a Justice of the Peace. They all advised her that a charge of stolen would "not hold up" because they are husband and wife and living in the same house.

The Applicant testified that prior to the suspension of her husband's licence in June, 1999, he routinely drove a vehicle belonging to himself. (Exhibit 14 shows that David Bruce Downing is the registered owner of a 1983 Oldsmobile motor vehicle, plate # 831 ZCE.) The Applicant stated that her husband did not have a set of keys to her car. However, she did say that her husband had, on occasion, in the past driven her car on short errands like going to the store for cigarettes. Furthermore, she stated that that is what she believes her husband was engaged in at the time that the vehicle was stopped and impounded. She also indicated that she believes that her husband intended to return to the house that day. The Applicant asserted that she believes that the vehicle was "not really stolen... It was [taken] without consent."

By utilizing a rental car, the Applicant testified that she has been able to continue meeting her obligations to her family and employer throughout the impoundment period. She did express anxiety over missing one week of work during the impoundment period in order to attend to personal matters relating to the impoundment and her husband's incarceration. She took a week of sick-days and she was compensated for them. Furthermore, she is agitated about having received a telephone call at work from the Registrar's office. The call was personal and it could be easily overheard by the Applicant's co-workers.

Her principal concern, relating to the impoundment, is the cost of the car rental and the impoundment fees. She is paying \$200 per week in rental fees. She does not know the amount of the impoundment fee. The car rental fee includes insurance. The Registrar's Agent explained to the Applicant that she could reduce her rental costs by utilizing the insurance on her car to insure the rental vehicle. The Applicant said that she plans to finance the car rental and impoundment fees through a bank loan. She has a friend with contacts at the Bank of Montreal who will be able to assist her in securing a loan. She plans to repay the loan after she has sold her house. She plans to sell her house and separate from her husband. She was planning to sell the house and separate from her husband even before the impoundment of her vehicle. The effect of the impoundment of her vehicle and the incarceration of her husband has been to accelerate the timetable for these plans.

Additionally, the Applicant is currently paying her husband's legal fees.

The Applicant is an honest, hard working, compassionate and loyal person who is a credit to her family and community. She is coping with numerous difficulties that are not of her own making. The Tribunal has a high degree of respect for the Applicant and sympathizes with her.

The Evidence of Erin Matthews

Ms. Matthews testified that she is a friend of the Applicant. She works with abused women and youth in Durham Region. Her evidence corroborated the testimony of the Applicant to a considerable degree. Ms. Matthews outlined the difficulties in the Applicant's marriage and personal life. She expressed the belief that the Applicant would not be able to pay the impoundment fees and would be forced to forfeit her car. She also expressed anxiety about the ability of the Applicant to tolerate the stress associated with the impoundment given the high degree of stress that she was bearing prior to the impoundment and incarceration of her husband.

Ms. Matthews is a passionate and loyal friend with a sincere concern for the Applicant's welfare. She expressed greater concern about the Applicant's finances than did the Applicant. While expressing general anxiety and exhibiting signs of stress, the Applicant did not say that she feared that she would be unable to obtain a bank loan and that, therefore, she would be forced to forfeit her car. It is unclear whether Ms. Matthews is intimately familiar with the Applicant's financial condition. In any case, the Applicant must be considered the best witness regarding her own finances. Therefore, the Tribunal prefers the testimony of the Applicant in this regard.

Other character witnesses filed support letters that corroborate the Applicant's evidence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David Bruce Downing;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence impaired driving under the

Criminal Code of Canada pursuant to which the driver's licence of the driver was then under suspension until November 18, 2000.

The Evidence of Police Constable Michael Wagenberg

The Officer testified that on the day in question he was working at a R.I.D.E. checkpoint in Whitby near the Applicant's home. He stopped the Applicant's vehicle then driven by her husband. He detected signs of intoxication and escorted, under arrest, the Applicant's husband to the police station. The Applicant's husband was then given a breathalyzer test.

The Applicant's vehicle was towed away. At her husband's request, the Officer telephoned the Applicant to advise her that her husband had been arrested. Upon further investigation, the Officer learned that the Applicant's husband's licence was under suspension. The Officer placed a second telephone call to the Applicant late that evening to advise her that her husband's legal situation was more complicated than at first believed. The Officer did not speak personally to the Applicant. He left a message on her voice mail.

Subsequently, the Officer had a conversation with an unidentified friend of the Applicant. The discussion concerned the possible laying of a charge against the Applicant's husband for stealing the vehicle. The Officer advised that a charge would not succeed because they are married and cohabiting in the same house. Furthermore, the Officer testified that the Applicant has not filed a complaint of "stolen" with the police as of the date of this hearing.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transportation of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2)(b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3)(a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the ground that the impounded vehicle was stolen.

The Registrar's Agent cited several sections of the *Criminal Code of Canada*. The essence of which was that neither a husband nor a wife can be found to have committed a theft of common property from their spouse. Therefore, the Registrar's Agent asserted that the Tribunal can not find that the impounded vehicle was "stolen."

However, the Tribunal in Lever v. Registrar of Motor Vehicles LSAB, released October 1999, stated:

The fact that the police did not lay a charge against James Lever [the Applicant's husband] is not an important element in this case. The police must deal with a different onus, that of beyond a reasonable doubt, when seeking to obtain Criminal Code convictions. Here the onus is one of the balance of probabilities.

In analyzing the meaning of "stolen" as found in section 50.2(3)(a) the Board must consider the legislative framework governing statutory interpretation. Section 10 of the Interpretation Act R.S.O. 1990 Chap. I-11 states: "Every Act shall be deemed to be remedial, whether its immediate purport is to direct the doing of anything that the Legislature deems to be for the public good or to prevent or punish the doing of anything that it deems to be contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent meaning and spirit."

The Ontario Court of Appeal in R v. Cappel (1993) 11 OR (3d) 693 (CA) at 697 described the Driedger (2d) approach to statutory interpretation as a "direct, logical and practical approach" and the "proper way to approach the construction of a statute."

In Driedger (2d) at 105 the task of statutory interpretation is summarized as follows:

1. The Act as a whole is to be read in its entire context so as to ascertain the intention of Parliament (the law as expressly or implicitly enacted by the words), the object of the Act (the ends sought to be achieved), and the scheme of the Act (the relation between the individual provisions of the Act).
2. The words of the individual provisions to be applied to the particular case under consideration are then to be read in their grammatical and ordinary sense in the light of the intention of Parliament embodied in the Act as a whole, the object of the Act and the scheme of the Act, and if they are clear and unambiguous and in harmony with that intention, object and scheme and with the general body of the law, that is the end.
3. If the words are apparently obscure or ambiguous, then a meaning that best accords with the intention of Parliament, the object of the Act and the scheme of the Act, but one that the words are reasonably capable of bearing, is to govern them.
4. If, notwithstanding that the words are clear and unambiguous when read in their grammatical and ordinary sense, there is disharmony within the statute, statutes in pari materia, or the general law, then an unordinary meaning that will produce harmony is to be given the words, if they are reasonably capable of bearing that meaning.

This multi faceted approach to statutory interpretation has been supported by the Supreme Court of Canada in a number of cases. It has been applied in cases such as British Columbia v. Henfrey Samson Belair Ltd. (1989) 59 DLR (4th) 726 (SCC), R v. Egger (J.H.) (1993), 153 NR 272 (SCC), R v. Heywood (1995) 174 NR 81 (SCC) and R v. McIntosh (B.B.).

Using the ordinary meaning rule as evidenced by dictionary definitions is still an important guide to statutory interpretation but it must be used in conjunction with other principles of statutory interpretation. In this case it is important to use it with the implied exclusion principle as stated in the latin maxim "The inclusion of one is the exclusion of another" "expressio unius est exclusio alterius". It is used to compare two provisions of the same statute. The recent amendments to the Highway Traffic Act in section 55.1(2) states quite specifically that suspensions under s. 41 and s. 42 can give rise to a police officer detaining a motor vehicle until the Registrar issues the impoundment order under section 55.1(3). Sections 41 and 42 give in specific detail what sections of the Criminal Code are applicable to these type of suspensions. Under 50.2(1) an appeal can be made to the Board and section 50.2(3) sets out the grounds for the appeal. If the Legislature wished to have section 50.2(3)(a) be subject to the Criminal Code it could have easily put in the specific sections under this subsection. By being intentionally silent it means that the definition of "stolen" need not be given a strictly Criminal Code type of interpretation.

The amendments of the Highway Traffic Act were established by the Legislature in order to ensure that the public treats seriously licence suspensions under the "drinking" sections of the *Criminal Code*. The Legislature wished to deter those with such licence suspensions from driving and wished to have the community understand their responsibilities to not allow their vehicles to be driven by those under these type of licence suspensions. In so doing the Legislature has, through section 50.2(3), permitted the owners of vehicles so impounded to appeal on specific grounds. This is not a strict liability section. The use of the word stolen under section 50.2(3)(a) should be looked at in its ordinary meaning as understood by the community.

The evidence in this case clearly establishes that the impounded vehicle was taken without the owner's consent by the Applicant's husband.

Therefore, the question before the Tribunal in this case is:

Was the impounded vehicle borrowed without the owner's consent OR was the vehicle "stolen"?

Black's Law Dictionary's definition of stolen highlights the vital distinction between borrowed without consent and stolen. A stolen item is "acquired...with the intent to deprive the owner of the benefit of ownership (or possession) permanently." By contrast, the Funk & Wagnalls Standard College Dictionary (Canadian Edition, 1978) defines borrow as "to take or obtain (something) with the promise or understanding that one will return it or its equivalent."

In other words, the question before the Tribunal is: Did the Applicant's husband take the vehicle with the intent to deprive the Applicant of the benefit of ownership or possession permanently?

The Applicant testified that prior to the suspension of her husband's license in June, 1999, he routinely drove a vehicle belonging to himself. The Applicant stated that her husband did not have a set of keys to her car. However, she did say that her husband had, on occasion, in the past driven her car on short errands like going to the store for cigarettes. Furthermore, she stated that that is what she believes her husband was engaged in at the time that the vehicle was stopped and impounded. The Applicant asserted that she believes that the vehicle was "not really stolen... It was [taken] without consent."

On the day of the impoundment, the Applicant returned to her matrimonial home. She placed her car keys on the kitchen table and then went into the washroom. Her husband saw the keys, picked up the keys and proceeded to drive his wife's car. (The Applicant testified that by this point in time her husband's motor vehicle was no longer in operating condition.)

Apparently, the car keys were in plain sight in a common area of the home. The decision by the Applicant's husband to take the keys was formulated on the spur of the moment when he was presented with the opportunity. He clearly did formulate the intention to drive while his licence was under suspension. Given that the object of his motorized journey was most likely the purchase of cigarettes, it is highly improbable that he formulated the intention to deprive his wife of the benefit of ownership or possession of the vehicle permanently. Therefore, the Tribunal concurs with the Applicant and finds that the vehicle was "not really stolen... It was [taken] without consent."

The Applicant has also appealed on the grounds that the impoundment of her vehicle will result in exceptional hardship.

Under Section 22 of Regulation 574 of R.R.O. 1990, as amended by Ontario Regulation 632/98, the owner must establish that no alternative to the impounded vehicle is available as a prerequisite condition for a finding of exceptional hardship under subsection (1) or (3).

The evidence in this case establishes that the Applicant rented a motor vehicle subsequent to the impoundment. Therefore, an alternative to the impounded vehicle is available. Therefore, the Tribunal may not render a finding of exceptional hardship under section 22.

Given the fact that the Applicant has the benefit of the use of a rented vehicle, her concerns do not relate to the consequences of the loss of the use of the impounded vehicle. Her concerns relate to the financial burden of the car rental and of the impoundment fees. Furthermore, it is obvious that the impoundment is exacerbating the Applicant's pre-existing high level of stress.

Section 22.3(b) does permit the Tribunal to consider financial loss. However, the losses contemplated in subsection 3(b) are losses incurred as a result of the loss of use of the impounded vehicle predicated on the assumption that no alternative to the impounded vehicle is available. Therefore, the rental costs are excluded from consideration as a loss

under section 22.3. Similarly, the impoundment fees are also excluded from consideration. Section 22 also excludes stress from consideration.

While they do not constitute grounds for a finding of exceptional hardship under section 22, the Tribunal recognizes the hardship that these concerns inflict upon the Applicant. The Tribunal notes that the Applicant did indicate that she intends to apply for a bank loan in order to finance the car rental and the payment of the impoundment fees. The Applicant, while exhibiting signs of stress and anxiety over the impoundment, did not say that she was concerned that she would not be able to obtain a loan. Also, the Registrar's Agent in the hearing suggested a method whereby the Applicant could reduce the insurance component of her rental costs. The Tribunal suggests that the Applicant prevail upon her husband to shoulder, at least, some of the financial burden from his present and future assets. The Tribunal trusts that these measures will obviate to some degree the hardship of the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

William Warburton, Presiding Member

Dino Bottero, Member

RELEASED: *May 30, 2000*

KENT

JULIE KENT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

JEROME H. STANLEIGH, Counsel, representing the Applicant
LUCY McSWEENEY, Counsel, representing the Ontario New Home
Warranty Program,
No one appearing for TONY POLSINELLI, Added Party

DATE OF
HEARING:

May 29, 2000

Toronto

ORDER

WHEREAS by decision letter dated August 27, 1999 of the Ontario New Home Warranty Program (the "Program") and supplementary decision letter dated May 17, 2000, the Program denied the claim of Julie Kent (the "Applicant");

AND WHEREAS the Applicant appealed the Program's decision to this Tribunal which appeal was due to be heard in Toronto on May 29 and 30, 2000;

AND WHEREAS at the commencement of the hearing on May 29, 2000, Counsel for the Applicant and Counsel for the Program requested that the hearing be adjourned to August 14 and 15, 2000;

NOW THEREFORE this Tribunal Orders:

- (i) The hearing of this matter be *peremptorily* adjourned *against the Applicant* to commence at 9:30 a.m. on Monday August 14, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto and to continue, if necessary, on August 15, 2000 at 9:30 a.m. at the Tribunal's above Chambers.

- (ii) The Applicant and the Added Party shall no later than 45 days prior to August 14, 2000 comply with the disclosure requirements under Rule 6.3(1) and (2) and Rule 6.4 (1) of the Rules of Practice of the Tribunal;
- (iii) The Program shall by no later than 30 days prior to August 14, 2000 comply with the disclosure requirements under Rule 6.4 (1) of the Rules of Practice of the Tribunal, the Program having already disclosed to the other parties documents under Rule 6.3 (1) of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: May 29th, 2000

VELLOZO

ROBERT VELLOZO

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE MOTOR VEHICLE DEALERS
COMPENSATION FUND

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: ROBERT VELLOZO, the Applicant,
LARRY A. BANACK, Counsel, representing the Board of Trustees of the
Motor Vehicle Dealers Compensation Fund

DATE OF
HEARING: April 18, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (formerly the Commercial Registration Appeal Tribunal), (the "Tribunal") from a written decision of the Board of Trustees of the Motor Vehicle Dealers Compensation Fund (the "Board") dated November 1, 1999, wherein the Board advised the Applicant that it was paying to the Applicant the sum of One Thousand Six Hundred Fifty Dollars (\$1,650.00) as payment of the Applicant's claim based on the wholesale value of the 1988 Mustang less a reconditioning cost.

At the outset of the hearing, Counsel for the Board reviewed the undisputed facts giving rise to the Applicant's claim to the Board. The Applicant was one of numerous victims, some of whom have appeared before this Tribunal, who were taken in by a fraudulent scheme whereby individuals who advertised their vehicles for sale were contacted by a representative of Uniglobe Financial Corporation ("Uniglobe") who agreed to purchase the vehicle and pay a "premium" because payment was by a post-dated cheque. The owner signed over the ownership to the vehicle and was given a "guaranteed purchase agreement" together with the post-dated cheque. The first group of sellers had their post-dated cheques honoured and their names were provided as references for subsequent prospective vendors. Unfortunately, after the first sellers received their money, the balance did not and upon presentation of their post-dated cheques, a seller was advised that the account was closed and the cheque was not honoured.

This is the situation in which this Applicant finds himself and the facts of his particular dealing with Uniglobe are contained in a letter dated January 27, 1994, written to the Ministry of Consumer and Commercial Relations, Investigation Section and filed as Exhibit A4" in these proceedings.

ISSUE:

It was agreed between the parties that the sole issue for determination by the Tribunal is the fair value for the vehicle and the amount of money that the Applicant is entitled to be compensated by the Board for his pecuniary loss.

THE EVIDENCE:

The position of the Applicant in this matter was given by the Applicant who testified on his own behalf. It was the Applicant's evidence that if the value of the 1988 Mustang was not \$4,600.00 as claimed in his application for compensation being the amount of the dishonoured cheque from Uniglobe, then the value was between \$3,200.00 and \$3,500.00. The Applicant stated that there was no evidence of any reconditioning and in his opinion the vehicle was road-worthy and that the records of the Ministry of Consumer and Commercial Relations which appeared at Tab 1, pages 18 to 21 and Tab 9 of the Document Brief which is Exhibit A3" in these proceedings, indicate that as of December 3, 1998, the vehicle was listed as still active.

The Applicant stated that the vehicle had received a safety standards certificate on August 23, 1993, a copy of which appears as an exhibit to the Applicant's application for claim at Tab 1 of Exhibit A3".

Under cross-examination, the Applicant stated that he had listed the vehicle for sale in August 1993 in the Auto Trader for a price of \$3,200.00. He determined this price as the market value for similar vehicles at that time. After providing a brief summary of his work experience, which did not include any work in the auto industry, the Applicant stated that he purchased the vehicle from Scarborough Nissan in September 1990 for, to the best of his recollection, about \$5,800.00 which included taxes. The vehicle in question is a black 1988 Ford Mustang, 4 cylinder, 5 speed, which apparently did not have air conditioning although the Applicant's recollection on this point was not clear. He did not recall the vehicle's mileage at the time of acquisition and acknowledged that at the time of purchase it had been on the road for approximately three years.

The Applicant works for a company in downtown Toronto but did not use the vehicle to regularly commute from his home in Scarborough to work but did use the vehicle for the occasional commute and on weekends and evenings. There were also trips to Montreal and camping trips.

The Applicant was the only driver of the vehicle and estimated that there had been approximately 20,000 to 25,000 kilometers put on the vehicle during his period of ownership.

Mr. Vellozo testified that he had owned two previous vehicles both of which he had traded in when acquiring a replacement vehicle and did trade in a vehicle when he acquired the Mustang.

It was the Applicant's evidence that he had the opportunity to obtain a vehicle from his father and as he had no need for two cars, he decided to sell the Mustang through the Auto Trader which he had never done before. The Applicant acknowledged that by placing an ad in the Auto Trader with a sale price of \$3,200.00, he could not expect to receive more than that amount in the event of a sale.

It was after the vehicle had been in the Auto Trader that the Applicant heard from Uniglobe and spoke to one Jack Goldstein ("Goldstein") who subsequently agreed to buy the vehicle for \$4,600.00 in October of 1993.

The Applicant acknowledged that at the time of the safety inspection no work was done on the car and to the best of his recollection, new tires had been put on the car early in 1992 and the car had been serviced at a garage in Scarborough but that the battery had not been changed nor the muffler, the brakes or clutch but the catalytic converter had been subject to a recall. The car had not been repainted however, it had been involved in a "fender bender" with the result that the rear quarter panel had been "popped out" and repainted.

The Applicant continued to drive the car until October 1993 when he gave the vehicle together with the ownership and keys to Goldstein. He could not recall what the odometer reading was at the time he delivered the vehicle and ownership to Uniglobe however he estimated it would have been approximately 94,000 kilometers.

Counsel for the Board called Mr. Bavelaar to give testimony on behalf the Board and qualified Mr. Bavelaar who had started his career as a "lot boy" and worked his way up until he was running a dealership and now owns and operates a used car dealership which deals with late model domestic vehicles. Mr. Bavelaar is the national adviser to the Automobile Protection Association regarding used cars, works with the Automobile Consumer Coalition with respect to maintenance, practices and trade-in matters and, in addition to other associations, is a regional adviser to the Used Car Dealer Association.

Mr. Bavelaar stated that the prices shown in the industry's "Black Book" are average prices based on actual sales through auctions in the industry. Mr. Bavelaar explained the difference between the various levels, "extra-clean", "clean", "average" and "rough", and indicated that the difference between "clean" and "average" was whether there was original paint and good tread on the tires. A clean vehicle would require very little or no clean up whereas an average vehicle would have paint chips and would require money for reconditioning. He then stated that the vehicle in question was considered to be a commuter car which, after having been driven for about five (5) years, would have very little value. He also noted that certain Ford products of this vintage were known to have paint-peeling problems. Further, the Mustang was known for poor winter driving as it was a light rear-wheel drive vehicle. Mr. Bavelaar indicated that he some personal knowledge with respect to a 1989 Mustang.

The price that a seller might receive for this vehicle would be susceptible to price variation depending upon the season as the vehicle would be considered to be in the "sport market" and would have a greater opportunity for sale in the spring and summer as opposed to the fall or winter. He suggested that it would be difficult to sell a 1988 Mustang in the fall.

Mr. Bavelaar gave evidence with respect to the different standards of certification that are applied where a garage is certifying a car for a customer and a motor vehicle dealer who is certifying a vehicle for resale. The dealer would be concerned with a customer coming back with complaints if only the minimum standards required under the certification procedure and used by most garages were applied.

It was Mr. Bavelaar's opinion that because of the type of vehicle, the fact that it was a 5 speed, did not have factory air conditioning, was being sold in the fall and was considered a "disposable" car, a dealer would drop a category and in the case of this vehicle would use what is referred to as "bottom book" which means the lowest price category which, according to the Black Book prices set forth at Tab 10 of Exhibit A3", would be \$1,440.00.

Mr. Bavelaar stated that when offering the lowest category price, issues of reconditioning, etc., are not taken into consideration, however, if one were to offer the price in the average category, which was \$2,350.00, there would be conditioning costs of between \$500.00 and \$700.00.

When Mr. Bavelaar was asked to establish a price based not on the Black Book but on the possibility of selling the car at the then market price taking into consideration profit, reconditioning and advertising, he suggested that if the market price was \$3,200.00 at the time, the vehicle would be offered for approximately \$2,995.00 with the expectation of a profit of approximately \$800.00 to \$1,000.00, and after a deduction for reconditioning the price offered would be approximately \$1,500.00.

On cross-examination, Mr. Bavelaar was asked to expand upon the difference between "extra-clean" and "clean" and stated that in reality the only difference between the two categories was the number of kilometers on the vehicle and that in both cases, there should be no chips, scratches, the tires should be in good shape, no stone chips in the windshield and certainly no dents. He stated that the damage to the quarter panel of the Applicant's vehicle would, in and of itself, be likely to drop the vehicle one category in the Black Book.

Mr. Bavelaar's testimony throughout the cross-examination was consistent with the evidence which he had given in his examination in chief.

THE LAW:

As the entitlement of the Applicant to make a claim to the Fund in the present circumstances is not an issue the relevant section of the Regulations under the Act appears as part of Regulation 801 under the Schedule "Terms of Compensation Fund", section 1 "Definitions" wherein a "claim" is defined to mean:

"a claim for *pecuniary loss* arising out of a transaction involving a trade in motor vehicle (emphasis added)."

Although the Applicant may have been able to obtain a better price for his vehicle in the retail market, the transaction giving rise to the Applicant's right to make a claim against the Fund is as a result of the transaction involving a motor vehicle dealer which is a different form of transaction and one to which the wholesale prices for a vehicle are taken into consideration.

The burden of proof is on the Applicant who must prove, on the balance of probabilities, that the amount that he claims to be entitled is the amount of his pecuniary loss with respect to this transaction.

During the course of the hearing, the Applicant abandoned his claim for \$4,600.00 and acknowledged that he could not claim \$3,500.00 when he offered the vehicle for sale for \$3,200.00. Unfortunately, the Applicant has not persuaded this Tribunal that the value of the vehicle at the time in question was \$3,200.00. Although the Tribunal sympathizes with the Applicant and the loss that he has incurred with respect to this matter and the length of time taken to have received compensation, the Tribunal must accept the evidence as to the value of this type of vehicle in a wholesale transaction taking place at the time of year in which the Applicant delivered the vehicle to Uniglobe.

The best value to be placed upon the vehicle would be as an "average" car which has a Black Book value of \$2,350.00 which would be subject to a reduction for reconditioning in the amount between \$500.00 and \$700.00 which would mean the pecuniary loss incurred by the Applicant would be \$1,650.00 being the amount paid to the Applicant by the Board.

At the conclusion of the hearing, counsel for the Board referred the Tribunal to three (3) cases which had been heard before this Tribunal involving Uniglobe Auto Brokers and the same scheme as that applied to the Applicant in the present matter. In each of the decisions the value for the vehicle in question as shown in the Black Book was taken into consideration to determine the fair value of the vehicle and the amount established for reconditioning is consistent with those cases and the evidence given to the Tribunal at this hearing.

DECISION AND ORDER:

The Tribunal finds that the Applicant has not proved his claim for greater compensation and therefore, pursuant to the provisions of section 15(3) of the Schedule to Ontario Regulation 801, R.R.O, 1990 as amended, made pursuant to the Act, the Tribunal hereby confirms the decision of the Board with respect to the Applicant's appeal.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: May 30th, 2000

024-RESP

0024/ADLS/00/002

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JOHN A. CARMICHAEL, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant
by written submissions only

DATE OF
HEARING: May 11, 2000

Kingston

DECISION

A hearing was held on May 11, 2000, at Kingston, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Board makes the following Order, with Reasons to follow:

THE BOARD CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

John A. Carmichael, M.D.
Presiding Member

RELEASED: *May 12, 2000*

0024/ADLS/00/002

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JOHN A. CARMICHAEL, M.D.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant
by written submissions only

DATE OF HEARING: May 11, 2000

DECISION RELEASED: May 12, 2000 Kingston

REASONS FOR DECISION

A hearing was held on May 11, 2000 at Kingston, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on May 12, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated March 31, 2000, and was received by the Tribunal on April 12, 2000, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters in dispute between the parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 2 Letter from counsel – dated April 3, 2000
- b) Exhibit # 3 Report from the Applicant's Family Physician – dated April 6, 2000

By the Respondent:

- a) Exhibit # 1 Affidavit of PC Officer # 1 – dated April 28, 2000
- b) Exhibit # 4 Report of expert witness Roger Goldstein, MB, ChB, FRCPC.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is

the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

On March 3, 2000, the Applicant was involved in a motor vehicle accident. The attending Constable, while completing the necessary documentation “detected a moderate odor of an alcoholic beverage on his breath”, i.e. the Applicant. The Applicant denied having anything to drink that day (exhibit 1).

After obtaining a roadside screening device, the Constable requested the Applicant to perform the breath analysis test. The Applicant initially refused, stating that he had to void. After relieving himself, the Applicant attempted the test a total of six times, each time failing to provide an adequate sample. After the third attempt, the Constable again demonstrated the proper use of the screening device. After the fifth attempt, the Applicant was informed that another failure would result in a criminal charge of refusal to provide a breath sample. After the sixth attempt, the Applicant was charged. On each attempt, the Applicant “provided a faint puff of breath that lasted for 1 or 2 seconds”. The rest of the time he held his breath and puffed out his cheeks (exhibit 1).

Counsel for the Applicant submitted a letter stating that the Applicant was being treated “for recurrent sinusitis with severe nasal congestion since Jan. 2000”. This, he states, “affected the Applicant’s ability to breathe through his nose and therefore affected his ability take in sufficient breath to provide a suitable sample” (exhibit 2).

A report from the Applicant’s Doctor confirms the diagnosis of “nasal congestion which would affect the patient’s ability to breathe through the nose” (exhibit 3).

The Respondent has provided the opinion of an expert witness that nasal congestion is not a barrier to performing the breath analysis test (exhibit 4).

APPLICATION OF THE LAW TO FACTS:

The Applicant is seeking reversal his driver’s licence suspension, March 3, 2000 for medical reasons, (Subsection 50.1(2)(b) of the HTA). The Applicant claims that his recurrent sinusitis and nasal congestion prevented him from providing an adequate breath sample. The only evidence presented to support this claim is a letter from the Applicant’s counsel. The Tribunal finds on the evidence that whether the nasal sinuses are congested or obstructed has no bearing on the ability of the subject to perform the test. This is confirmed in the letter from the expert witness’s, paragraph seven.

With respect to the Applicant's medical condition and the Applicant's failure to provide a breath sample, the Tribunal notes that the Applicant's doctor, while confirming the presence of nasal congestion, avoids any comment on the effect of such a state on one's ability to perform the test.

The onus is on the Applicant in this appeal to establish on the evidence that he did not provide a breath sample due to a medical condition. The Applicant has not discharged that onus as required by section 13 of the HTA.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated March 3, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

John A. Carmichael, M.D.
Presiding Member

RELEASED: *May 15, 2000*

GIBSON

JASON GIBSON

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: JOSEPH HEWITT, Presiding member
JOHN OOSTROM, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JASON GIBSON, Applicant
unrepresented

DATE OF HEARING: May 29, 2000

DECISION RELEASED: May 31, 2000 Toronto

REASONS FOR DECISION

A hearing was held on May 29, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Jason Gibson (the "Applicant")
Motor Vehicle:	1992 Honda Civic, plate # AEXJ 556 (the "vehicle")
Date of Appeal:	May 12, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on May 29, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I Jason Gibson have had my car impounded and I was not driving at the time of the incident. I was slightly intoxicated at the time in question and an acquaintance of mine told me that he was licenced and able to drive my vehicle for me. So I figured it was better for him to drive than me. Apparently I was wrong because I found out shortly after that he was in fact not licenced. Now I'm stuck with no car and a very large impoundment fee to look forward to. I use my car to get to work and back and I'm now finding myself in a very tight jam without without it. If you could please see this situation from my side it would be greatly appreciated. Yours truly Jason Gibson.

Mr. Jason Gibson was sworn and testified that he was at a bar in Brampton, and met Mr. Pellegrims, and old work friend that he had not seen in six months. Mr. Pellegrims offered to drive Mr. Gibson's car to Mr. Gibson's girl friend's house due to the fact that Mr. Gibson was intoxicated. Mr. Gibson asked Mr. Pellegrims if he was okay to drive and if he had a driver's licence. Mr. Pellegrims said that he was okay to drive and that he did have a licence. They were driving through Brampton and were stopped by the police for excessive noise (squealing tires). The police checked Mr. Pellegrims with a roadside breathalyser, and also found that he was driving while under suspension. Mr. Gibson's car was impounded.

Mr. Gibson stated that he pays \$10.00 per day to take a cab to work. Some days, he gets a ride to work or home if he can. This impoundment is a major inconvenience, and his finances are limited. His expenses are in the neighbourhood of \$400.00 per week due to bills and rent, and he cannot afford the cost of the impoundment. Mr. Gibson said that he lived five kilometres from work and earns \$18.00 per hour, and can work overtime.

Mr. Gibson called Mr. Pellegrims as a witness. He was sworn and testified that he had met Mr. Gibson at a bar in Norval, Ontario. They were old work friends, and he offered to drive Mr. Gibson's car because he felt that Mr. Gibson was intoxicated. Mr. Gibson asked him if he was okay to drive, and if he had a driver's licence which he replied that he was okay to drive and that he had a driver's licence. It was about 2:30 a.m., when they left the bar and drove to Brampton. They were stopped by the police, and Mr. Pellegrims could not produce a driver's licence and was given a roadside breathalyzer, which registered an alert. As a result of driving while under suspension, he was given a 90 day A.D.L.S. suspension. Mr. Pellegrims said that he was just helping out a friend.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael Jason Pellegrims;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of failing to provide breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 25, 2003.

The respondent offered no further evidence.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of section 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

DUE DILLIGENCE

To succeed in this appeal, the Applicant must establish that he exercised due diligence to determine that Michael Pellegrims' driver's licence was not under suspension at the time of the vehicle being impounded.

The Tribunal finds that Michael Pellegrims' driver's licence was under suspension and further finds that he was driving the Applicant's motor vehicle at the time that it was impounded.

Section 50.2(3)(c) of the Act requires that the owner, Jason Gibson, exercise due diligence in attempting to determine that Michael Pellegrims' driver's licence was not suspended at the time of the impoundment of the owner's motor vehicle.

The ground of appeal argued by the Applicant in subsection 50.2(3)(c) of the Act requires the Applicant make inquiries as to Michael Pellgrims' licence at the time of the impoundment. Meeting the requirements of subsection 50.2(3)(c) is the sole basis of the Tribunal's jurisdiction in this hearing.

The Tribunal finds that the Applicant made little effort to confirm the status of Mr. Pellegrims' driver's licence. He did not exercise due diligence, and accordingly he has failed to establish that as the owner of the vehicle, he exercised due diligence as required by subsection 50.2(3)(c) of the Act.

EXCEPTIONAL HARDSHIP

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provides that this Tribunal may consider financial or economic loss as a ground of appeal but only providing, among other things, that no alternative to the impounded vehicle is available. The Applicant has not established that no alternative to the impounded vehicle is available. For example, he has not shown that he can not rent or borrow another vehicle when required. The evidence indicates that he lives close to his place of employment.

Also, the Applicant does not meet the criteria of O. Reg. 632/98, subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting. The Applicant did not satisfy the Tribunal that he has in fact incurred any significant expenses in alternative transportation modes.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship as that term is circumscribed by section 22 of Regulation 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joseph Hewitt, Presiding Member

John Oostrom, Member

RELEASED: *May 31, 2000*

ADLS/00/219

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JOHN CARMICHAEL, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant
by written submission only

DATE OF HEARING: May 9, 2000 Kingston

DECISION

A hearing was held on May 9, 2000, at Kingston, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Board makes the following Order, with Reasons to follow:

THE BOARD CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

John Carmichael, M.D.
Presiding Member

RELEASED: *May 10, 2000*

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JOHN A. CARMICHAEL, M.D.
Presiding Member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant
by written submissions

DATE OF HEARING: May 9, 2000

DECISION RELEASED: May 10, 2000 Kingston

REASONS FOR DECISION

A hearing was held on May 9, 2000 at Kingston, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on May 10, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated March 10, 2000, and was received by the Tribunal on March 31, 2000, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters in dispute between the parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 3 Letter from counsel – dated March 24, 2000
- b) Exhibit # 4 Medical Report – dated March 10, 2000

By the Respondent:

- a) Exhibit # 1 Affidavit of PC Officer # 1
- b) Exhibit # 2 Affidavit of PC Officer # 2

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

On February 13th, 2000 at 12:50 a.m., Constable Officer # 1, badge no. (#) pulled up behind the Applicant's car which was parked with its flashers on, at the side of the road. The Constable engaged the Applicant in a few minutes conversation. Upon noticing the Applicant to be emanating a strong odour of alcohol and his eyes to be blood shot and glossy, the Constable placed him under arrest. At that moment, the Applicant became hostile, aggressive and verbally abusive. He continued this behaviour for the most of his remaining time in custody. During this period the Appellant gave mixed responses to the offer of counsel and consistently refused to take or try to take a breath analysis test (exhibits 1 & 2).

A letter from the Applicant's counsel states that the Applicant was suffering from Bell's Palsy. As a result he had lost movement of one side of his face and therefore “did not intentionally refuse to blow but his medical condition had prevented him from blowing into the machine” (exhibit 3).

The Applicant's counsel has submitted a medical report from a Physician # 1 who although it does not so state, should be considered the Applicant's family physician. This brief report provides a diagnosis of Bell's Palsy with onset February 6th, 2000. The report based on a visit by the Applicant to the doctor's office February 8th, 2000 lists the symptoms (compatible with the diagnosis) and the treatment given. A visit February 25th, 2000 states the “condition resolved” (exhibit 4).

APPLICATION OF THE LAW TO FACTS:

The symptoms and sign of Bell's Palsy are well defined. The degree of severity of the symptoms and signs vary greatly, ranging from complete paralysis of the muscles of one side of the face to mild and local muscle weakness. The Applicant's medical statement fails to describe any physical findings which might provide an objective assessment of the degree of disability, if any, experienced by the Applicant, e.g. muscle weakness, facial asymmetry, inability to close the eye, etc. During the time, the Applicant was in custody he did not mention that he was suffering from Bell's Palsy. During this same period, neither Constable noticed any physical impediment i.e. “facial or mouth problems of any kind” that might have limited the Applicant's ability to provide an adequate breath sample (exhibits 1 & 2).

The Tribunal acknowledges that an individual suffering from Bell's Palsy at the severe end of the symptomatic scale might have difficulty effectively sealing the mouthpiece and therefore successfully performing the test. Even this might be overcome by manually holding the lips on the paralyzed side together.

The Applicant refused to provide a breath sample when requested. The onus on the Applicant to succeed in his appeal is to establish on a balance of probabilities that he failed or refused

to comply with the demand to provide a breath sample because he was unable to do so for a medical reason.

The Tribunal has considered the evidence, including, the Applicant's deportment while in custody, the lack of physical signs of disability while in custody, and the lack of an accurate description of any physical disability in his medical report. The Applicant has not established that his refusal to provide a breath sample was based on a medical condition.

The Applicant, therefore, has not met the onus required of him in this appeal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 13th, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

John Carmichael, M.D.
Presiding Member

RELEASED: *May 12, 2000*

010-CARD

0010/MED/00/002

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to Section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: Jeffrey M. Lee D.C., Presiding Member
Roy Melvin M.D., Member

APPEARANCES: Claire Rowett, Respondent
Representative for the Minister

Applicant
unrepresented

DATE OF
HEARING: May 18th, 2000

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the Highway Traffic Act (Ontario).

FACTS:

Ms. Rowett was sworn and took the stand and presented the following evidence.

The Notice of Appeal states that the Applicant's driver's licence was downgraded effective July 5, 1999 (Exhibit # 1).

The Applicant's driver's licence was downgraded after an unsolicited letter, dated February 18th, 1999, received from Physician # 1, Temiskaming Hospital, informing the Ministry that "I am notifying you of this gentleman's cardiac condition. He suffered an episode of ventricular tachycardia which lasted for approximately 2.5 hours and required defibrillation to resolve. As he is a professional driver, I am notifying you so that you can follow his ongoing cardiac assessments and make decisions as to when he can resume driving." (Exhibit 2 Tab 10).¹

A further report was submitted by Physician # 2. The report was dated May 14, 1999, and it advised the Ministry that the Applicant has remained stable and had no recurrences of syncope or rhythm disturbance that would impair his ability to operate a motor vehicle. Therapy consisted of medication and an ICD (implantable cardioverter defibrillator).

The Applicant was informed that as a result of the above information, his driving privileges were suspended due to his medical condition.

Physician # 3, Cardiologist, Electrophysiologist, in a letter dated August 5, 1999, informed the Ministry that the Applicant had remained stabilized and had no clinical tachycardia or loss of consciousness since the implant. Physician # 3 did state that the Applicant had experienced three inappropriate shocks, however these were not related to the tachycardia.

The Medical Advisory Committee reviewed the file on August 25, 1999 and granted a reinstatement of the Applicant's Class "G" licence.

The Applicant has appealed under Section 50(1) of the HTA.²

The Applicant asked the Ministry's representative why he was only informed that he could have a "GM" licence and not informed why he was not told that he did not qualify for a class "A" licence. The Ministry's did not have an answer as to why but speculated that there was a delay in getting information from one person to the other and perhaps this information was misplaced.

¹Pursuant to Section 177 of the HTA (1) every legally qualified medical practitioner shall report to the Registrar the name, address and clinical condition of every person sixteen years of age or over attending upon the medical practitioner for medical services, who in the opinion of the medical practitioner is suffering from a condition that may make it dangerous for such a person to operate a motor vehicle.

²Section 50.(1) states:
Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32 (12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision of the Licence Suspension Appeal Board.

The Tribunal asked the representative for the Ministry if she could direct our attention to where in the Highway Traffic Act there was a listing of designations of Class 1,2,3,4,5 and to what letter i.e. Class A, B, C, etc. that these corresponded to. The representative was unable to direct our attention to any specific reference.

The representative for the Respondent was excused from the stand.

The Applicant took the stand and was sworn. He stated that he believed that he was fit to drive and was supported by his cardiologist, Physician # 4.

He stated that he did not understand why the medical waiver was granted for his "G" licence and not for his "A" licence. He further stated that he was having financial difficulties because he was unable to work as a truck driver for which he required is Class "A" licence.

The Applicant had nothing further to add, and was excused from the stand.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;

- (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
- (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- (1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.
- (2) The Board may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Registrar relied on Section 32(12)(b)(i) of the Highway Traffic Act to downgrade the Applicant's licence to a Class "G". The downgrade was in accordance with the basic medical standards found in Regulation 340/94 made under the HTA. The Registrar relied on Section 17(1)(c) and (d) of the Regulations. Section 17(1)(c) requires that the applicant or holder has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis. Section 17(1)(d) of the Regulations requires that "an applicant or holder has no established medical history of heart disease including arrhythmia or a respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class."

The Registrar also relied on N.S.C³ and the MTMAC⁴. The NSC 3.5.9, Implantable Cardioverter/Defibrillator, The Standard: Ineligible for a Class 1,2,3,4 however for a Class 5 licence ("G" licence) the standards may be waived, @if the device has delivered no shock or anti-tachycardia pacing therapy and at least one year has elapsed since implantation."

By virtue of the medical evidence presented to the Tribunal the Applicant, does not meet these requirements as set out in the legislation. The Tribunal finds that the evidence presented supports the Ministry's arguments that the Applicant's driver's licence should not be upgraded to a Class AA@ licence on the basis of Regulation 340/94 Sections 14 and 17 under the Highway Traffic Act.

DECISION:

Upon the application by the Applicant to appeal the decision dated July 5, 1999 of the Minister (ARespondent@) to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the Highway Traffic Act (HTA@), and having considered the evidence filed with the Board, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE BOARD pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.
Presiding Member

Roy Melvin, M.D.
Member

RELEASED: *May 30, 2000*

³N.S.C. National Safety Code for Motor Carriers

⁴Ministry of Transportation Medical Advisory Committee

0036/ADLS/00/004

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: GILLES A. LAMARCHE, D.C.
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: May 17, 2000 Timmins

DECISION

A hearing was held on May 17, 2000, at Timmins, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Board makes the following Order, with Reasons to follow:

THE BOARD CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Gilles A. Lamarche, D.C.
Presiding Member

RELEASED: May 18, 2000

0036/ADLS/00/004

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: Dr. G. A. Lamarche
Presiding Member

APPEARANCES: Mr. K. M. Biel
Representative for the Registrar of Motor Vehicles
By written submissions

Applicant
by written submissions

DATE OF
HEARING: May 17, 2000

DECISION
RELEASED: May 18, 2000 Timmins

REASONS FOR DECISION

A hearing was held on May 17, 2000, at Timmins, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on May 18, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated April 17 2000, and was received by the Tribunal on April 20, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The request by the Applicant to reduce the disclosure timing period was not agreed to by the Respondent. The Rules of Practice standards apply.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1. Notice of Appeal – dated April 12, 2000
 - ground for appeal – medical
- b) Exhibit #2. Applicant's Medical Information
 - dated May 4, 2000
- c) Exhibit #3. Letter from Physician # 1
 - dated April 11, 2000
- d) Exhibit #4. Note from Physician # 2
 - dated April 13, 2000

By the Respondent:

- a) Exhibit #5. M.T.O. submissions 36 pages
 - received April 19, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

On March 10, 2000, P.C. Officer # 1 of the Ontario Provincial Police was requested to respond to a motor vehicle accident on Concession 2/3 Tuckersmith Township. Upon investigation, P.C. Officer # 1 learned that the driver of the vehicle involved in the single vehicle accident was transported to Seaforth Hospital. P.C. Officer #1 attended Seaforth Hospital and interviewed the driver of the vehicle, the Applicant. The Applicant explained he hit a patch of ice causing the accident. While speaking with the Applicant, P.C. Officer #1 noted that he had a strong odour of an alcoholic beverage emitting from his breath and that his eyes were bloodshot and glassy and his speech was slurred. P.C. Officer #1 formed the opinion that the Applicant had been in care and control of a motor vehicle while his ability impaired. The Applicant was read his rights to counsel, read his caution, and read the breathalyzer demand. When asked if he understood these instructions, The Applicant indicated yes. The Applicant denied drinking any alcohol. P.C. Officer # 2 attended Seaforth Hospital to perform the breath test. The Applicant attempted six times to provide a sample of breath to P.C. Officer #2 and on all the attempts he failed.

According to the affidavits of P.C. Officer #2 and P.C. Officer #1, the Applicant failed to provide a breath sample because he did not follow instructions, (i.e. place tongue over mouthpiece, small puff of breath, no air blown in instrument), even though P.C. Officer #2 instructed him before each attempt. The Applicant was examined by Seaforth Hospital Emergency on call physician, Physician # 3, who states that there was no reason why the Applicant could not provide a breath sample.

APPLICATION OF THE LAW TO FACTS:

The Applicant, has appealed under section 50.1 (2) (b) of the H.T.A., on the grounds that he was unable to provide a breath sample for a medical reason. No specific reason is given, though in his submission The Applicant states that he saw Physician # 2 on March 10, 2000, concerning chest pain and breathing problems. In his note dated April 13, 2000, Physician # 2 states that he saw the Applicant on March 10, 2000, for symptoms of dysphagia, chest discomfort and shortness of breath. He states that he subsequently referred him for a surgical opinion. There is no reference to any tests being performed, any differential diagnosis, and there is no objective information provided. Physician # 2 fails to meet the criteria set out in

Regulation 574 15 (1)(2), R.R.O., 1990, as amended by Ontario Regulation 510/96. The Applicant further states that he was taking Prepulsid and ordered by Physician # 2 to stop immediately, then referred to Physician # 1 who later diagnosed "obstructing cancer at the lower esophagus and upper stomach". Physician # 1 states "there is significant chance that spread beyond....causing his chest pain." Physician # 1's report also fails to meet the requirements of Regulation 574, 15 (1)(2).

The Respondent submits and supports his affidavits from P.C. Officer #1 and P.C. Officer #2, as well as statements from Physician #3, Witness #1, Witness #2 and Witness #3, attending Seaforth/Clinton Ambulance staff, that the Applicant did in fact have an obvious odour of alcohol on his breath. Physician # 3 also states, referring to the Applicant " he had some other physical signs including slurred speech.... He was unsure about what day it was.... In my opinion he had been drinking alcohol..... he showed no signs of decomposition indicating that his behaviour was more likely due to alcohol intoxication rather than a closed head injury.... This man was on medication for a stomach ailment which could not account for these symptoms. There was no reason why this man could not provide a breath sample.... There was no compromise in his airway or breathing."

The Registrar submits that the actions of the Applicant suggests that he had no intention of giving a breath sample to P.C. Officer #2. Upon careful review of all material, this Tribunal agrees with that submission.

It is obvious that the medical personnel who attended to The Applicant following his injury, agree that he had an odour of alcohol on his breath and that he showed no signs of respiratory distress. It is logical to assume that if the Applicant was experiencing difficulty breathing before or during the breath demand, he would have brought this to the attention of the medical staff. No where in his submissions or that of the witnesses is there such mention.

The Applicant has failed to establish the merit of his appeal under Section 13, of Regulation 574, and has failed to prove under Section 50.1 (2)(b) that he was unable to provide a breath sample for a medical reason.

This Tribunal finds that in this case there is no direct link between an oesophageal cancer and an inability to provide a proper breath sample and is in agreement with the opinion submitted by Dr. Roger S. Goldstein.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated March 11, 2000, of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Dr. Gilles A. Lamarche
Presiding Member

RELEASED: *May 23, 2000*

FILE NAME: 0036.adls

039-RESP

0039/ADLS/00/005

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: May 17, 2000 Hamilton

DECISION

A hearing was held on May 17, 2000, at Hamilton, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: May 18, 2000

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: Antoine Aouad, M.D.
Presiding Member

APPEARANCES: Alana Best
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: May 17, 2000

DECISION
RELEASED: May 18, 2000

REASONS FOR DECISION

A hearing was held on May 17, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on May 18, 2000 with Reasons to follow.

THE BOARD RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated April 20, 2000, and was received by the Tribunal on April 25, 2000, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath/blood sample because of a medical reason."

Preliminary Matters

There were no motions, requests for adjournment, nor filing of new information. The Respondent submitted a certified copy of the Applicant's driving record and the Notice to the Registrar, as well as a letter from the Ministry of the Solicitor General verifying the qualifications of PC Officer # 1.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated April 20, 2000
- b) Exhibit #2 Applicant's Medical Information
- c) Exhibit #3 Notes from Physician # 1 – dated April 10, 2000

By the Respondent:

- a) Exhibit #4 Ministry of Transportation submissions – 18 pages
– received May 11, 2000
- b) Exhibit #5 Video Taped Recording of Breath Demand
- made February 24, 2000
- c) Exhibit #6 Letter from the Ministry of the Solicitor General verifying the
qualifications of PC Officer # 1
- received May 17, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's Driver's Licence was suspended "Feb 24 2000" as per Notice of Appeal (Exhibit # 1).

Physician # 2, the Applicant's family physician for "11 years 10 months", prepared the "Applicant's Medical Information" form dated "April 20th". Under the heading "Details and Diagnosis of patient's present condition", Physician # 2 comments: "chronic (illegible) - moderate obstruct airway disease " (Exhibit # 2)

According to Physician # 2, the Applicant's condition is "gradual, progressive..." (Exhibit # 2).

Physician # 1, prepared a second "Applicant's Medical Information" form. Under the heading "Details and Diagnosis of patient's present condition", Physician # 1 notes: " Bronchitis - " (Exhibit # 3)

According to Physician # 1, the Applicant has suffered from "Bronchitis for x years...Pulmonary function tests revealed Mild/Moderate obstruct worse in small airways." (Exhibit # 3)

A Brantford Medical X-Ray & Ultrasound report, signed by Physician # 3, on March 3, 2000, concludes "Mild peribronchial thickening, mild accentuation of the perihilar bronchovascular markings. The lungs are otherwise clear. Heart size and pulmonary vessels are normal. Bones unremarkable." (Exhibit # 2)

A Pulmonary Function Report from St. Joseph's Hospital details the results of the Applicant's test. Above the Internist's signature is a hand written note which states "Mild. moderate obstruction. worse with small airways. Minimally improved by bronchodilators..." (Exhibit # 2)

Physician # 1 signed a handwritten note on April 10, 2000 stating that the Applicant "...suffers from Bronchitis. After reviewing the pulmonary function test, in my opinion the Applicant would be unable to provide adequate sample of his breath for analysis. The maximum he could probably blow for would be 3-4 seconds." (Exhibit # 3)

The Respondent provided the following Documents:

- Notice to Registrar dated February 24, 2000.

- Driver Record of the Applicant, dated April 26, 2000
- Vehicle Record, dated April 26, 2000
- Video recording of breath sample demand made on February 24, 2000.
- Affidavit of Police Constable Officer # 2, badge #(no.), for the Brantford Police Service.
- Report of Dr. Roger Goldstein, dated May 2, 2000

Applicant's "DRIVER'S RECORD" since 1971, shows no "CONVICTIONS, DISCHARGES AND OTHER ACTIONS". (Exhibit # 4)

Affidavit of Police Constable Officer # 2 attests to the events surrounding the charge and the subsequent arrest. In paragraph 16. Constable Officer # 2 states: "AT 1:20 AM I attended the breath room. I served the accused a Notice of Intent re: certificate evidence, I also served the accused with a Notice of Intent re: a greater penalty, I also served the accused with an ADLS 90 day suspension notice. I witnessed his signature on all of these documents. He was given a copy of the documents." (Exhibit # 4)

Paragraph 18 of the Affidavit sworn by Police Constable Officer # 2 indicated that "Constable Officer # 1 advised me that the accused had failed to provide a suitable sample for the breathalyzer machine."

In a letter dated May 2, 2000, Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP, Professor of Medicine and Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "*...consultant respirologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis... familiar with the Alcotest and the Intoxilyzer 5000C...*" (Exhibit # 4)

Dr. Goldstein "*...reviewed the information... from... Physician # 2 and Physician # 1 and the x-ray report from Physician # 3 as well as the pulmonary functions tests from St. Joseph's Hospital.*" (Exhibit # 4)

Dr Goldstein concludes that "*...Pulmonary function tests of March 3, 200 show that the Applicant has an FEV1 of 2.9 litres (73% of predicted), a normal FEV1/FVC ratio and a flow rate at mid vital capacity of 2.7 litres with a good response to Ventolin. These tests are entirely consistent with the provision of a satisfactory breath sample... x-ray report would not provide the reason for the absence of a satisfactory breath sample.*" (Exhibit # 4)

At the hearing, the Applicant testified that he has suffered from bronchitis for "...over 10 years..." He had been taking antibiotics for the prescribed seven days, which he finished three days prior to the incident. However, he does not regularly take any medication, nor does he carry a bronchodilator. The Applicant admitted to being a smoker, who now smokes only four cigarettes per day.

The Applicant called his physician the day after the incident and arranged for an appointment the following Monday.

In cross-examination, the Applicant stated that he did inform the officer that he suffered from bronchitis.

The Respondent's witness Police Constable Officer # 1 testified that he is a qualified technician and has been since February 22, 1999. At no time did he notice any discomfort on the part of the Applicant.

According to P.C. Officer # 1, the Applicant was cooperative except in his attempts to provide an adequate breath sample. He was given twelve opportunities but failed to activate the breathalyzer machine.

APPLICATION OF THE LAW TO FACTS:

The issues are, how does the medical condition of the Applicant relate to Section 50.1 (2) (b), and did this medical condition cause him to fail to comply with the breath demand? Pursuant to Section 13 of Regulation 574 (Amended), the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The video taken at the time of the administration of the breathalyzer test was introduced in evidence and viewed by the Tribunal. The Tribunal finds that the video is inconclusive and unhelpful in assisting the Tribunal to make the determination of whether the Applicant was unable or refused to provide a breath sample.

The Applicant argues that he was unable to provide an adequate breath sample due to a medical condition he has had for "...over ten years...". The Applicant substantiates this statement with notes from his physicians. Doctor Physician # 2 verifies that the Applicant suffers from "*chronic bronchitis - moderate obstruct airway disease...gradual, progressive...*" (Exhibit # 2)

Physician # 1, who diagnosed the Applicant's present condition as: "Bronchitis" also summarizes the results of the Pulmonary Function tests, performed at St. Joseph's Hospital as "Mild/Moderate obstruct worse in small airways." (Exhibit # 3)

The Respondent contends that no medical reason caused the Applicant's failure to provide the required breath sample and that the Applicant did not demonstrate any health discomfort at the time the breath demand was made. The latter statement is corroborated by PC Officer # 1's observations. and the report prepared by Dr. Goldstein.

Dr. Goldstein, who upon reviewing "...the information... from... Physician # 2, Physician # 1 and the X-Ray report from Physician # 3 as well as the pulmonary functions tests, from St. Joseph's Hospital " concluded that "*...tests are entirely consistent with the provision of a satisfactory breath sample.*" (Exhibit # 4)

The onus is on the Applicant to establish the merit of his appeal. However, no compelling evidence was provided by the Applicant, in his own defence. Physician # 1 and the pulmonary functions tests confirm that the Applicant's condition is mild/moderate. The Applicant takes no medication for any respiratory condition and continues to smoke. Thus, based on the evidence before the Tribunal, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated February 24, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *May 23, 2000*

0040/ADLS/00/006

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: STEPHEN J. KELLY
Presiding Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: May 15, 2000 Ottawa

DECISION

A hearing was held on May 15, 2000, at Ottawa, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Board makes the following Order, with Reasons to follow:

THE BOARD CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Stephen J. Kelly
Presiding Member

RELEASED: May 17, 2000

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: STEPHEN J. KELLY
Presiding Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: May 15, 2000

DECISION RELEASED: May 17, 2000 Ottawa

REASONS FOR DECISION

A hearing was held on May 15, 2000, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Board released its Decision on February 10th, 2000 with Reasons to follow.

THE BOARD RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, as amended, chapter H.8, as amended. The Applicant elected that his appeal be decided by the Tribunal by way of an oral

hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated April 26, 2000.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

AI was unable to provide the required breath sample because of a medical reason.®

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 - Notice of Appeal, dated April 26, 2000
- b) Exhibit #2 - Medical report of Physician #1, dated May 2, 2000
- c) Exhibit #7 - Notes of Constable Officer #1 (5 pages)
- d) Exhibit #6 - Statement of the Applicant which accompanied his Notice of Appeal

By the Respondent:

- a) Exhibit #3 - Ministry of Transportation of Ontario Submissions (14 pages)
- b) Exhibit #4 - Certified Driving Record for the Applicant, dated May 5, 2000
- c) Exhibit #5 - Vehicle Registration report regarding the Applicant, dated May 1, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with the demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act ("HTA") states:

50.1 (1) AA person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) A report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of

speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

The report shall be signed by the medical practitioner.®

Finally, section 13 of Regulation 574 (amended) provides:

AA person appealing a suspension has the onus of establishing the merit of the appeal®.

FACTS:

The Tribunal heard the evidence of the Applicant. The Applicant stated that on the date of this incident, February 16, 2000, he spent the full day working as a courier. He did not eat any supper. He then attended a course at St. Paul's University, which ended at approximately 9:00 p.m. At the end of class, the Applicant attended an establishment, which served alcohol, where he consumed one Apersonal jug® of beer. Each jug contained two glasses of beer. He could not say how many ounces the jug or glasses held.

The Applicant left the establishment some time after midnight. As he was tired, had not had supper, and had consumed alcohol, he decided to take the back roads home, as this would be safer. As a result, he travelled into the town of Embrun. As he approached aAY® in the road, he attempted to turn but the car slid into a snow bank. He was able to back the car out and proceed down the road, at which point he was stopped by Officer #1, of the Casselman detachment of the Ontario Provincial Police.

The Applicant acknowledged advising the officer that he had been drinking. He was requested to take a roadside breath test, which he agreed to do. Upon being placed in the back of the cruiser, the Applicant states that he advised Officer #1 that he suffered from claustrophobia and asked Officer #1 to leave the door open or the window down. In response to the request, Officer #1 advised the Applicant that if he could drive in a closed vehicle, he could sit in a closed vehicle for the purposes of taking the test. He also advised that the windows could not be lowered and that it was proper procedure to keep the door closed while the test was being given.

At that point, the Applicant described that he began experiencing an anxiety attack. He began to feel panicky and had difficulty breathing. He attempted to control the attack through a number of meditation techniques. This included focussing on his internal self, breathing exercises, certain body motions, and repetition of numbers. His total focus at that time was on getting out of the cruiser and breathing.

The Applicant recalls being requested to provide a number of samples. He believes he attempted to provide three samples and cannot explain why the samples were not effective,

other than he was simply focussed on getting out of the vehicle. The Applicant points out that the notes of Constable Officer #1, who either saw the Applicant following his arrest at the scene or at a nearby station, noted that the Applicant was swaying and counting.

The Applicant explained that he had been having medical problems for over 20 years. Initially, the problem was diagnosed as a heart problem. Following a variety of tests which confirm the absence of a heart problem, his then general practitioner diagnosed that he was suffering from anxiety attacks. This diagnosis was made in approximately 1990. Physicians have recommended medication to control the symptoms, but the Applicant prefers to control them through the techniques described above and by simply removing himself from the stressful situation.

The Applicant relies upon the medical report filed by Physician #1, dated May 2, 2000. The report was set out on a Ministry of Transportation form and specifically acknowledges that it was being completed for the purpose of explaining why the patient was unable, for medical reasons, to provide a breath sample. The report explains that the Applicant has suffered from a panic disorder for at least 10 years and that he cannot tolerate closed spaces. The report goes on to describe symptoms of chest pains, anxiety, and hyperventilation. The report does not explain the length of time that Physician #1 has treated the Applicant, nor does it provide the date of the most recent examination to support the findings set out in the report or what would prevent the Applicant from providing a breath sample.

The Tribunal also heard from Constable #1. Constable #1 indicated that he had been with the Ontario Provincial Police Force since 1989 and a qualified breath technician in 1991. He has conducted hundreds of roadside breath tests during the course of his career. Constable Officer #1 acknowledged that the Applicant was not speeding and that he stopped him following the Applicant running into a snow bank with his vehicle. Constable Officer #1 also acknowledges the Applicant backed his car out of the snow bank without difficulty. When he stopped the Applicant, he noticed a strong odour of alcohol and that the Applicant had red eyes.

Upon placing the Applicant in the back of the vehicle, Constable Officer #1 acknowledged that the Applicant requested that the window be left open or the door slightly ajar. He explained that the windows could not be lowered and that proper procedure called for the door to be closed. While he was not concerned about flight on the part of the Applicant at the time the test was being conducted, police called for the door to be closed for if the test was failed, the individual would be placed under arrest and could become agitated and attempt to get out of the vehicle at that time.

According to Constable Officer #1, he demonstrated the breath test to the Applicant. The Applicant then tried on three occasions to give a sample of his breath. In doing so, he would close his mouth around the mouthpiece but, as he blew, he would open his mouth so that air would escape around the mouthpiece rather than go into the machine. Constable Officer #1 gave a further demonstration between the third and fourth tests. Again, for the same reason, the fourth test was not successful. Between the fourth and fifth test, Constable Officer #1 advised the Applicant that if he failed to provide a test, he would be charged with refusal, to which the Applicant replied Ayes, yes@. The fifth test was also unsuccessful and the Applicant was charged. When asked if he understood that he was being charged, the Applicant

responded Ayes whatever@. When given his rights to counsel and asked if he understood, the Applicant responded Ayes@.

It was only after the Applicant was placed under arrest that he advised Constable Officer #1 that he suffered from claustrophobia. It was not until the return to the station that, according to Constable Officer #1, the Applicant alleged that he was having an anxiety attack. In the opinion of Constable Officer #1, the Applicant appeared nonchalant during the time Constable Officer #1 was demonstrating the test and the Applicant was to have been providing a sample.

During this time frame, Constable Officer #1 did not notice the Applicant attempting to meditate, unusual body movements, or the Applicant counting. He did not see signs of increased anxiety, hyperventilation, or difficulty breathing. The Applicant was driven home in the back of a police cruiser by two other police officers who reported to Constable Officer #1 that the Applicant did not make any complaints of being claustrophobic or suffering from anxiety during the drive.

Where the Applicant's evidence conflicts with that of Constable Officer #1, the Tribunal prefers and accepts the evidence of Constable Officer #1.

APPLICATION OF THE LAW TO FACTS:

While the Tribunal accepts that the Applicant may suffer from anxiety attacks, it does not accept that he was suffering such an attack at the time Constable Officer #1 was attempting to administer the roadside breath test, or that the medical condition prevented the Applicant from providing a sample of his breath. Constable Officer #1 did not note signs of an anxiety attack (increased anxiety, difficulty breathing, or hyperventilation), nor did he note signs that the Applicant was attempting to control his symptoms (meditation, controlled breathing, controlled movement, or counting). The Applicant appeared to understand what was going on and was nonchalant.

It is also important that the Applicant had no difficulty placing his mouth around the mouthpiece and blowing. The only reason the sample was not sufficient, was because the Applicant did not keep his mouth closed around the mouthpiece. The Applicant provided no explanation, nor did the report of Physician # 1, as to why the Applicant was unable to do so.

If the Applicant was focussed on getting out of the vehicle as quickly as possible as he claims, then the method to do so would have been to simply keep his mouth closed around the mouthpiece and provide a sample. It must have been obvious to the Applicant that, by failing to provide the sample, he was only prolonging his stay in the back seat of the cruiser.

It is also noted that the medical report provided by Physician # 1 did not comply with the requirements of section 574. Specifically, there is a total absence of explanation as to why this medical condition would prevent the Applicant from providing a breath sample.

The onus rests with the Applicant and he has failed to establish, pursuant to section 50(1)(2)(b), that he was prevented from providing a breath sample for a medical reason.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated May 16, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act (HTA) and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Stephen J. Kelly
Presiding Member

RELEASED: *May 25, 2000*

SLATER

ALLAN WAYNE SLATER

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: JOHANNE N. MORISSETTE, Vice Chair

APPEARANCES:

RAY IRWIN, agent representing the Applicant
AVIVA R. HARARI, counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: May 24, 2000 Sudbury

ORDER

Following attendances on May 24, 2000 at a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000, is known as the Licence Appeal Tribunal) of Ray Irwin, agent for Allan Wayne Slater (the "Applicant") and Aviva R. Harari, counsel for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

WHEREAS the Applicant appealed a Notice of Proposal dated February 18, 1999, issued by the Registrar of the *Motor Vehicle Dealers Act*, (the "Act") to refuse the registration of the Applicant, Allan Wayne Slater, as a motor vehicle salesperson under the provisions of the Act.

AND WHEREAS prior to the hearing commencing, the Tribunal was informed by the parties that a written settlement had been arrived at in regard to the appeal; and

Having reviewed the Terms and Conditions as to the disposition of these proceedings which is attached hereto as Schedule "A".

AND WHEREAS the parties further agreed to the following Term and Condition, which does not form part of Schedule "A", which reads as follows:

The salesperson agrees not to submit an application to become a dealer in the very immediate future, nor will the salesperson apply to have an ownership interest in a dealership. This does not preclude the salesperson to apply for a dealer or ownership interest, in the foreseeable future, should the Registrar deem it appropriate for him to do so, taken into consideration the time lapsed and his conduct which will allow him to apply for same.

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@ and the aforesaid Term and Condition.

LICENCE APPEAL TRIBUNAL

Johanne N. Morissette
Vice-Chair

RELEASED: May 29th, 2000

ONTARIO MOTOR VEHICLE INDUSTRY COUNCIL

SCHEDULE "A"

- 1) The salesperson acknowledges that his registration will be revoked if the salesperson breaches any of the terms and conditions set out herein or if the salesperson provides false information on any application or document provided to the Registrar.
- 2) The salesperson agrees to provide a copy of this Order to his employer.
- 3) The salesperson agrees that his explanation of his convictions is substantially as set out in the written disclosure submitted to the Registrar.
- 4) The salesperson agrees to notify in writing his employer and the Registrar if the salesperson's drivers licence is suspended for any reason.
- 5) The salesperson shall advise his employer and the Registrar in writing of any charges laid against him.
- 6) The salesperson to make timely payments of all family support obligations and shall within 30 days enter into an arrangement with the family responsibility office to repay all arrears subject to any court proceedings related to the arrears.
- 7) The salesperson agrees to enter into arrangements to pay off all outstanding debts, in particular, the debt owing to HOJ National Leasing and the salesperson shall provide proof of agreement to the Registrar within 10 days from the date of this Order.
- 8) The salesperson agrees not to transfer his registration to another dealer without prior written consent from the Registrar.
- 9) The salesperson agrees not to be final signatory on any vehicle purchase agreements.
- 10) The salesperson agrees not to be an officer, director, manager or owner of a motor vehicle dealer.
- 11) The salesperson agrees not to submit an application to become a dealer. The salesperson further agrees not to have ownership interest in a dealership.
- 12) The salesperson hereby consents to an Order of the Licence Appeal Tribunal which may include the terms and conditions set out herein.
- 13) The salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.
- 14) The salesperson hereby acknowledges that he has had the opportunity to obtain legal advice.
- 15) The salesperson agrees not to submit an application to become a dealer in the very immediate future, nor will the salesperson apply to have an ownership interest in a

dealership. This does not preclude the salesperson to apply for a dealer or ownership interest, in the foreseeable future, should the Registrar deem it appropriate for him to do so, taken into consideration the time lapsed and his conduct which will allow him to apply for same.

Signed in the city of Sudbury this 24th day of May, 2000.

" _____ "
Alan Wayne Slater

These Terms and Conditions are accepted by the Registrar

May 24, 2000 " _____ "
Amanda LeeDempsey
Per: Carl Compton, Registrar

MARCHI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
STEVEN AND DOLORES MARCHI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

STEVEN AND DOLORES MARCHI

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

KEVIN DOBLE PROPERTIES LTD.

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on May 29-31, 2000 and June 1-2, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., on Monday, August 28, 2000, and to continue August 29-31 and September 1, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 2nd, 2000

PADAYACHEE

THAVARAJ DAVE PADAYACHEE

APPEAL FROM A PROPOSAL UNDER THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair
CHARLES SANDIFORD, as a Member
PETER MENZEL, as a Member

APPEARANCES: RICHARD CHOJNACKI, Counsel, representing the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF HEARING: January 18 & 19, 2000 &
February 3, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar, Motor Vehicle Dealers Act (the "Act") issued a Notice of Proposal dated the December 8, 1997 in which the Registrar proposed to refuse to registrar Thavaraj Dave Padayachee (the "Applicant") as a salesperson under the Act. By his letter dated December 21, 1997 the Applicant requested a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal). A hearing was held on May 15 and October 14, 1998. By Order of the Tribunal dated October 27, 1998 the Proposal of the Registrar was upheld. The Applicant appealed the said Order of the Tribunal to the Divisional Court. By Order of the Divisional Court dated July 29, 1999 the said order of the Tribunal was revoked, and the matter sent back to the Tribunal for a rehearing before a differently constituted panel. The Registrar issued a Notice of Further or Other Particulars dated December 23, 1999. The matter was heard by a three member panel on January 18, 19 and February 3, 2000.

ISSUE:

Should the Tribunal uphold the Proposal of the Registrar to refuse to registrar the Applicant as a salesperson under the Motor Vehicle Dealers Act?

EVIDENCE:

Opening Argument by Counsel for the Registrar:

Counsel for the Registrar agreed that this is a case under section 5 of the Motor Vehicle Dealers Act for the refusal to grant registration based on past conduct, in that, the Applicant did not act with honesty, with integrity and in accordance with law.

Counsel indicated that there are three grounds for the Registrar's position: 1. the issue of a cheque and misappropriation of money from a dealership; 2. side deals in which retail leases were altered by using side letters without the consent of the dealership or the finance company; and 3. the Applicant working as a salesperson when not registered under the Act.

Testimony of Howard Alan Masson:

Mr. Masson leased a Nissan Pathfinder from Oakville Nissan in May, 1997. He dealt with Dave Padayachee. The retail lease agreement of 36 months had a payment by Mr. Masson of \$5,454.01. Mr. Masson testified that he signed a cheque in the amount of \$5,400.00 dated May 5, 1997. Mr. Masson stated he was in a rush and filled out the cheque with the name of Dave Padayachee. As he was filling out the cheque he asked Dave if it was alright that he had put the cheque in Dave Padayachee's name and Mr. Padayachee said he would take care of it. Mr. Masson testified that by giving Mr. Padayachee the cheque he thought it was to pay for the Pathfinder as he had no other reason to give money to Mr. Padayachee. The back of the cheque shows a bank stamp of May 6, 1997. Mr. Masson testified that he thought the signature on the back of the cheque looked like the signature of Mr. Padayachee.

Mr. Masson further testified that in July, 1997 Oakville Nissan telephoned him and wanted payment for the Pathfinder. Mr. Masson was surprised to have them telephone him for that purpose. He spoke to Ken Young of Oakville Nissan. Mr. Masson testified that Mr. Padayachee then telephoned him and said it was "ok" as they had found the paperwork on the books, and it had been thought that there was a third party involved in the deal.

In cross-examination, Mr. Masson testified that he had a business friendship with Mr. Padayachee. He would have lunch with him and had known him for two years. He had met Mr. Padayachee's wife and children. Mr. Masson testified that he trusted Mr. Padayachee and thought he was a man of integrity. Mr. Masson testified that when Mr. Padayachee had telephoned him to say it was "ok" he thought there was someone else on the telephone line listening as Mr. Padayachee had mentioned Mr. Ken Young was there. Mr. Masson did not hear Mr. Young's voice at that time. When he had filled out the cheque, he had started filling in Dave Padayachee's name and then Mr. Masson had said to Dave, "Is that ok?". Mr. Masson felt the matter had been a bookkeeping issue.

Testimony of Beverly Ann Young:

Mrs. Young testified that she had worked at Oakville Nissan with her husband. She was the secretary and treasurer for the business. The dealership was sold in May, 1999.

She had worked at the business for twenty years and was the secretary/treasurer from 1996 to 1999. Her husband, Ken Young, was in ill health and could not come to this hearing. Her husband had been with the dealership since 1972.

Mrs. Young testified that she did the licensing, the banking, the payroll and handled the overdue accounts. She was familiar with Dave Padayachee who worked for the dealership from August, 1996 to July, 1997 in the capacity of sales manager. Mr. Padayachee's responsibilities were to book after the salespersons, help to close deals, and deal directly with customers.

Dave Padayachee and her husband Ken had agreed to part ways in July, 1997 as Mr. Padayachee had a cheque which was written in his name for a car. It was the payment for the delivery of the car for Alan Masson. Mr. Masson had a lease for a Pathfinder in May, 1997. It is customary to get that payment prior to the delivery of the car. The payment of \$5400.00 was missing so her husband called Mr. Masson. Then in July, 1997 Mrs. Young telephoned and spoke to Mrs. Masson as they still did not have their money then. After that they got the money from Dave Padayachee.

Mrs. Young testified that the cheque had been made out to Dave Padayachee and the dealership never received it. Mr. Padayachee had said the deal was short and he expected to get the money in a few days. He had told her husband that he would settle it. Then in July, 1997 Dave Padayachee gave \$1,300.00 to her and the remainder of the monies owing came out of his pay due to Mr. Padayachee when he left the dealership.

Mrs. Young testified that she had active involvement with Mrs. Masson who provided her with a copy of the cancelled cheque near the end of July, 1997.

In cross-examination Mrs. Young stated she could not remember when Mr. Padayachee told the dealership that the Masson deal was short. She knew that her husband called Mr. Masson. Oakville Nissan got the money but not by receiving the cheque. Mrs. Young stated that when she saw the cancelled cheque, she felt Mr. Padayachee had acted dishonestly. She stated that Mr. Padayachee was not fired from the dealership.

Testimony of Sharon Elliott:

Ms. Elliott testified that she was dealing with Woodchester Sukuki on a retail lease dated August 25, 1999. She was dealing with Ray Paulsen and Dave Padayachee. Mr. Padayachee was the sales manager, and he was handling the financial negotiations for the trade in and the purchase of the new vehicle. Ms. Elliott wanted to do a trade in because she would have to pay tax on a cash sale. She testified that she signed the contract dated August 25, 1999 and someone else signed the contract on behalf of Mr. Padayachee. She had asked Mr. Padayachee for a business card, but he said he did not have one.

In cross-examination, Ms. Elliott testified that Mr. Paulsen showed her the vehicle. She never took delivery of the vehicle because the final offer to purchase was not the same as the offer to lease, and Ms. Elliott did not want to sign it. Ms. Elliott told Mr. Padayachee that she would not sign the contract as it differed from the offer to lease. Mr. Padayachee was the one doing the financial negotiations. He was in the room with a Ms. Gaerano. Ms. Elliott thought Ms. Gaerano was his secretary. Mr. Padayachee

told her that the trade in value had to change. Ms. Elliott dealt then with Simon, the General Manager, and Sandy, a co owner of the dealership. She also involved a friend who came to the dealership with her and she eventually got her own car back after a week. She had the Ontario Motor Vehicle Industry Council ("OMVIC") also telephone the dealership on her behalf.

Testimony of Steve Allan Sayeau:

Mr. Sayeau is a registered motor vehicle salesperson and has been registered for seven years. He worked with Dave Padayachee at Woodchester Suzuki in 1999. Mr. Sayeau was a registered salesperson at Woodchester Suzuki and business manager. He is now working for a dealership in Brampton as a Business Administrator. Mr. Sayeau testified that he thought Mr. Padayachee was the new car manager at Woodchester Suzuki. He worked about 40 hours per week with Mr. Padayachee. Mr. Padayachee worked with the salespeople to help them sell cars. He would work with the customers and help close the deal. Mr. Sayeau had not observed Dave Padayachee sign any deals. He knew that there was some difficulty with Mr. Padayachee and his sales licence.

In cross-examination Mr. Sayeau stated that he left Woodchester because Simon had fired him. While this upset him, it was not surprising as Simon had fired other salespeople before him. Ray Paulsen was the used car manager, he was the business manager and Dave Padayachee was the acting sales manager and helped with the new car department. There were four salespeople plus Ray working at the dealership.

Testimony of Gordon Edward Dennis:

Mr. Dennis is the owner and general manager of Guelph Nissan. He has been a dealer/principal since March, 1980. Besides Nissan automobiles, he deals with the Infiniti line. Dave Padayachee had worked in the service department at his dealership in 1982. Then he worked at the dealership from the fall of 1991 until July, 1996. When his employment was terminated. When Dave Padayachee was hired, it was based on his sales results. Mr. Dennis was involved in a number of other businesses at the time. Mr. Padayachee was the new and used car sales manager in 1991. He had operational control to negotiate the sale and lease of cars, negotiate trade in values, hire and fire the sales people, and obtain and dispose of cars on the lot.

Mr. Dennis testified that he found discrepancies involving side deals on contracts in the sales department.

The lease payment is based on capitalized cost (selling price less trade in less downpayment). At that time the number of months on leases was 36 or 48 months. The lease payment is based on the residual value of the vehicle, that being the estimated value of the car at the end of the lease. This is a formula dealing with the number of months on the lease, the total kilometers (km) for the lease, and the condition of the car.

Mr. Dennis testified that the constants set out in leases were being altered in the side letters without the knowledge of the dealership. Some side deals were verbal and some were in writing. They were not in the records of the dealership but were found when the

customers came back to the dealership on the basis of the side deals. None of these side deals were authorized.

Mr. Dennis gave as an example the retail lease to Brighthouse Inc. It was for 48 months with a residual value of \$23,370.00 based on 24,000 km per year. But the side letter said the residual value was \$23,300.00 and the maximum mileage was 116,000 km which is 20,000 km more than what was on the contract. This side letter was not with the paperwork at the dealership, and Mr. Dennis was not aware of it until the customer, Alex Haig, came into the dealership with the side letter some years later.

Another example was the retail lease to Jennifer MacRae dated November 23, 1994. It was for 48 months with a residual value of \$11,518.40 and mileage at 24,000 km per year. There was a side letter dated November 23, 1994 to Jennifer MacRae allowing her to return the vehicle after 24 months with no penalties or further obligations. He testified that normally there would be penalties for an early return and the residual value after 24 months is probably about \$20,000.00. Again, this side letter was not in the files of the dealership and Mr. Dennis first knew about it when the customer returned the car to the dealership in November, 1996.

Another example was the retail lease to Helen Kefalas dated November 21, 1994. It is for 48 months with a residual value of \$11,587.40 and 24,000 km per year. The side letter dated November 24, 1994 to Helen Kefalas allows her to return the vehicle after 24 months with no further obligations. This side letter is signed by Dave Padayachee. Mr. Padayachee did not have the authority to do such a side letter. Mr. Dennis found out about it when the customer returned the vehicle after 24 months in November, 1996.

A further example was the retail lease of A. Morino dated December 14, 1994. It was for 48 months with a residual value of \$5813.50 with 24,000 km. There was a side letter dated December 14, 1994 signed by Dave Padayachee stating that the vehicle could be purchased for \$5000.00. The customer showed Mr. Dennis this letter in December, 1998 and purchased the car for \$800.00 less than the contract stated.

Another example was the retail lease for Regal House Kitchens. The work sheet and the retail lease showed the same figures, that being 48 months with a downpayment of \$2300.00 and monthly payments of \$392.00 plus tax. But the retail lease also had the requirement of a co-signer. The side letter dated September 29, 1995 signed by Dave Padayachee states that the co-signer is released from his obligations under the retail lease after 12 months. There was no authority by the dealership to do this, and it leaves the dealership exposed with no security coverage.

A further example was the Vie retail lease. It was a prepaid lease in that by paying the lease with one payment, it reduced the interest charges. After 24 months at a mileage rate of 19,200 km per year the residual value was to be \$18,722.00. The lease worksheet also reflects the terms of the retail lease. But there was a side letter signed by Dave Padayachee stating the customer could buy the car for \$17,000.00. When the customer came to the dealership to purchase the car, he provided the side letter. Mr. Dennis did not know about it until that time. The dealership lost the \$1,722.00 for the residual value of the car. Mr. Dennis did not agree with the modified residual value. It was costing his dealership to honour it. The side letter was done without Mr. Dennis' authorization or consent.

Another example was the retail lease agreement with Jennifer Cook. It was dated May 2, 1996 for 36 months with 19,800 km per year and a residual value of \$13,844.16. The side letter dated June 10, 1996 stated that the residual value remains the same, but the km are increased to 82,000 km for the term of the lease. That is an increase of km of over 20,000 for the term of the lease. This side letter was signed by Dave Padayachee at the request of another salesperson.

Mr. Dennis testified that none of the side letters were in the dealership files, and he was first aware of them when customers brought them into his dealership. The dealership files contain the bill of sale, the worksheet, the document to Nissan Canada Finance, ownership, insurance, and bill of sale to Nissan Finance. It is now the policy of Nissan Canada Finance that they will not finance a deal if they find out there has been a side deal.

Mr. Dennis testified that he has been in business since 1980 and his business is built on customer satisfaction. None of the customers with the side deals have done repeat business with his dealership.

Mr. Dennis testified that due to decreases in profitability for new car sales, Mr. Padayachee's salary plan was changed in 1995. However, the side deals reduced the gross profit for the deals as set out in the contracts. Mr. Dennis stated that he has never seen side deals again. Side deals are not accepted in the industry as they are not part of the legally binding contract.

Mr. Dennis stated described the Naicker lease agreement of April 4, 1996. It involved Mr. Padayachee putting a used vehicle a new lease agreement. Mr. Dennis did not know about this until eighteen months later when the customer complained.

Under cross-examination, Mr. Dennis stated that his dealership's sales manager has authority to enter into agreements to sell cars. His dealership makes money every year. The number of kilometers on an agreement would be reflected in the monthly payment and the residual level. Nissan Canada set restrictions on inducements in 1998. Mr. Dennis agreed that there is no document in the exhibits which sets out the relationship between Guelph Nissan and Nissan Canada.

Mr. Dennis testified that the 1995 pay-plan for Dave Padayachee sets out seven responsibilities that Mr. Padayachee is authorized to perform for the dealership. As well, Mr. Padayachee had authority to control new and used vehicle grosses.

Regarding Particular #2 in the Registrar's Notice of Proposal, Mr. Dennis stated that his dealership had experienced losses in the new car sales department. Due to that, he changed his management structure at the dealership in July, 1996 and hired someone as the General Sales Manager. Dave Padayachee quit, and Mr. Dennis stated he accepted his resignation.

Mr. Dennis remembered seeing one of the side letters in early to mid 1996, but he could not remember what his actions were respecting that discovery. He was still being informed about side deals in 1999.

Mr. Dennis estimated that of the seven-lease agreement deals shown to him from the exhibits, the salesperson might have made a commission of about one thousand

dollars. Mr. Dennis agreed that Dave had the authority to make the decision to approve a deal and did not have to come to him for that approval.

Mr. Dennis testified that there was nothing in the files at the dealership showing any of these side letters. In the files there would be a copy of the lease agreement, a copy of the worksheet, the vehicle registration with the manufacturer, the ownership transfer, the financial contract and downpayment, the lien check and the delivery receipt. These side deals were done without corporate authorization or knowledge.

Testimony of Mary Jane South:

Ms. South is Deputy Registrar and Director of Operations at OMVIC and has been since its inception in January, 1997. Prior to that time, she had been Deputy Register for its predecessor for two years and involved in a number of senior positions within the Ministry of Consumer and Commercial Relations.

Ms. South testified that the Ontario Motor Vehicle Dealers Act is a public protection statute. It is there to inspire a level of confidence by the public in the standards for the motor vehicle industry. It contains revocation and penalty clauses.

Ms. South stated that under section 3(1)(b) of the Act, registration is required to act as motor vehicle salesperson. Mr. Padayachee has not been registered since his registration lapsed on July 13, 1997. The definition of being a motor vehicle salesperson is not limited to just signing the contract for the sale or lease of a motor vehicle.

Ms. South testified that a reinstatement application for Mr. Padayachee dated September 4, 1997 was received at her office on September 11, 1997.

Her office received a complaint from Mr. Dennis of Guelph Nissan. Her office was investigating the complaint that Mr. Padayachee was acting as a salesperson without being registered under the Act.

In the opinion of Ms. South, the conduct of Mr. Padayachee did not entitle him to be registered as a motor vehicle salesperson.

The panel members were not prepared to hear evidence on the complaint by Mr. Naicker regarding the odometer reading as odometer tampering is not part of the particulars of the Notice of Proposal.

Under cross-examination, Ms. South agreed that none of the consumers suffered a financial loss. She felt that the dealership was placed at risk by the conduct of Mr. Padayachee. The Registrar did not lay any charges against Mr. Padayachee.

Testimony of Thavaraj Dave Padayachee:

Mr. Padayachee is 46 years of age, married with three children. He is the sole support for his family. He has been registered within the Motor Vehicle Industry since 1981.

Mr. Padayachee testified that he was asked by Nissan Canada to help out Ken Young at Oakville Nissan. He was the general sales manager there and was responsible for buying, selling and training of sales staff.

Regarding the Massan vehicle, Mr. Padayachee testified that he knew Mr. Massan as he had sold him cars previously and they were business friends. Mr. Massan came to pick up his car on a Saturday and did not bring a cheque with him for the downpayment. Dave let him take the car away. Dave told Ken Young of this and Dave took responsibility for the car. On the Monday, Mr. Masson gave Mrs. Padayachee the cheque and Mrs. Padayachee endorsed it and put it into their bank account. On Tuesday, Mrs. Padayachee told him of her actions. The bank account was overdrawn and Dave did not have the funds to give the money to Ken Young. Eventually he did pay Oakville Nissan this money.

Mr. Padayachee testified that due to his embarrassment of not having the funds he did not tell Ken Young about the cheque. He was not fired from Oakville Nissan. Mr. Padayachee felt that he handled the situation poorly and that he should have gone to Mr. Young about the cheque.

In 1991, Mr. Padayachee was hired at Guelph Nissan. He had been recommended by Mark Irwin. He was the general sales manager and approved deals, the trade ins, the buying and selling of cars and ensuring customer satisfaction. He would approve the deals of his salespersons and then the paperwork would go to the business office.

Regarding the Naicker transaction, Mr. Padayachee testified that Mr. Naicker was a friend of his. He signed the sales document which showed 24,958 kms. The business manager prepared the retail lease which spoke of an odometer reading of 96,000 kms. Mr. Padayachee stated that there were a number of cars sold at the dealership which were used but sold as new, perhaps 50 out of 200. When asked by the panel why questions were not asked of Mr. Dennis regarding this issue, Mr. Padayachee stated Mr. Dennis had already stated he could not remember the individual deals. Mr. Padayachee stated that he did not prepare the retail lease agreements. He agreed that it was his signature on the side letters but stated he was not the salesperson for these deals and in many instances the letter was prepared by someone else and he just signed it. A number of salespeople needed these letters. He had no physical contact with the customers when they came to pick up their car.

Mr. Padayachee testified that he complained to Mr. Dennis that he was underpaid on the commission. Then Mr. Dennis gave him a new commission structure. Mr. Padayachee went to the Labour Board to get advice, but Mr. Dennis had accepted his resignation.

Mr. Padayachee remembered that in July, 1998, Nissan Canada told the dealers that it does not accept enhancement documents.

In July, 1997 Mr. Padayachee was hired as the new car manager at Woodchester Nissan. He requested that his registration be transferred from Oakville Nissan to Woodchester Nissan.

Mr. Padayachee remembers getting the Registrar's Notice of Proposal about the first week of January, 1998. He sent in his request for a hearing after receiving the Proposal. As he was not allowed to sell cars, he became the operations manager. His

duties included sales training, advertising, pre-delivery, liaison between service and sales departments to check on optional equipment being installed and cars being made ready for the customers. In January, 1999 he moved to Woodchester Suzuki with the same job description. He did not sell cars to customers.

Regarding the Elliot deal, Mr. Padayachee testified that Ms. Elliot purchased the car from Ray Paulsen and the deal was finalized by Irsilia Gaetano. He met Ms. Elliott when she came to pick up her car. She was with a friend and was very upset and wanted the deal cancelled.

Regarding the monies he owed to Oakville Nissan, Mr. Padayachee stated that given his financial situation, he paid it as quickly as possible.

Under cross-examination, Mr. Padayachee stated that Mr. Masson's statement that he gave the cheque to Dave was incorrect as he was working at the dealership that day. The cheque is dated May 5, 1997 and the delivery receipt is dated May 9, 1997.

Mr. Padayachee testified that he never told Ken Young that Mrs. Padayachee had cashed the cheque. He paid \$1,300.00 sometime in June to Beverly Young, and she took it without an explanation.

In making the side letters, Mr. Padayachee stated that he was not dealing with the lease agreement but fulfilling the promises made to the customer by the salesperson. He did not know about putting 24,000 km as a limit on the side letters. He was responsible for making the deals profitable for the dealership. Mark Irwin reported directly to Mr. Dennis. Dave Padayachee reported directly to Mr. Dennis. The salespeople reported to Mr. Padayachee. Mr. Padayachee stated that Nissan Canada did not know about the side deals.

In the side letter dealing with Regal House Kitchens, Mr. Padayachee felt that the term "satisfactory completion" met that there had been established good credit. He did not know if the letter was sent to the finance company although Mr. Irwin said it had been okayed by the finance company.

In the side letter dealing with Ms. Kefalas, Mr. Padayachee stated that he did not have to tell the finance company if the dealership was going to buy back the car in 24 months rather than 48 months as on the retail lease. He felt this despite clause 27 of the retail lease which states "This lease represents the entire agreement between Lessor and Lessee". "Any representation or warranties not contained herein are excluded".

Mr. Padayachee testified that his registration had an expiry date of July 13, 1997. He took holidays in August and then started with Woodchester Nissan on September 4, 1997. He saw the registration form at Woodchester. It was in December, 1997 that he learned of problems with his registration, and he told Woodchester that he was unsure about the registration. On February 8, 1998, Woodchester Nissan sent a letter to OMVIC asking about his registration.

Mr. Padayachee testified that currently he works at Woodchester Suzuki as the operations manager and is paid a salary plus compensation on gross profit of the dealership. He has an income of \$5,000.00 per month. He is restricted in his income because he cannot sell cars. Every two weeks he receives a draw of \$1,500.00 and on the 8th of the month he receives \$2,000.00.

Mr. Padayachee stated that he had signed a previous letter to Mr. Bent of Sunquest regarding excess kilometer charges. He stated that Ms. Elliott lied in saying that he had negotiated her contract for her.

Mr. Padayachee testified that he had done nothing wrong. He testified that the manager is responsible for dealing with the finance company. Also, he testified that he had obtained photocopies of the letters from the files so Mr. Dennis was not telling the truth about getting the letters from the customers directly. He stated that he would offer inducements to customers to get them to agree to leases.

Testimony of Marijke Gair:

Ms. Gair is a salesperson at Woodchester Nissan. She had worked at Guelph Nissan for 6 years prior to that. Dave Padayachee had hired her at both places. She would show the car, and negotiate the deal, and do up a worksheet which the customer would initial. Then she would take that worksheet to Dave Padayachee for approval. If it was approved, it went to the business office to Mark Irwin and the customer would meet with him. The paperwork would be completed, and the delivery date would be arranged. None of the lease agreements which were made exhibits at this hearing involved her customers.

Ms. Gair testified that she once had a customer ask for extra numbers of kilometers and she had gone to Mr. Padayachee to get a letter signed which was given to the customer on delivery of the car. She never took such a letter to Mr. Dennis. The paperwork was done by the business manager and the delivery of the car was made by the sales representatives. The side letters were used as a method of customer retention.

Ms. Gair stated that she knew of other such letters by other sales representatives who had gone to Mr. Padayachee for a signature.

Under cross-examination, Ms. Gair stated that she did not know if the side letters were sent to Nissan Finance. She had first heard of the side deals when she testified at the hearing before the Commercial Registration Appeal Tribunal in May, 1998. She was not aware of such side deals prior to working at Guelph Nissan, and she has not done any while working at Woodchester Nissan. She knew that through the side deals the customer was looking for a way to get a low km lease. She never thought there was anything wrong in doing such side deals.

Ms. Gair testified that she did not know if Mr. Dennis knew what was going on at the dealership with these side deals.

Ms. Gair stated that she did the delivery of the vehicle to Mr. Masson and the delivery date was May 9th.

Ms. Gair testified that she is not aware of any policy by Nissan Canada respecting such side deals. She testified that at the dealership if Dave Padayachee was not available, then a salesperson would go to Mark Irwin or the other managers. The paperwork is sent to the business office. Sometimes Dave Padayachee helps to close a sale.

Testimony of Ronald Patrick Myles:

Mr. Myles is working at Woodchester Nissan. Previously he worked at Guelph Nissan from 1996 to 1998. Dave Padayachee, hired him as a salesperson.

Mr. Myles testified that he would do a worksheet that might be signed by the customer. He would take it to the sales manager for approval. If not approved he would ask the customer for a counter offer and sometimes the customer would speak directly to the sales manager. Sometimes he would bring in the sales manager for help. The exhibits filed at this hearing respecting side deals were done with customers that he did not assist, but he was familiar with most of the side letters except for the one for Regal House Kitchens. Jennifer Cook was his customer, and he cannot explain why the date of the side letter was later then the date of the sales agreement.

Mr. Myles testified that he knew Mr. Dennis was involved in the dealership. Mr. Myles testified that he had never taken a side letter to Mr. Dennis for approval. However, he testified that he thought such deals were fine. He testified that if Dave Padayachee was not available you could go to Mark Irwin or Mr. Dennis for approval of such side deals. Mr. Myles stated that he delivered the vehicles plus the incentive letters to the customers.

Mr. Myles stated that he knew that Nissan Canada in 1997 or 1998 issued a letter against the side deals. Mr. Myles felt that the side deals did not change the lease agreement.

Under cross-examination, Mr. Myles stated that he has been the sales manager at Woodchester Nissan since March, 1999. He has not seen such side letters there. When at Guelph Nissan he did at least three or four such letters and all the signatures on such letters were Dave Padayachee's. It is Mr. Myles's understanding that a copy of the side letter is in the file that goes to the business office. Mr. Myles is not aware of why his name is mentioned in the side deal to Mr. Brie.

Mr. Myles testified that it was necessary to get the bank's approval for the financing of an agreement, and he would telephone or fax them the details. He was not aware of the bank getting a copy of the side letters.

Testimony of Nick Liguori:

Mr. Liguori is the dealer/principal at Oakville Nissan since May, 1999. He is an owner at Woodchester Nissan and Woodchester Suzuki. He has known Mr. Padayachee for two and one half years. He trusts him and he is aware of what had happened at Oakville Nissan. In that deal, he understood that the customer was a friend of Dave Padayachee's and had given Mr. Padayachee some money, which Mr. Padayachee took home. Mr. Liguori is not knowledgeable of the full particulars of the incident. But, he testified, the records at Oakville Nissan show no monies being owed by Mr. Padayachee and to the contrary that Dave Padayachee paid the money to the dealership.

Under cross-examination, Mr. Liguori stated that he initially started in 1977 with the body shop business and then in 1979 with car sales. He bought Woodchester Nissan in

1990, Woodchester Infiniti in 1991, Woodchester Suzuki in 1996/97 and Oakville Nissan in May, 1999. He is a registered motor vehicle salesperson.

Mr. Liguori testified that he likes Dave Padayachee and finds him to be a hard worker. He knows that a letter came from OMVIC to Woodchester Nissan because Mr. Padayachee told him about it. This happened about ten months ago. Dave Padayachee was the sales manager at Woodchester Nissan from September, 1997 into 1999, when he went to Woodchester Suzuki, but not as a sales manager. Dave Padayachee has no involvement with the customers at Woodchester Suzuki.

Mr. Liguori agreed that it was an offence to have an unregistered salesperson working for a dealership. He is not aware of the side deals and finds the concept rather "sleezy". Mr. Liguori agreed that if the sales manager takes home money at night, that money should be received at the dealership the following morning. He testified that such a person should bring in the cheque or give verbal communication about the transaction.

Mr. Liguori testified that if an employee did not tell him about keeping a cheque he would have to decide what to do with that employee. He would talk to the employee and then make a decision. Mr. Liguori cannot remember if Nissan Canada has a policy on side letters.

Testimony of Ersilia Gaetano:

Ms. Gaetano was hired at Woodchester Nissan as assistant business manager in February, 1999. In August, 1999 she was transferred to Woodchester Suzuki. She had met Dave Padayachee while at Woodchester Suzuki. He is the operations manager there.

She testified that on the Elliott deal, Ray Paulsen was the salesman. Ms. Gaetano did the paperwork on the lease and telephoned Ms. Elliott to say it was approved. The worksheet was completed by Ray and Ms. Elliott. Ms. Elliott arrived at the dealership with a male friend and she questioned a clause in the lease agreement. Ms. Gaetano called in Dave Padayachee to explain it. Ms. Elliott became upset. She was questioning the trade in allowance on her previous vehicle.

Under cross-examination, Ms. Gaetano stated that Ms. Elliott's dispute was over the amount of the trade in allowance. Ms. Gaetano stated that she called in Dave Padayachee to assist due to his experience.

Testimony of Simon Derderian:

Mr. Derderian is the general manager of Woodchester Nissan. He is also a dealer/principal there. He is the general manager of Woodchester Suzuki. He hires staff, looks after problems and is concerned with expenses and profit figures.

Mr. Derderian testified that he met Dave Padayachee about 8 years ago while on an industry trip to Las Vegas. He had hired Dave Padayachee in the fall of 1997 to be the new car sales manager. At that time he was not aware of any licencing difficulties respecting Mr. Padayachee. He found out that there were problems with Dave

Padayachee's registration in the spring of 1998. He transferred Dave Padayachee to Woodchester Suzuki and hired a sales manager for Woodchester Nissan.

Mr. Derderian testified that when he got a letter from OMVIC, he sent a letter in response which outlined the job responsibilities of Dave Padayachee as operations manager. Mr. Padayachee handles marketing, training, dealer trades, advertising and customer service.

Initially Dave Padayachee had asked him for a letter to OMVIC regarding his job responsibilities. When OMVIC responded that Mr. Padayachee should not be acting as a sales manager, Mr. Derderian changed his duties. Mr. Derderian testified that when it was known at Woodchester Nissan that Mr. Padayachee had lost his licence as a salesperson under the Act, Mr. Derderian transferred him to Woodchester Suzuki.

Mr. Derderian testified that Mr. Padayachee receives gets a guaranteed draw of \$5,000.00 per month from the dealership.

Mr. Derderian stated that he knew Dave Padayachee had problems over a lease contract and a deposit. Both Ken Young and Dave told Mr. Derderian about the deposit. Mr. Derderian testified that he had had an incident at Woodchester Suzuki with a sales manager and a deposit, and he gave the man another chance. Mr. Derderian testified that he considers Dave Padayachee to be a man of integrity and honesty.

Regarding the Elliott transaction, Mr. Derderian stated that he talked to Mrs. Elliott about the deal. When she said she did not like it, he cancelled the deal. He had already transferred the ownership of her previous vehicle, and he had to redo it.

Mr. Derderian testified that Nissan had a low km lease with an enhanced buyback and lower monthly payments. He testified that there has never been a side deal at Woodchester Nissan, and Mr. Derderian would know of it due to the office procedures there. Mr. Derderian stated he would not give such side deals, but he does give incentives such as oil changes and floor mats.

Under cross-examination, Mr. Derderian stated that he was aware prior to May, 1998 of problems with Dave Padayachee's registration under the Act. He testified that when he worked as a sales manager at Woodchester Nissan, Mr. Padayachee worked on deals and sold cars to customers.

Testimony of Tony Canade:

Mr. Canade is the Vice President of Woodchester Auto Group. That is the controlling company for a number of companies. He is a management team member and sets policies and procedures for the issues of growth in sales and expansion. He reports to Sandy Liguori.

Mr. Canade hired Mr. Padayachee as a sales manger to commence work in August, 1997. He had to be a registered salesperson to hold this job. This required that Mr. Padayachee's existing licence be transferred. He testified that the transfer did not seem to be a very quick process. There were no procedures in place at the company at that time to keep checking on this matter. He testified that the company practices due diligence now in checking on the status of a transfer.

Mr. Canade testified that he received a fax in February, 1998 from OMVIC saying the process respecting Mr. Padayachee's transfer was under review and that Mr. Padayachee could not be registered. After that Mr. Canade did some research on the procedures with OMVIC, and he realized that this was a serious situation. Prior to this time Mr. Canade had not paid much attention to OMVIC.

Mr. Padayachee was still the sales manager in February, 1998. By a memo of May 27, 1998 he relieved Mr. Padayachee of his duties as a sales manager. When Mr. Padayachee was first hired, he had a compensation package of \$1,500.00 per week plus the bonus program for sales of new cars. As of May 27, 1998 that compensation package changed and Mr. Padayachee was paid a percentage for the gross profits of fixed departments. Mr. Padayachee was transferred to Woodchester Suzuki in February 1999 to be the operations manager to use his experience to help structure that organization.

Mr. Padayachee was paid \$5,000.00 per month or \$60,000.00 per year and this was tied to parts and service gross profits at 6 percentage. Mr. Canade went through the payroll figures to indicate what compensation was salary payment and what was payment under the percentage arrangement. In July, 1999, Mr. Padayachee's compensation arrangement became a biweekly draw of \$1,500.00 plus \$2,000.00 bonus monthly.

Mr. Canade testified that he knew of the situation at Oakville Nissan. He stated that Dave Padayachee allowed a customer to take a vehicle without paying the downpayment. The customer delivered the cheque to Mrs. Padayachee who deposited it in their personal bank account. This was at a time when the Padayachee's were having serious financial problems, and the account was overdrawn. Dave Padayachee approached Ken Young and said he would take care of the matter. Mr. Canade understood that there is no money owing by Dave Padayachee to Oakville Nissan.

Mr. Canade stated that the strength of an organization is the people the organization employs. Mr. Canade stated that Mr. Padayachee is good with customers and knowledgeable. Dave knows sales, services and financing. Mr. Canade stated that Mr. Padayachee is good at what he does, and Mr. Canade likes and respects Mr. Padayachee.

Under cross-examination, Mr. Canade stated that the organization has loaned Mr. Padayachee \$12,000.00 to \$15,000.00, and this is documented.

Mr. Canade stated that he understood that Mr. Padayachee's registration had to be transferred from Oakville Nissan to Woodchester Nissan. He did not ask for a pocket certificate. He confirmed that he was personally aware of the problem respecting a transfer of Mr. Padayachee's register when the fax arrived from OMVIC in February, 1998. Prior to that, Mr. Padayachee had not told him of any problem with the transfer of his registration. About two months ago, Mr. Canade became aware of this hearing and the circumstances at Guelph Nissan. He knew of the cheque at Oakville Nissan situation about four months ago and he knew that Dave paid \$1,000.00 in June or July and paid the balance owing when he left the company.

Mr. Canade stated that the first loans from his company to Mr. Padayachee were made after the company was aware of the Oakville Nissan situation.

Testimony of Sandy Liguori:

Mr. Liguori has been in the car business since 1977, initially in car refinishing and then in 1989 he bought into a dealership. He owns Woodchester Nissan, Woodchester Infiniti and Woodchester Suzuki plus Woodchester collision. He is the CEO of these companies and the principal shareholder. His brother, Nick Liguori is also a shareholder. Mr. Sandy Liguori is the General Manager of Woodchester Suzuki, the General Manager of Woodchester Collision and the Vice President of the Woodchester Auto Group.

When Woodchester Nissan hired Mr. Padayachee it was with a high recommendation from Nissan Canada as being a good sales manager. When Simon hired Dave Padayachee there were no inquiries made about the licensing of Mr. Padayachee.

Mr. Liguori testified that he knew there were a few problems at Guelph Nissan dealing with leases and the over kilometers issue. He testified that he knew at Oakville Nissan there was an issue of a deposit going to Dave Padayachee. Mr. Liguori talked to Ken Young who said it was a personal matter between him and Dave. Mr. Liguori knew about these issues sometime in 1998.

Though Mr. Liguori has been a licenced salesperson since 1977 he testified that he was not familiar with OMVIC.

Mr. Liguori has come to know Dave Padayachee, and the allegations do not change his opinion of him. He stated that everyone can make mistakes. He stated that if there were conditions attached to Dave Padayachee's licencing he would have to know the conditions before saying he could agree to them. As far as Mr. Liguori is concerned, Dave Padayachee has made a mistake but desires a second chance.

Mr. Liguori testified that there is no policy at his companies to honour over kilometer leases. He stated that the sales manager has the authority to offer incentives to the customers. He would prefer to offer incentives such as oil changes.

Under cross-examination, Mr. Liguori stated that if a certain number of kilometers are required in a lease, then one should follow that requirement, which he stated is the way one does business with integrity. Mr. Liguori is not aware of any side letters at his companies.

Regarding his company's loan arrangements with Dave Padayachee, Mr. Liguori was not aware of the details and stated it was not very often that he did this for an employee.

Mr. Liguori knew for about a year that Dave Padayachee was having problems. with his registration. He did not know what led to Mr. Padayachee owing the \$5000.00 to Ken Young. He stated that while Mr. Padayachee has made mistakes, Mr. Liguori has seen worse situations. He thinks Dave Padayachee is a kind, gentle person and he wants to help him out. He had loaned money to Dave Padayachee for his legal bills and housing costs.

LEGAL ARGUMENTS:

Counsel for the Registrar:

Counsel for the Registrar argued that Mr. Padayachee's registration should be refused due to his past conduct. That past conduct includes the cheque at Oakville Nissan; the side deals at Guelph Nissan; and the continuation of his working without a registration.

Mr. Padayachee in his testimony has stated that he has done nothing wrong. However, counsel submitted, Mr. Padayachee's conduct does show he lacks honesty, integrity and respect for the law. The test is not whether or not he is entitled to a second chance but what has he done.

Counsel submitted that Mr. Masson's evidence is independent and unbiased. He stated he went to Mr. Padayachee's house and dropped off a cheque with Mr. Padayachee. When he made out his cheque in the name of Mr. Padayachee, he was told by Mr. Padayachee that making Mr. Padayachee the payee was appropriate. This testimony is different from that of Mr. Padayachee who says Mr. Masson left it with Mrs. Padayachee. There was no evidence from Mrs. Padayachee. Mr. Padayachee did not tell Oakville Nissan about the cheque, being paid to Mr. Padayachee. He misled the dealer about the cheque, and only when confronted about it did he make payments to repay the dealership. There were no bank documents to confirm his story about being in overdraft. In any event, his financial situation is no excuse, and this situation speaks to his integrity.

Counsel further submitted that at Guelph Nissan Mr. Padayachee altered the terms of the contracts with his side letters. The term of lease, number of kilometers and residual value of vehicle are all interrelated. It is the evidence of Mr. Dennis that the dealership was not aware of these side letters and there are no letters admitted showing Mr. Dennis's signature.

Counsel argued that the witnesses produced by Mr. Padayachee are not independent. They all have a strong connection to Mr. Padayachee. Both Mr. Carr and Mr. Myles were hired by Mr. Padayachee to Woodchester Nissan. Both said Mr. Padayachee had the authority to sign the letters. Neither asked Mr. Dennis to sign such letters. There has been no rational explanation why the retail lease agreement could not reflect the terms of the lease. Mr. Padayachee testified that he did not believe it was necessary to inform Nissan Finance about the side letters. The letter from Nissan Canada speaks to certain kind of side deals but not what happened with these side deals. Clause 27 in the retail lease agreements makes it clear that such deals do not form the basis of the contract.

Mr. Padayachee's compensation package is related to the gross profit. But the side deals were of no benefit to the dealership.

Counsel also noted that the Registrar's initial proposal was dated December, 1997 and that although Mr. Padayachee has not been registered since July, 1997. Mr. Padayachee ignored that fact and continued to work as a sales manager. The evidence of Sharon Elliott is that Mr. Padayachee negotiated with her on her deal. Mr. Steve Sayo stated that Mr. Padayachee dealt with customers and sold cars. His evidence is both independent and credible.

Counsel argued that none of Mr. Padayachee superiors had any understanding of the issues before this Tribunal. Their evidence is coloured by the loans from the company to Mr. Padayachee.

Counsel submitted that Mr. Padayachee has shown no respect for the legislation. He did not tell his employers in December, 1997 that he received the Registrar's Notice of Proposal, and, as late as May, 1998, he was still working as a sales manager.

Also, counsel argued, if the dealership employing Mr. Padayachee was made aware by the Registrar in February, 1998 of the problems of Mr. Padayachee's registration but does nothing for months, then how can that dealership abide by any terms and conditions that might be considered by this Tribunal?

Counsel for the Registrar argued that the Voglsberg decision deals with the conduct of the Applicant, not the issue of complaints, Brenner test is not of future promises but of past conduct.

In conclusion, counsel for the Registrar argued that the Tribunal must look at the past conduct of the Applicant and only one of Mr. Padayachee's incidents of misconduct is sufficient to support the Registrar's Proposal.

Counsel for the Applicant:

Counsel for the Applicant noted that in the Registrar's Proposal, the matter outlined in clause 2 was no longer outstanding because Mr. Dennis has stated that Mr. Padayachee has fulfilled number 2 dealing with his dealership. The other particulars noted in the proposal deal with past conduct and counsel for the Applicant made the following submissions.

The purpose of the legislation is to protect the public. Mr. Masson says he trusts Mr. Padayachee. Ms. Elliott is a biased witness and the tempers the weight to be given to her evidence.

The evidence to be given by Mrs. Young is minimal as her evidence is based on hearsay.

Regarding Guelph Nissan, Mr. Padayachee did not commit the dealership to deals that it could not fulfill. The Sunquest letter shows that there has been repeat business.

Mr. Dennis's testimony is too vague to be credible.

At Woodchester Nissan, Mr. Padayachee was working without registration. What should be the punishment? There has been no charges under the legislation and none under the Criminal Code. It is important that the Tribunal look at the whole of the evidence. Under the legislation the Tribunal can impose terms and conditions.

In summary, counsel for Mr. Padayachee argued that is a general obligation of fairness. The punishment should fit the crime, counsel submitted, and the Registrar's proposal was not appropriate on the evidence.

THE LAW:

The relevant legislation is the Motor Vehicle Dealers Act, and in particular Sections 3, 5, and 7 which provide as follows:

Section 3 states:

3. (1) No person shall,

.....

(b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 5 states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

Section 7 states:

7. (1) Where.....

.....

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

APPLICATION OF LAW TO FACTS:

The Registrar in his Notice of Proposal and Notice of Further Particulars states that the Applicant should not have his registration granted due to the past conduct of the Applicant which offends against section 5 of the Motor Vehicle Dealers Act. The three particular instances are: 1. That the Applicant worked as a motor vehicle salesperson when not registered with the Registrar; 2. That the Applicant did side deals while at Guelph Nissan which were not of an honest nature; 3. That the Applicant while at Oakville Nissan kept the deposit of a customer for his own benefit.

The Applicant in his own testimony does not deny the acts complained of by the Registrar. The Applicant admits he signed the letters as a person of authority with the dealership. He denies that such letters should be considered as improper. The

Applicant admits that he did have the deposit monies from the Masson lease and that they were not repaid until he left the Oakville Nissan dealership. He states that it was due to some financial issues with his bank and was not intentional. The Applicant admits that he was working as a sales manager at Woodchester Nissan from September, 1997 until the end of May of 1998. During that time his registration as a salesperson had expired and he had not received any new registration documents. He states that he thought it was just a matter of the transfer of registration and when it became apparent that there were some issues he alerted his employer about the problem.

The legislation itself states that a registration can be revoked or not granted if the Registrar feels the Applicant lacks honesty, integrity, or does not act in accordance with the law. In making this assessment the Registrar is required by the legislation to consider the past conduct of the Applicant. The case law since Brenner v The Registrar of Motor Vehicle Dealers and Salesman (1983) O.J. NO.1017 has been quite clear that neither the Registrar nor the Tribunal should be considering the prospective conduct of the Applicant but should be basing their decisions on the Applicant's past conduct. Recent caseload in the Divisional Court has emphasized that the Tribunal in making its decision has to carefully review the facts of the particular case and state the basis of its decision. It is also trite law as found in the decision of Keith Mark Baldwin (1997) CRAT 19 that the Tribunal needs to consider the whole of the evidence in arriving at its decision. The Tribunal must assess the evidence as it relates to the dictates of the relevant legislation.

In this case, the Applicant has admitted in his evidence that he worked as a sales manager at Woodchester Nissan from September, 1997 until the end of May, 1998. During that time he was not registered as a motor vehicle salesperson with the Registrar. His registration had lapsed in July, 1997. An application to renew it had not been sent to the Registrar prior to the expiry date of the registration. The Applicant worked for eight months as an unregistered salesperson.

There is no dispute that the duties of a sales manager include many of the same duties as being a salesperson. Both deal with the customers to negotiate the sale or lease of a vehicle. The sales manager is asked to do this by the salesperson who feels he/she needs some extra help, and the sales manager can close the deal with the customer.

It is contended by the Applicant that acting as a salesperson while not being registered under the Act does not in itself warrant so severe a penalty as being refused registration under the Act. Instead, the Applicant urges the Tribunal to impose terms and conditions upon his registration.

The Tribunal disagrees with this analysis. The misrepresentation by the Applicant to his employer and to his customers is a serious violation of the legislation. The Motor Vehicle Dealers Act is legislation designed to protect the public. By requiring that all sales people be registered, the Act intends to safeguard the interests of the public who wish to purchase or lease a motor vehicle. There are standards of conduct expected of a registered salesperson. There is a range of penalties under the Act.

The Tribunal does not find the conduct of the Applicant relating to his registration indicates someone who has integrity and acts in accordance with law. The Applicant by the Notice of Proposal received in early January, 1998 was aware that the Registrar did not wish to grant him registration as a salesperson. The Applicant had worked as a

registered salesperson since 1981. The Tribunal does not believe his explanation that he thought his registration would be transferred from Oakville Nissan to Woodchester Nissan. One cannot transfer a registration that no longer exists. That point is emphasized by the fact that the application received by the Registrar in September, 1997 was an application for registration, not transfer of an existing registration. The Applicant acted, at best, with disregard as to his lack of registration.

The Applicant, while admitting he was wrong, asks the Tribunal to grant him his registration based on terms and conditions. In previous cases such as Golab v Ontario Commercial Registration Appeal Tribunal (1998) O.C.R.A.T.D.176 and Rom-Canada Motors Inc. v Ontario Commercial Registration Appeal Tribunal (1999) O.C.R.A.T.D. No. 27 this Tribunal has granted Applicants their registration based on terms and conditions. These terms and conditions have often been based on the salesperson being supervised by the senior management of a dealership or someone experienced in the motor vehicle industry. In this case we have a dealership in which the senior management have been woefully blind as to their duties under the Motor Vehicle Dealers Act. The Woodchester Nissan dealership management were aware by February, 1998 that there were problems and that the Registrar did not wish to register Dave Padayachee. But it takes to the end of May, 1998 for the dealership to act and reassign Mr. Padayachee to the duties of operations manager. Even with this reassignment, there are suspicions as stated in the evidence of Ms. Elliott that Mr. Padayachee acted in a manner in August, 1999 that resembles that of a sales manager, not an operations manager. He was negotiating with Ms. Elliott to salvage the lease deal and to explain what had happened with the trade in value of her old car.

Ms. Gaetano's evidence as to why she asked Mr. Padayachee for help does not satisfactorily explain his behaviour. Ms. Gaetano does not explain why she did not ask the salesperson, Mr. Paulsen or the current sales manager for help. Instead she relies on the experience of Mr. Padayachee. While not conclusive evidence it does leave the Tribunal concerned as to what else Mr. Padayachee did that was not consistent with his expressed job duties as an operations manager.

The Tribunal is not satisfied with the explanation of Mr. Tony Canade as to why he waited a number of months after the fax from OMVIC to determine the state of Mr. Padayachee's registration. The senior management of the Woodchester Auto Group have experience within the motor vehicle industry. It is a regulated industry. It is the responsibility of senior management to understand and comply with the legislation that regulates their industry. The Tribunal has no confidence that the senior management of the Woodchester Auto Group could supervise any imposed terms and conditions where the Tribunal to consider them for Mr. Padayachee. Indeed, Mr. Sandy Liquori stated that he would have to know what was being imposed before he could determine if he could abide by such terms and conditions.

The Tribunal has concerns about the side letters produced into evidence from the period of time when Mr. Padayachee was the sales manager at Guelph Nissan. Mr. Dennis, the owner of Guelph Nissan, states he never authorized these side deals. He states he did not know about these letters until the customers began to return the cars in accordance with the side deals. He states that there was no copy of these letters in the corporate documentation kept at his dealership. The evidence of the Applicants' witnesses did not seriously challenge the testimony of Mr. Dennis. Ms. South states that Mr. Dennis did complain about Mr. Padayachee due to these side deals. Mr. Dennis used restructuring to restrict the authority of Mr. Padayachee when the first of

the side deals came to his attention. Mr. Padayachee's commission was linked to the gross sales of new cars and new car leases. The use of side deals would increase that gross sale figure and thereby increase the annual commission for Mr. Padayachee.

There is no evidence of any side letters being signed by Mr. Dennis. There is no evidence by any witness that they approached Mr. Dennis to sign a side letter. No witness could adequately explain what happened to the side deal letter once it was signed by Mr. Padayachee. No witness could state that Nissan Finance was aware of the side deals. The directive by Nissan Canada in 1998 was directed to the issue of inducement and did not directly link to the kind of inducement, that is, the side letters, being used by Dave Padayachee and his sales staff at Guelph Nissan. Mr. Padayachee had considerable authority as a sales manager. He could have refused to sign such letters. There is no evidence that he ever refused to sign such a letter.

The Tribunal does not agree with the interpretation by Mr. Padayachee that the side deals did not affect others, nor were they detrimental to the dealership. The side deals dealt with the core issues by which the dealership and in particular Nissan Canada and its finance arm, Nissan Finance, approved the provision of financing for a lease. If the kilometers were increased, that had an impact on the residual value of the vehicle and on the monthly rate for the lease. If the contract was shortened it had an impact on the profit taking to interest payments made to the finance company. The side letters were in direct contradiction to section 27 of the retail lease agreement between the customer and the dealership. Whether or not a customer did or did not suffer financial loss or whether or not the dealership did nor did not suffer financial loss is not the issue. Vogelsburg stands for the proposition that there does not need to be a victim for there to be behaviour that is detrimental to the public purpose of the Act. The making of the side deals was not behaviour showing integrity. It was deceitful to the dealership, to Nissan Canada and to Nissan Finance.

The Tribunal does not agree with Mr. Padayachee that he did nothing wrong in taking and then keeping the deposit monies from the Masson lease for a period of months. Mr. Padayachee did not act with integrity and honesty when he kept the funds without giving full disclosure to Mr. Young of Oakville Nissan. The Tribunal finds that the evidence given by Mr. Padayachee differs in many fundamental ways from the evidence given by Mr. Masson. Mr. Masson states he gave the cheque to Mr. Padayachee and made a mistake by having it made out to Mr. Padayachee personally rather than the dealership. Mr. Masson states that on a couple of occasions either he or his wife were asked by the dealership for the deposit money. A copy of the cashed cheque was sent to the dealership to conclude this matter. The Tribunal accepts the evidence of Mr. Masson over that of Mr. Padayachee on this matter. Mr. Masson's evidence is also substantiated by the documentation, in particular the delivery date signed for by Mr. Masson on the retail sales agreement.

The Tribunal finds that the possession by Mr. Padayachee of the deposit monies was made more inappropriate by his failure to disclose this fact to his employer. Even his current employers at the Woodchester Auto Group agreed that if a sales manager had deposit monies for whatever reason it was incumbent upon that sales manager to hand over the monies to the dealership within a short period of time. Here Mr. Padayachee had the monies, kept the monies for a period of months, did not disclose to the dealership that he had the monies so that the dealership made inquiries with the customer for the deposit monies and only paid back the monies out of what was owing

to him when he concluded his employment at that dealership. The Tribunal finds his behaviour to be dishonest and lacking in integrity.

Based on the above findings of fact, the Tribunal has concluded that Mr. David Padayachee demonstrated previous conduct that showed he acted in a dishonest fashion, lacked integrity and failed to act in accordance with the law. The Tribunal finds that this past conduct indicates that the Registrar acted reasonably in making his assessment that Mr. Padayachee should not be granted registration as a motor vehicle salesperson under the Act.

ORDER:

For the reasons stated above, pursuant to the authority vested in it by section 7(9) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his Proposal and not grant Registration of the Applicant as a Motor Vehicle Salesperson under the Act.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice-Chair, Presiding

Charles Sandiford
as a Member

Peter Menzel
as a Member

Released: June 5th, 2000

MEHTA

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
GULSHAN AND SUKHDEV MEHTA

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

GULSHAN AND SUKHDEV MEHTA

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TOWN WOOD HOMES LIMITED

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a pre-hearing in the above matter on June 2, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Wednesday, July 19, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 6th, 2000

BHUP

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ROHAN BHUP

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

ROHAN BHUP

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

DORCHESTER PIONEER DEV. LTD.

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on May 17-19, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at Middlesex County Building, North Room, 399 Ridout Street, London, Ontario at 9:30 a.m., on Tuesday, August 29, 2000, and to continue August 30-31, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 6th, 2000

PREHEARING

In the matter of an application by Mr. Garry Adams dated April 19, 2000 for a hearing before the Licence Appeal Tribunal pursuant to the provisions of section 197, *the Child and Family Services Act*, (the Act), R.S.O. 190, chap. C11 as amended, to consider the appeal of the proposal of the Director under *the Child and Family Services Act*, dated March 22, 2000 to refuse to renew the licence of the Adams Family Group Home under s.195 and s. 196 of *the Child and Family Services Act*.

TRIBUNAL: ROBERT ADAMS
Presiding Member

APPEARANCES: TOM BURNS, M.C.S.S. Representative
DAPHNE HAND, M.C.S.S. Representative
SUSAN O'LEARY, M.C.S.S. Representative
MARVIN VATENSKY, M.C.S.S. Representative
ANNA RAIMONDO, M.C.S.S. Counsel

GARRY ADAMS, the Applicant
ESTER AIKEN, Clinical Director of AFGH

DATE OF
PRE-HEARING: June 2, 2000

Kingston

ORDER

A Prehearing Conference between the parties was held on June 2, 2000 in Kingston at the Howard Johnson Confederation Place, 237 Ontario Street, as set forth in the Tribunal's Notice of Prehearing Conference dated May 15, 2000, where the parties reached a settlement of the issues in this matter on the terms set out in Schedule "A" attached hereto.

The Tribunal, on the consent of the parties, makes the following order:

1. The proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said schedule "A"; and
2. The hearing scheduled for June 14, 15, 2000 in this matter is cancelled and the proceedings before this Tribunal are therefore concluded.

LICENCE APPEAL TRIBUNAL

Robert Adams
Presiding Member

RELEASED: June 6, 2000

MEMORANDUM OF SETTLEMENT

Schedule "A"

The matter of the Ministry of Community and Social Services refusal to renew the licence of Garry Adams pursuant to section 196 (a)(ii) of the Child and Family Services Act is resolved in the following terms:

- 1) Garry Adams shall withdraw his Notice of Appeal effective June 2, 2000.
- 2) Paragraph one applies notwithstanding the Ministry's decision regarding Esther Aiken's licencing application.
- 3) Garry Adams' licence shall continue until such time as the Ministry of Community and Social Services renders its decision regarding Esther Aiken's licencing application.
- 4) The parties, Garry Adams and the Ministry of Community and Social Services, acknowledge and agree that Esther Aiken's application shall be considered in the usual course in accordance with the requirement of the Child and Family Services Act and its regulations.

The following terms and conditions shall apply:

DURING THE PERIOD PENDING THE DECISION REGARDING ESTHER AIKEN'S LICENCING APPLICATION

- i) Garry Adams shall have no contact or involvement with the residents of the Adams Family Group Home.
- ii) Garry Adams shall continue to perform administrative functions for the Adam's Family Group Home offsite.
- iii) Garry Adams shall be permitted to attend the Adams Family Group Home premises in order to perform such reasonable repairs and maintain the property as required. The activities as stated herein shall be conducted by Garry Adams when there are no residents at the Adams Family Group Home.

AFTER A DECISION IS RENEDED WITH RESPECT TO ESTHER AIKEN'S LICENCING APPLICATION, THE FOLLOWING TERMS AND CONDITIONS SHALL APPLY:

- i) Garry Adams shall have no involvement or contact with any of the residents of the Group Home.
- ii) Garry Adams shall have no involvement with the operation of the Group Home in any way.
- iii) Garry Adams may exercise his duties and responsibilities as a landlord on the Group Home premises.

Dated at Kingston, Ontario on June 2, 2000.

" " "

Garry Adams

Tom Burns for MCSS

"Susan O'Leary"
Witness

"Marvin Vatsensky"
Witness

"Robert Adams" for the Tribunal

TOYOTA CREDIT CANADA INC.

TOYOTA CREDIT CANADA INC.

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FOR AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ALANA BEST, Representative of Registrar of Motor Vehicles

PAUL CHUMAK, Q.C., Counsel for and Representative of
Tatiana Manevskaja, agent for Toyota Credit Canada Inc.

DATE OF HEARING: June 7, 2000 Toronto

ORDER

PURSUANT to the provisions of the Highway Traffic Act, R.S.O. 1990, Chap. H. 8 as amended, Toyota Credit Canada Inc. (the "Applicant") appealed a decision of the Registrar of Motor Vehicles (the "Registrar") made under section 55.1 of the Act to impound a certain 2000 Lexus RX300 motor vehicle, plate number AFYN 760;

UPON MOTION, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's ground of appeal of exceptional hardship as a ground to be heard at a hearing;

UPON READING the exhibits and hearing submissions of the representative of the Registrar as well as submissions by Paul Chumak, Counsel for Tatiana Manevskaja, the agent of the Applicant, this Tribunal finds that the ground of exceptional hardship [section 50.2(3)(d)] upon which the Applicant relies in this appeal, does not apply by virtue of section 50.2(4) as a previous order to impound under section 55.1 was made with respect to another motor vehicle then owned by the Applicant;

AND WHEREAS Counsel for the Applicant's agent requested the opportunity to add a further ground for appeal in terms of section 50.2(3)(c) to be heard by this Tribunal;

AND WHEREAS the Representative of the Registrar having made submissions to this Tribunal;

THIS TRIBUNAL ORDERS that Counsel for the Applicant's agent shall by no later than 5:00 p.m. on Thursday June 8, 2000 serve upon the Respondent and file with the Tribunal a motion requesting the additional above-noted ground of appeal to be heard at 10:30 a.m. on Tuesday June 13, 2000 at the Tribunal's offices at 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, failing which the Applicant's appeal shall be dismissed.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: *June 7, 2000*

PREHEARING

IN THE MATTER OF an application by 880148 Ontario Limited d/b/a Mas Transport, dated March 22, 2000 for a hearing before the Licence Suspension Appeal Board (which as of April 1, 2000 is known as the Licence Appeal Tribunal) pursuant to Section 50(1) of the Highway Traffic Act appealing the 30 day Suspension and Seizure Order of the Deputy Registrar dated March 20th,;

AND IN THE MATTER of the Highway Traffic Act R.S.O. 1990 Chapter H.8 as amended;

AND IN THE MATTER of the safety record of 880148 Ontario Limited;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificate 103-879-057 issued to 880148 Ontario Limited;

AND IN THE MATTER of plate portions of permits for all commercial motor vehicles issued to 880148 Ontario Ltd.

TRIBUNAL: Stuart Cork

APPEARANCES: Murray Forbes, Counsel for the Respondent

Jack Armstrong, Solicitor for the Applicant

**DATE OF
PRE-HEARING:** May 19th, 2000

ORDER AND SUMMARY OF DISCUSSION

A Prehearing Conference between the parties was held on May 19th, 2000 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Prehearing Conference dated April 10, 2000.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing dates have been set for July 24, 2000, and July 26, 2000, at 1 St. Clair Avenue West, 12th Floor.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties would occur **on or before Friday July 14, 2000. The Respondent is to forward copies of its materials to the Applicant, on or before June 2, 2000, and the Applicant is to forward copies of its materials to the Respondent on or before June 30, 2000.**

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will provide the Applicant with the following:

- CVOR publication excerpts
- CVSA standards and out of service criteria documents
- MTO NSC truck and bus publication
- Accident, police report, CVIR and CVSA Templates
- Any other such materials to be provided in response

4. The Respondent will present testimony and evidence from at least one witness: Ms. Margaret Mooney, head of Sanctions and Control, or one of her employees. She will go through the material that was before the Registrar at the time of his decision to impose the sanction. The Respondent may call other witnesses in response to issues that may be raised by the Applicant.

The evidence to be used by the Respondent will include:

- Ministry analysis of the Applicant's record
- Show cause meeting analyst's notes and materials
- Copies of Applicant's show cause meeting submissions
- Safety net reports with summaries
- Copies of correspondence between the carrier and the Registrar
- Copies of Order and Notice of Appeal with supporting documents
- Copies of Commercial Vehicle Inspection Reports
- Updated CVOR abstract with analysis showing the Applicant's record as of Order date
- Formal documents, correspondence
- Notice of Appeal
- Police accident reports
- Application for change of fleet size
- Other relevant documents

5. The Applicant will present testimony and evidence from five witnesses. These will include: Evan Mason, President of Mas Trucking, Scott Mason, Company Vice President, and three company drivers.

The evidence presented by the Applicant will include:

- Material dealing with the Applicant's total fleet size, which units they are, and total miles traveled
- IFTA returns
- Will say statements from company drivers

6. It was outlined at the Prehearing Conference that:

The Registrar has issued a Suspension and Seizure Order dated March 20th 2000, pursuant to Section 47 of the Highway Traffic Act, as of the 27th day of March, 2000 for 880148 Ontario Ltd.

At the hearing of this matter, the Tribunal will be asked to review in detail a time period of approximately two years prior to the Suspension Order, from January 8th, 1998, until the date of the Order.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *June 8, 2000*

0058/MED/00/007

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: May 30, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated May 5, 2000
- b) Exhibit #2 Applicant's medical information – received May 5, 2000
- c) Exhibit #3 Letter from Physician # 1 – dated January 10, 2000
- d) Exhibit #4 Applicant's submissions – 6 pages – received May 18, 2000
- e) Exhibit #6 Drug description for Tegretol – received May 30, 2000

By the Respondent:

- a) Exhibit #5 Ministry of Transportation submissions – tabs 1 – 18
- received May 18, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a final written summation with respect to this matter, as well as original certified copies of the Applicant's driver's record and accident report.

The Applicant submitted a copy of the Drug Description for Tegretol, which was entered on consent as Exhibit # 6

FACTS:

The Applicant is appealing the suspension of his driving privileges effective "January 1, 2000" as set out in Exhibit # 5, Tab 16.

The Applicant's driver's licence was originally suspended in April 1998 and returned in June 1998.

A letter written April 27, 1998, by neurologist Physician # 1, concludes "*...When I saw him on 2 February 1998, I was inclining to think that he might indeed have been having seizures, but when I retook the history subsequently on March 9, 1998 the impression I gained was that these were not seizures. I did an EEG which was normal and a CT scan which was normal ...my diagnostic impression is that he did not have seizures. I think his symptoms are somatic expression of depression...*" (Exhibit # 5 Item 3)

Sunnybrook Health Sciences Centre Emergency Report, dated "991114," states "*...May have had black out panic attacks? absence sz's*" (Exhibit # 4)

The Applicant came to the attention of the Ministry as a result of an unsolicited report dated "14 Nov 1999" from Physician # 2. Physician # 2 advises: "*known seizure disorder x 2 years...reassess ability to drive...*" (Exhibit # 5 item 6)

Letter dated January 10 from, Physician # 1, neurologist states "*...His last seizure was in November 1999 ...His EEG and CT scan are normal...*" (Exhibit # 5 item 8)

A Department of Medical Imaging report, dated February 10, 2000, indicates "*...no evidence of intracranial haemorrhage, infarction, or tumour mass... Normal...CT of the head.*" (Exhibit #5 item 11)

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS, dated "April 14, 2000", completed by Driver Improvement Counsellor Harry Ansara, details the Applicant's history as explained by the Applicant. The Applicant confirms that he "*...was stupid ...doctor's prescribed medication ...didn't take regularly ...doctor's did not find anything wrong... problems was stress... stress level reduced....*" (Exhibit # 5 Tab 13)

Exhibit # 5 item 16, Ministry of Transportation driving Record for the Applicant since 1970, shows no infractions.

At the hearing, the Respondent offered a re-iteration of the written material contained in exhibit #5, tabs 1 through 18.

The Applicant informed the Tribunal that his wife was with him, and asked permission for her to assist him.

The Applicant's memory of the events is sketchy. His wife answered most of the questions directed to the Applicant. The Applicant remembers nothing about the incidents, other than blacking out.

Evidence was introduced that the Applicant had been under stress but is now taking a different approach to life. He is taking a course for "*family problems*" and practicing yoga. Also, the main source of stress, his mother, is no longer living with him. The Applicant's wife confirmed that he is no longer depressed. According to the Applicant, he believes that the episode in 1999 occurred as a result of his failure to take adequate medication, and he is now ensuring that he follows his prescription carefully.

The Applicant has voluntarily given up driving on a daily basis, as he found it too draining. He is driving only every other day.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar to "...suspend or cancel" a driver's licence for "*any...sufficient reason...*". The Registrar originally suspended the Applicant's driver's licence after receiving an unsolicited report dated "14/Nov 1999" from Physician # 2 advising that the Applicant had "*known seizure disorder x 2 years...reassess ability to drive...*" (Exhibit # 5 item 6)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, in suspending the Applicant's driver's licence, based on the information from Physician # 2.

The Applicant argues that his licence should be re-instated. In the Applicant's favour is a letter written by Physician # 1, which concludes "*...my diagnostic impression is that he did not have seizures. I think his symptoms are somatic expression of depression...*" (Exhibit # 5 Item 3)

Nonetheless, in his subsequent letter to Tribunal, Physician # 1, contradicts himself by stating that "*...His last seizure was in November 1999*" (Exhibit # 5 item 8)

Similarly, the Tribunal uncovered a further contradiction. The Hospital Emergency admittance sheet, for the night of the incident, apparently under Physician # 2's signature, questions the Applicant's diagnosis "*...May have had black out panic attacks? absence sz's*" (Exhibit # 4). Three days later, Physician # 2 advised the Ministry of the Applicant's condition: "*known seizure disorder x 2 years... reassess ability to drive....*" (Exhibit # 5 item 6).

The Tribunal is at loss to explain the contradictions, but in weighing the evidence and the Applicant's demeanour at the hearing, the Tribunal must consider carefully the applicable section of Regulation 390/94, i.e., Section 14 (a) which states that:

"An applicant for or a holder of a driver's licence must not,

a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely..."

By his own admission, the Applicant had reduced driving to every other day, as he found driving daily too onerous.

Based on the evidence before the Tribunal, it appears the weight of evidence is in favour of the Ministry's decision. The Tribunal notes that the Applicant may seek and provide new neurological evidence to the Ministry, any time at his convenience.

The Tribunal is satisfied that the criteria described in the Regulation 340/94 section 14 (a) of the HTA applies to the Applicant. Thus, the Tribunal concurs that the Applicant's driver's licence remain under suspension.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 1st, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Roy Melvin, M.D.
Member

RELEASED: June 6, 2000

MED/00/201

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
HOWARD GOLDSTEIN, M.D., Member

APPEARANCES: ALANA BEST,
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: May 26, 2000

OSHAWA

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated March 20, 2000
- b) Exhibit #2 Applicant's submissions – tabs 1 – 7 – received May 12, 2000

By the Respondent:

- a) Exhibit #3 Ministry of Transportation submissions – tabs 1 – 11
- received May 12, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a final written summation with respect to this matter.

The Applicant asked the Tribunal to disregard the driving evaluation report.

FACTS:

The Applicant is appealing the suspension of his driving privileges effective "99 06 10" as set out in Exhibit # 1.

The Applicant came to the attention of the Ministry as a result of an unsolicited Medical Condition Report, dated "8/3/99". Physician # 1 informs the Ministry that the Applicant is suffering from "*...Rt CVA w Lt hemiparesis and significant left neglect...improving but currently not capable of safe operation of mvehicle...*". (Exhibit # 2 Tab 1)

On April 21, 1999, Physician # 1 prepared a second Medical Condition Report stating "*...Rt CVA w Left hemiparesis, left sensory deficit and perceptual (visual deficits) - patient's perceptual problems may interfere w safe operation of motor vehicle...*". (Exhibit # 2 Tab 3)

Physician # 2 writes to the Ministry under the letterhead of PHYSICIAN #2 MCFP (EM) FAMILY MEDICINE. In his letter, dated August 30, 1999, he details the Applicant's history and current condition "*...he suffered a stroke as a result of right carotid endarterectomy ...in January 1999... he has exceeded all expectations of recovery... his most recent visual field testing that demonstrate almost complete restoration of his previous left homonymous hemianopsia... I would recommend ...driver's license be re-instated...*". (Exhibit # 2 Tab 6 a)

Attached to Physician # 2's letter is a report from the L. H. C. signed by L. O. This report provides the results of tests carried out at "Community Rehabilitation and Integration Services (CRIS)" and is dated August 18, 1999. L. O. concludes: "*Perceptual reassessment has been favourable. The Applicant has demonstrated significant improvement wrt his visual attention and ability to scan accurately. Spatial awareness has also improved significantly, however, is below the mean acceptable score (-2SD). The Applicant also completed the Test of Everyday Attention (TEA test). Overall, improvements were noted with respect to his age related scaled scores. His speed of processing and attention to selective visual details has improved from abnormal to slightly below average range. The Applicant's ability to do two tasks simultaneously has improved from his abnormal range to low average range. He continues to demonstrate difficulties in the area of auditory selective attention (i.e. coping with distractions)*". (Exhibit # 2 Tab 6 b)

In the Summary, L. O. comments "*Improvements noted with attention, scanning & spatial awareness - some mild impairment with visionspatial problem solving*". The Applicant obtained a score of 54 out of a possible 61. (Exhibit # 2 Tab 6 c)

MEDICAL ADVISORY COMMITTEE CASE STUDY, dated September 22, 1999, recommends "*...REQUEST A DRIVER EVALUATION IF REHAB PASSES HIM THEN REINSTATE, VISION OK FOR "G"...*". (Exhibit # 3 Tab 7)

A Driving Evaluation carried out by the Therapeutic Solutions, Rehabilitation Services in Barrie, details the Applicant's history as well as the results of several tests which include a driving test of *"...a period of approximately 60 minutes, conducted within the streets of Barrie in the morning hours of Saturday, February 19, 2000..."*. In the Summary and Recommendations portion of the report, W. N. (B.Sc.O.T.) states: *"...the Applicant... has made obvious gains in his recovery ... There are specific residual difficult areas, including slowed responses (e.g. problem solving; observation) when presented with increasing amounts of stimuli. These areas of difficulty have had a significant impact in the Applicant's present ability to drive safely as noted today while driving his car for the assessment purpose ... It is the recommendation of the driving evaluation program that the Applicant not be reinstated with full driving privileges at this time..."* (Exhibit # 3 Tab 9)

Exhibit # 2 Tab 11, is a Ministry of Transportation driving Record for the Applicant since 1986, showing one speeding infraction.

The Applicant provided the Tribunal with case law relevant to this matter which were entered as Exhibit # 3, items 1 (a), (b), 2 and 3.

Exhibit # 3, items 4 and 5 are, respectively: the "Notice of Suspension" and the Ministry's form letter informing the Applicant of the suspension.

A copy of the Driver's Evaluation, also forming part of the Respondent's evidence and recorded as Exhibit # 2, tab 9, constitutes the Applicant's Exhibit # 3, item 6.

Item 7 of Exhibit # 3, is an undated, unsigned letter which appears to be a driving evaluation. The name "W. N." is written at the bottom. The Applicant explained that this is his version of what W. N. should have written as his driving evaluation.

At the hearing, the Respondent offered a re-iteration of the written material contained in exhibit # 2, tabs 1 through 11, and on the text of the written summary provided at the commencement of the hearing.

The Applicant stated that he is no longer attending rehabilitation

In his closing remarks, the Applicant again asked the Tribunal to disregard the report signed by W. N., detailing the Applicant's driving evaluation. Further, the Applicant emphasized several times his disagreement with W. N.'s version of events that occurred during the examination.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Prior to dealing with the issue of the suspension, the Tribunal must address the Applicant's request concerning the admissibility of driver's evaluation report, due to the behaviour of the Examiner. As a response to the Applicant's endeavours to berate and cast aspersions upon the examiner's reputation, the Tribunal explained at the hearing,

and now reiterates that the Tribunal has no jurisdiction to deal with arguments of unfairness or corruption.

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "*any...sufficient reason...*". The Registrar originally suspended the Applicant's driver's licence after receiving an unsolicited Medical Condition Report. On "8/3/99," Physician # 1 informed the Ministry that the Applicant is suffering from "*...Rt CVA w Lt hemiparesis and significant left neglect...improving but currently not capable of safe operation of mvehicle...*". (Exhibit # 2 Tab 1)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, in suspending the Applicant's driver's licence, based on the information from Physician # 1.

The Applicant argues strongly that his licence should be re-instated. In the Applicant's favour is the August 30, 1999 letter written by Physician # 2, "*... has exceeded all expectations of recovery...*" (Exhibit # 2 Tab 6 a).

Nonetheless, the Tribunal must also consider the letter from L. O. attached to Physician # 2's, which provides the results of tests carried out at "*Community Rehabilitation and Integration Services (CRIS)*". L. O. concludes: "*... Spatial awareness ... is below the mean acceptable score (-2SD).... speed of processing and attention to selective visual details... slightly below average range.... ability to do two tasks simultaneously... low average range.... e difficulties in the area of auditory selective attention (i.e. coping with distractions)*". (Exhibit # 2 Tab 6 b)

In weighing the evidence, the Tribunal can not exclude the Driver Examiner's evaluation. W. N. is quite adamant in her recommendation "*...the Applicant not be reinstated with full driving privileges at this time...*" W. N. corroborates her concluding remarks with specific details of the Applicant's examination which she refers to as "*...most distressing and frightening experience... fortunate ...today ...not involved in any vehicle collisions*". (Exhibit # 3 Tab 9)

Regulation 390/94, Section 14 (a) is clear in that:

"An applicant for or a holder of a driver's licence must not,

- a) *suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely..."*

Based on the evidence before the Tribunal, it appears premature to overrule the Ministry's decision. The Tribunal notes that the Applicant may seek and provide to the Ministry new medical evidence from a neurologist, any time at his convenience. The Tribunal is satisfied that the Applicant does not meet the criteria described in the Regulation 340/94 section 14 (a) and (b) of the HTA. Thus, the Tribunal concurs that the Applicant's driver's licence remains under suspension.

DECISION:

Upon the application by the Applicant to appeal the decision dated June 10, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

Howard Goldstein, M.D., Member

RELEASED: June 2, 2000

UNIVERSAL TOURS AND TRAVEL INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
UNIVERSAL TOURS AND TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: December 17, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

UNIVERSAL TOURS AND TRAVEL INC.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on June 12, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Monday, July 10, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 9th, 2000

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: May 2, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Licence Appeal Tribunal appointed a time and place for a hearing in the above matter on July 10, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, July 7, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 9th, 2000

SILVERMAN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
PETER A. SILVERMAN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

PETER A. SILVERMAN

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

RESIDENCES OF RUSSELL HILL INC.

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a pre-hearing in the above matter on June 1, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against the Added Party* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, September 5, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 12, 2000

CARRICATO

RONALD PATRICK CARRICATO

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE BOARD OF FUNERAL SERVICES

TO ISSUE A LICENCE SUBJECT TO CONDITIONS

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES: RONALD PATRICK CARRICATO, representing himself
BERNARD LEBLANC, Counsel, representing the Registrar, Board
of Funeral Services

DATE OF
HEARING: APRIL 11, 2000 SUDBURY

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar, Board of Funeral Services, by his Proposal dated October 12, 1999 issued a licence to the Applicant, Ronald Patrick Carricato, based on two conditions: 1. That he cannot manage or directly supervise a funeral establishment for a period of five years; 2. That he cannot manage or directly supervise a transfer service for a period of five years. The Applicant by his letter of October 27, 1999 requested a hearing before the Commercial Registration Appeal Tribunal. The hearing was held at Sudbury on April 11, 2000. The Commercial Registration Appeal Tribunal as of April 1, 2000 became the Licence Appeal Tribunal.

ISSUES:

Should there be terms and conditions on the licence of the Applicant?

If so, what should be the terms and conditions?

EVIDENCE:

Opening Statement: Registrar

Counsel for the Registrar, Board of Funeral Services, stated that the issue is the imposition of conditions upon the Applicant that he not manage or directly supervise a funeral establishment or transfer service for a period of five years. The concerns of the Registrar arose out of the past conduct of the Applicant, in particular how he went out of business and how he dealt with prepaid contracts.

Testimony of Joseph Richer:

Mr. Richer has been the Registrar, Board of Funeral Services, since September 1, 1998. Prior to that time he was an inspector for the Board of Funeral Services for a period of five years. The duties of the Registrar include the administration and enforcement of the Funeral Directors and Establishments Act. He oversees the issuance of licences, reviews the conduct of registrants and hires inspectors to review the practice of registrants. As an inspector he had ensured that registrants comply with the requirements of the legislation. To do that he had attended at the premises of funeral establishments and reviewed their books and records.

There is a yearly renewal of the licence of registrants. Mr. Richer testified that his office had received the application renewal form of Mr. Carricato on September 3, 1999. Mr. Richer had made his decision to impose conditions on the licence renewal based on the past conduct of the Applicant.

The records of the Registrar for Mr. Carricato showed that on September 5, 1991 Mr. Carricato had been found guilty of professional misconduct and had received a reprimand from the Discipline Committee of the Board of Funeral Services and a five hundred dollar fine. A Notice of Hearing dated July 18, 1991 had been issued against Mr. Carricato alleging professional misconduct. The more serious allegations related to deficiencies in the maintenance of records for prepaid funerals. Mr. Carricato had signed an Agreed Statement of Facts and a waiver of counsel on August 29, 1991. After the order of the Discipline Committee Mr. Carricato had written to the Chair of the Discipline Committee stating his displeasure at the reprimand.

Mr. Richer testified that in January, 1988 the then Registrar had been concerned as to the record keeping practices of the Applicant, in particular the failure to have contracts signed for all funeral services and supplies. Further in January, 1988 an inspector for the Board of Funeral Services had expressed concerns about how Mr. Carricato kept his prepaid contracts. It took the Applicant some time to locate the balance of his prepaid contracts which were found under the seat cushion of a sofa. The documents were not being kept in a systematic order as required under the Prepaid Funeral Services Act.

Mr. Richer testified that in February, 1990 the then Registrar deferred granting a funeral services establishment licence to the Applicant until the Applicant provided records as required under the Prepaid Funeral Services Act.

Mr. Richer testified that he had inspected the Carricato Funeral Home on August 25, 1994. He had found four concerns with the physical plant and six concerns about record keeping. Though two letters were sent by then Registrar about these issues, Mr. Carricato never responded.

On July 25, 1995 there was a further inspection of the Carricato Funeral Home. According to the testimony of Mr. Richer, there were twenty-seven concerns expressed by the inspector of which ten related to the physical plant and seventeen relation to record keeping practices. The inspector noted that the prepaid ledger was three years out of date. Mr. Carricato had responded by a fax dated September 15, 1995 that the concerns had either been corrected or would be corrected.

Mr. Richer stated that on October 28, 1998 an inspector checked on the Carricato Funeral Home in Sault Ste. Marie. It was closed, and the inspector was unable to contact Mr. Carricato. The inspector was informed that the home had been closed since August, 1998. The Board of Funeral Services put a notice in the local newspaper to locate anyone who had made prepaid funeral contracts with the Applicant. Letters were sent to a number of financial institutions asking about trust accounts with the Carricato Funeral Home. Mr. Richer obtained a summary from his inspector, Randall Balon, on the situation with the Carricato Funeral Home. The Business Development Bank had foreclosed in the spring of 1998 but there were no bankruptcy proceedings. The books and records were kept at the home of Mr. Carricato's mother. Though the Funeral Home closed in August, the Board of Funeral Services was not informed.

After discussions with the Licence Committee of the Board of Funeral Services, Mr. Richer felt that Mr. Carricato could not operate a funeral establishment on his own. There had been a consistent pattern of non compliance with the record keeping requirements under the Act.

Under cross-examination Mr. Richer stated that there were about twelve prepaid contracts with the Carricato Funeral Home. There was a pattern of non compliance despite written warnings and constant inspections. To date, the Board of Funeral Services still does not know who is entitled to one of the bank accounts held by the Carricato Funeral Home under the Regulations of the Funeral Directors and Establishment Act.

Mr. Richer hoped that after five years of working under another funeral director, Mr. Carricato would be aware of how to manage his records. He believes Mr. Carricato needs to have another managing director oversee Mr. Carricato's work.

Mr. Richer stated that at present there are no mention programs in existence. Inspectors do offer advice when they inspect a funeral establishment. There has been a requirement to attend professional responsibility courses once every five years. The courses include a course on effective record keeping.

Mr. Richer stated that conditions placed on licences normally range from three to seven years. With attendance at professional development courses required by law at least once every five years, putting a period of three years on as a condition for Mr. Carricato's licence would not be sufficient.

Testimony of Randy Balon:

Mr. Balon has been an inspector with the Board of Funeral Services since May 15, 1995. His list of establishments which he had to inspect includes the funeral home of Mr. Carricato.

According to his testimony, Mr. Balon was in Sault Ste. Marie doing other inspections of funeral homes when he was told that Mr. Carricato was not in business any longer. He went out to the business premises of the Carricato Funeral Home on October 28, 1998 and found a building which looked like it had been neglected for some time. He attempted to contact Mr. Carricato but was unsuccessful. He tried again at the business premises on October 29, 1998 and after finding no one there he contacted his supervisor in Toronto. Following her instructions, he then contacted all the bank managers on record with the Board of Funeral Services where prepaid trust accounts

were held by the Carricato Funeral Home. He found 8 such trust accounts although the records of the Board of Funeral Services had 11 accounts on record. Following further instructions from the Registrar, Mr. Balon then put these financial establishments on notice that the Board of Funeral Services intended to obtain an order to freeze the assets of the Carricato Funeral Home. No such order was made as the financial establishments voluntarily cooperated and froze the accounts.

Mr. Balon testified that he put a notice in the *Star* newspaper in Sault Ste Marie informing the public that anyone with prepaid funeral contracts from the Carricato Funeral Home should contact the Board of Funeral Services. Mr. Balon also was able to determine that the business premises had been listed for sale with a realty company since July 10, 1998.

Mr. Balon did meet with Mr. Carricato on November 12 and 13, 1998. From Mr. Carricato he found that the Business Development Bank had foreclosed on him in the spring of 1998. Mr. Carricato had not notified the Board of Funeral Services of this. The business records for the Carricato Funeral Home were with Mr. Carricato's mother, rather than being on the business premises. Mr. Carricato stated that he still owed a newspaper for death notices. This bill was paid by Mr. Carricato on November 13, 1998.

Mr. Balon found that the Public Accountant's report was not filed in time and that the prepaid funeral ledger was not completed.

Mr. Balon testified that one of the prepaid funeral contracts was cancelled, and the monies had been refunded. Two other prepaid funeral contracts were completed through the death of the parties. He was able to account for all of the prepaid funeral contracts, and there were only 8 outstanding trust accounts. The majority owners of the existing accounts wished to be transferred to another funeral home, although some wished to have their monies refunded. One could not be located until recently, and the Board was getting instructions from that person on what to do with that trust account.

There continues to be one account at a credit union which the Board is uncertain if it is a trust account. It has not to date been resolved.

Under cross-examination Mr. Balon testified that he recalled at his meeting with Mr. Carricato in 1998 that Mr. Carricato had stated that he was "not good with bookkeeping". Mr. Balon stated that no explanation was given as to why Mr. Carricato did not inform the Board of Funeral Services about the problems with his business.

Testimony of Ronald Carricato:

Mr. Carricato testified that he was initially licensed in 1970 and received his funeral establishment licence in 1979. He has had his funeral home in Sault Ste Marie, and there has been no public complaints. He has always worked with the Registrar to resolve any issues.

Mr. Carricato stated that he did hold a funeral establishment licence in January, 1987 despite a letter to the contrary in the documents of the Registrar.

Regarding the Discipline Committee action in 1991, Mr. Carricato stated that he had signed the Agreed Statement of Facts on the advice of the then Registrar, Mrs.

Reynolds who told him it was a formality. He was distressed to get a five hundred dollar fine and a reprimand from the Discipline Committee. Mr. Carricato stated that at that time he was having some financial problems keeping the funeral home in operation.

Mr. Carricato stated that in 1994, when he was next inspected, he was doing only twenty funerals a year. He does not recall any mention by the inspector as to problems with his trust account or his ledger for the prepaid funerals.

He was inspected again in 1995, and he did respond to that inspection in writing. He was told by the then Registrar, Mrs. Reynolds, that everyone in the business was having problems with prepaid funeral accounting.

Mr. Carricato testified that the rules governing funeral homes were different prior to 1990 and it had taken him a little longer to deal with the changes. He said that there is nothing wrong with his records. If the Board now wants all aspects of the contract signed then he will do so. His problems with disbursements were minor, for example, a three dollar difference over a newspaper notice.

Regarding his actions in the summer of 1998, Mr. Carricato stated that he had provided a funeral in August, 1998. He had told some of his prepaid customers that he was trying to sell the funeral home. He cannot explain why he did not alert the Board of Funeral Services about his problems.

Mr. Carricato stated that it was unfair to tell him that he could not operate a funeral establishment for five years due to his bookkeeping practices.

In his cross-examination Mr. Carricato stated that he did not know how the files got under the sofa cushion. He agreed that he had read and signed the Agreed Statement of Facts in 1991 which listed a number of problems with his establishment, but he did not sign it until asked to do so by the Registrar. He agreed that there were a number of concerns mentioned by inspectors over the years concerning how he kept his contracts and the lack of signatures for his contracts. He agreed that two different inspectors on two different site visits had reached the same conclusions about the problems with his contracts and his prepaid ledgers.

Mr. Carricato stated that to this date he still did not know what was wrong with his prepaid ledger. He maintained that he never told Mr. Balon that he was not good with bookkeeping.

Closing Statements:

The Registrar:

Counsel for the Registrar argued that the Registrar had ample reason to make his Proposal. The evidence of the witnesses showed that the ultimate responsibility rests with the licensee. The evidence is clear, stated the Counsel for the Registrar, that Mr. Carricato consistently failed to meet his record keeping and bookkeeping responsibilities. The inspections showed remarkably similar problems. As well, Mr. Carricato failed in his responsibility to his prepaid customers in 1998. His customers were not taken care of, and if someone had died there were no alternative arrangements.

Mr. Carricato:

Mr. Carricato argued that there is no doubt there were some problems, but his record keeping was adequate. He should be granted his funeral establishment licence on more lenient conditions than those proposed by the Registrar.

LEGISLATION:

The relevant legislation is the Funeral Directors and Establishments Act:

Section 20(3) provides:

An applicant is entitled to a licence or a renewal of a licence as a funeral director or to operate a funeral establishment or to operate a transfer service except if,

- a) the applicant cannot reasonable be expected to be competent or financially responsible in the conduct of the applicant's business;
- b) the past or present conduct of the persons referred to in subsection (4) affords reasonable grounds for belief that the applicant will not operate in accordance with law and with integrity and honesty;

(4) Clause 3(b) applies to the following persons:

- 1. the applicant
- 2. an officer or director of the applicant
- 3. a person holding more than ten per cent of the equity shares of the applicant or an officer or director of such person.
- 4. Any person having a beneficial interest in the operation of the business of the applicant or licensee.

(6) A licence is subject to such conditions as may be consented to by the applicant, imposed by the Tribunal or prescribed.

Section 21(2) provides that:

Subject to section 22, the Registrar may refuse to renew or may suspend or revoke a licence,

- a) for any reason that would disentitle the licensee to a licence under subsection 20(3) if the licensee were an applicant

Section 22(5) provides that:

After Holding a hearing, the Tribunal may be order direct the Registrar to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(6) The Tribunal may attach such conditions to its order or to the licence as it considers proper to give effect to the purposes of this Act.

Section 23(1) provides that:

A person who is refused a licence or who is refused a renewal of a licence may apply in writing to the Registrar for the issuance of a licence only if at least one year has passed since the refusal.

Regulation 470 under the Act governs the Licensing and Business Practices and provides that:

Section 15(1) Every operator of a funeral establishment or transfer service shall maintain books, records and accounts at the place of business, in which shall be recorded:

- (a) all money received under a contract for the purchase of funeral services or supplies or transfer services;
- (b) all money disbursed in accordance with the terms of a contract for the purchase of funeral services or supplies or transfer services and
- (c) all other money received or disbursed in connection with its business

Section 19 of the Regulation states:

Every operator of a funeral establishment or transfer service that receives prepayment funds shall maintain a register or ledger located on its premises in which shall be entered,

- a) the date of the contract,
- b) the name and address of the person with whom the contract was made,
- c) the name, address, age and when known, the place and date of death of the beneficiary,
- d) the date on which the contract is fully performed, or cancelled; and
- e) the details of the prepayment funds invested or deposited under section 16

Section 25(1) states:

Within three months after its fiscal year end, every operator of a funeral establishment or transfer service shall have a report prepared by a public accountant licensed under the Public Accountancy Act with respect to all prepayment funds invested.

Section 31(1) states:

It is a condition of a funeral director's licence that the funeral director attends, at least once every five years, a professional development course of instruction in topics related to funeral services conducted or approved by the Board.

ANALYSIS:

The Registrar under the Funeral Directors and Establishments Act has a duty to regulate the funeral homes to ensure that the public is protected. Funeral directors and their establishments have an extremely important role with the public. It is a sensitive role as members of a family are often in their most vulnerable state at the loss of a loved one. The Registrar and the Board of Funeral Services must ensure that those operating within the funeral business are people of integrity, honesty and operate in accordance with the law. With the introduction into the funeral business of the prepaid funeral contracts the Registrar has an additional burden of ensuring that public's money is protected in trust accounts. The funeral director under Regulation 470 has many obligations as to the record keeping and bookkeeping practices of his/her business. These regulations were enacted by the legislators out of their concern for the financial integrity of the funeral business, and it is the duty of the Registrar to ensure that the responsibilities and obligations for record keeping are maintained by the funeral directors.

With this background, the Tribunal has no difficulty in agreeing with the Registrar that in this particular case there is a need to have terms and conditions upon the renewal of the licence of Mr. Carricato. He had applied for an application for certification authorizing the performing of embalming. The Registrar by his Proposal of October 12, 1999 stated that he could be granted that licence subject to Mr. Carricato not managing or directly supervising a funeral establishment or transfer service for five years. In other words Mr. Carricato could be licenced to work in a funeral establishment or transfer service, but he could not be the manager or direct supervisor for five years.

The evidence presented by the Registrar and Mr. Balon is clear, and except for the statement that Mr. Carricato had said he was not good at bookkeeping it was not seriously challenged by Mr. Carricato. There is a pattern of behaviour, evidenced from the Discipline Committee proceedings of 1991 through to his last inspection of 1995, that Mr. Carricato could not get organized when it came to his record keeping practices. Indeed, even in 1988 Mr. Carricato was so careless with his record keeping that he found some of his prepaid files tucked under a sofa cushion. Mr. Carricato has to understand that a funeral director has to keep proper records.

The evidence does not show any serious infractions by Mr. Carricato regarding his embalming or other practices. It is not suggested that Mr. Carricato is a dishonest person. There have been no public complaints against any sharp practices by Mr. Carricato. He is just careless with his paperwork.

Based on the evidence of his carelessness with paperwork, the Tribunal would have been inclined to have imposed a minor condition upon Mr. Carricato such as taking a course offered by the Board of Funeral Services on bookkeeping practices. However the Tribunal is quite concerned about the episode in 1998 when Mr. Carricato closed up his funeral home after the actions of the Business Development Bank but failed to alert his regulatory body to his circumstances. As well, in the opinion of the Tribunal, Mr. Carricato breached his obligations to his prepaid customers by not insisting that they move their contracts to other funeral establishments or refund their monies under the contracts. Mr. Carricato was well aware that he could not continue his business and had put his premises up for sale in July, 1998. Under those circumstances Mr.

Carricato needed to act to protect his prepaid customers. It was only through good fortune that none of his prepaid customers died during the summer and fall of 1998. It would have caused tremendous stress to the families of these prepaid customers to have tried to contact Mr. Carricato and then to have found that he is not available and his funeral establishment closed. The behaviour of Mr. Carricato in this situation is not acceptable in the opinion of this Tribunal.

The Tribunal is not convinced that the five years proposed by the Registrar is a suitable time frame. It was not convinced by the explanation of the Registrar that three years is too little given the obligation under the legislation to go to a course every five years and that seven years is too much given the fact that the issues mainly relate to record keeping. Funeral Directors might have to take a course every five years to maintain their licence, but the Registrar should require those funeral directors who have a pattern of behaviour in matters which can be improved to take certain courses on a more frequent basis.

There is no doubt that Mr. Carricato needs to improve his record keeping. There is also no doubt that Mr. Carricato needs to understand the issues surrounding the provision of prepaid funeral contracts. He applied for his licence in late August of 1999, and the Tribunal is of the opinion that he should be deterred from being the sole manager or supervisor of a funeral establishment or transfer service for a further year. During that time, Mr. Carricato must take a course provided by the Board of Funeral Services that deals with record keeping practices.

As the Tribunal is concerned as to his past conduct with prepaid funeral contracts, the Tribunal orders that he not be permitted to accept such contracts at his funeral establishment or transfer service for one year after he is permitted to manage or supervise a funeral establishment or transfer service. Within that year Mr. Carricato is to take a course provided by the Board of Funeral Services that deals with prepaid funeral contracts. If the Board does not have such a course, then Mr. Carricato must request the Registrar to have an inspector attend at his establishment and have that inspector review with him all of the responsibilities required of a funeral director in the matter of prepaid funeral contracts. Mr. Carricato must also undertake that if at any time he finds it necessary to shut down the operations of his funeral establishment or transfer service for any reason, he must immediately contact the Registrar and inform the Registrar of this situation and comply with the instructions of the Registrar on how he is to close down his funeral establishment or transfer service. Mr. Carricato must understand that he wishes to work and operate a business in a regulated industry. Accordingly, he must abide by the regulations and business practices of that regulated industry. In the opinion of this Tribunal, the Registrar has acted with commendable patience and fully appreciates that Mr. Carricato has been working in the funeral industry for thirty years. Mr. Carricato needs to understand the obligations of the Registrar and look upon the Registrar to provide him with guidance on the practices within the industry.

ORDER:

The Tribunal, acting under its authority as found in Section 22(5) and (6) of the Funeral Directors and Establishments Act orders the following:

1. That Mr. Carricato be granted his licence to perform embalming under the following conditions:
 - a) that he not manage or directly supervise a funeral establishment or transfer service for one year from the date of this order;
 - b) that he will take a course as offered by the Board of Funeral Services on bookkeeping practices prior to the expiry of condition a);
 - c) that he will not provide prepaid funeral contracts to customers for one year after the revocation of condition a);
 - d) that he take a course as provided by the Board of Funeral Services or accept instruction as provided by the Registrar, Board of Funeral Services, on the responsibilities and practices of prepaid funeral contracts prior to providing such prepaid funeral contracts to customers at his funeral establishment or transfer service.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice-Chair

Released: June 12, 2000

McLELWAIN, J.C. o/a J.C. McLELWAIN CONSTRUCTION

J.C. McLELWAIN o/a J.C. McLELWAIN CONSTRUCTION

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

BRIAN CAMPBELL, Counsel representing the Applicant
CAROL STREET, Counsel representing the Registrar, Ontario New
Home Warranty Program, the Respondent

DATE OF
HEARING: June 12, 2000 Toronto

ADJOURNMENT ORDER

WHEREAS by Notice of Proposal dated June 30, 1999, issued by the Registrar, Ontario New Home Warranty Program and by a Supplementary Notice of Proposal dated May 12, 2000, issued by the Registrar, Ontario New Home Warranty Program to Revoke the Registration of J.C. McLelwain o/a J.C. McLelwain Construction;

AND WHEREAS the Applicant appealed the Program's Notices of Proposals to this Tribunal which appeal was due to be heard in Toronto on June 12-14, 2000;

FOLLOWING ATTENDANCES on June 12, 2000 of Brian Campbell, Counsel for J.C. McLelwain o/a J.C. McLelwain Construction (the "Applicant") and Carol Street, Counsel, for the Registrar, Ontario New Home Warranty Program (the "Program") appeared before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal);

AND WHEREAS at the commencement of the hearing on June 12, 2000, Counsel for the Applicant and Counsel for the Program requested that the hearing be adjourned in order to permit them to complete negotiations which would result in the Applicant agreeing to certain terms and conditions, whereby the Program would withdraw its Proposals;

NOW THEREFORE this Tribunal Orders:

- 1) The hearing of this matter on consent of Counsel for both parties, is adjourned to July 12, 2000 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;
- 2) Counsel for the Program is to inform the Tribunal prior to July 12, 2000 whether the Program is withdrawing its Proposals and therefore no hearing date is required.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice-Chair

Released: June 13, 2000

TIRANI, MOHAMAD o/a A 1 TIRE CENTRE

MOHAMAD TIRANI O/A A 1 TIRE CENTRE

MOTION TO DISMISS AN APPEAL FROM A PROPOSAL OF THE
REGISTRAR UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: G. KENT McCLURE, Q.C., Vice-Chair

APPEARANCES:

No one appearing for the Applicant
AVIVA R. HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF

MOTION: June 14th, 2000

Toronto

ORDER

PURSUANT to the provisions of the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M. 42, as amended, Mohamad Tirani o/a A 1 Tire Centre (the "Applicant"), appealed a Notice of Proposal dated March 1, 2000 issued by the Registrar (the "Registrar") under the *Motor Vehicle Dealers Act* to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal);

UPON MOTION, made by Counsel for the Registrar for an Order by the Tribunal dismissing the Applicant's appeal to the Registrar's proposal, heard by this Tribunal on Wednesday, June 14, 2000, at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, M4V 1K6, no one appearing for the Applicant;

ON READING the exhibits and hearing evidence and on hearing submissions of counsel for the Registrar, no one appearing for the Applicant although properly served as appears from proof of service filed, this Tribunal finds that due to delay, non-attendance and failure to proceed on the part of the Applicant, the Applicant has abandoned these proceedings;

THIS TRIBUNAL ORDERS that the appeal by the Applicant to the Registrar's proposal is dismissed and pursuant to the authority vested in the Tribunal under section 7(4) of the *Motor Vehicle Dealers Act*, the Registrar is directed to carry out his proposal dated March 1, 2000 to revoke the registration of Mohamad Tirani o/a A 1 Tire Centre as a motor vehicle dealer.

LICENCE APPEAL TRIBUNAL

G. KENT McCLURE, Q.C.
Vice-Chair

Released: June 14th, 2000

CHRYSLER CREDIT CANADA LTD.

CHRYSLER CREDIT CANADA LTD.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF
MOTOR VEHICLES**

ORDER

WHEREAS Chrysler Credit Canada Ltd. (the "Applicant") appealed the order of impoundment effective May 27, 2000 to November 23, 2000 by the Registrar of Motor Vehicles (the "Respondent"), impounding the Applicant's motor vehicle;

AND WHEREAS the Applicant appeals to this Tribunal under section 55.1 of the *Highway Traffic Act*, and the Applicant's grounds of appeal were due diligence as provided under section 50.2(3)(c) of the Act and exceptional hardship as provided under section 50.2(3)(d) of that Act;

AND WHEREAS a motion was brought by the Respondent for an order that the Tribunal dismiss the Applicant's ground of appeal of exceptional hardship and that the Applicant's appeal proceed only on the ground of due diligence;

On consent of the parties THE TRIBUNAL ORDERS that:

1. The ground of exceptional hardship under section 50.2(3)(d) be deleted from the Applicant's notice of appeal; and
2. The Applicant's appeal before this Tribunal shall proceed solely on the ground of due diligence under section 50.2(3)(c).

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C., Chair

RELEASED: June 14, 2000

MOLINOLO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CARLOS ARIEL MOLINOLO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 19th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CARLOS ARIEL MOLINOLO

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Carlos Ariel Molinolo, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 12, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Carlos Ariel Molinolo
80 David Lewis Drive
Concord ON L4K 3H8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Carlos Ariel Molinolo (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, Motor Vehicle Dealer's Act, in writing of the charges against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer of the charges against him and to immediately give said notification, in writing, to the Registrar.
3. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
4. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
5. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
6. The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
7. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.

8. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
9. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
10. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.
11. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of 2000.

(Signature) Carlos Ariel Molinolo

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

SELLENS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CHARLES EDMUND SELLENS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 15th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CHARLES EDMUND SELLENS

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Charles Edmund Sellens, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 5th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Charles Edmund Sellens
31 Cross Street
Dundas ON L9H 2R5

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Charles Edmund Sellens (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, *Motor Vehicle Dealers Act*, in writing, of the charges laid against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant will not provide any false or misleading information, verbally or in writing, to a representative of the Registrar.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer. Should he wish to transfer his registration, he shall submit a new application for registration to the Registrar.
5. The Applicant agrees to successfully complete the certification course within 60 days of the issuance of this Order.
6. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
7. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

8. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
9. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
10. The Applicant acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, and / or if he is convicted of any offence under the Criminal Code, the Registrar is directed to, and shall carry out the proposal, and the Applicant's registration shall automatically be revoked.
11. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of March 2000.

(Signature) Charles Edmund Sellens

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

OLDFORD

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
CLIFFORD F. OLDFORD

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 24th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

CLIFFORD F. OLDFORD

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Clifford F. Oldford, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 14th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St Clair Ave. West
Toronto, ON M4V 1K6

From: Clifford Oldford
60 Alder Street
Orangeville, ON L9W 5A8

In accordance with section 4.1 of the Statutory Powers Procedures Act, and section 5(2) of the Motor Vehicle Dealers Act, the parties to the proceeding, Clifford Oldford (hereafter the "Salesperson") and the Registrar, Motor Vehicle Dealers Act, waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based on the following Terms and Conditions:

1. I agree to forthwith advise the Registrar in writing if any charges are laid against me and I further agree to advise my employer in writing and provide proof of same to the Registrar. I further agree to advise the Registrar and my employer, in writing, of the disposition of the charges.
2. I agree not to be a partner, shareholder, officer, director or manager of a motor vehicle dealership, without the prior written consent of the Registrar.
3. I agree that my registration will be revoked if I am convicted of an offence under any law.
4. I agree not to be the final signatory on any sales contracts on behalf of the dealer.
5. I agree to make full disclosure on all subsequent applications submitted to the Registrar.
6. I agree to provide a copy of this order to my employer.
7. I hereby acknowledge that the Registrar may take further administrative action, including a proposal revoke my registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
8. In the event that I breach any of the Terms and Conditions set out herein, I agree that the Registrar is authorized and directed to carry out the proposal and shall revoke my registration.

9. I hereby consent to an order which may include the Terms and Conditions set out herein.

10. I hereby withdraw my appeal to the Licence Appeal Tribunal.

11. I acknowledge that I have obtained or have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out herein.

Signed in the City of _____, this _____ day of _____, 2000.

Witness

Clifford Oldford

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar

NIGRO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JOSEPH MICHAEL NIGRO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 13th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOSEPH MICHAEL NIGRO

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Joseph Michael Nigro, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 12th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Joseph Micheal Nigro
1038 Simpson Street
Thunder Bay ON P7C 3K7

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Joseph Micheal Nigro (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, Motor Vehicle Dealer's Act, in writing of the charges against me.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify my employer of the charges against me and to provide the Registrar with written confirmation of the disclosure.
3. I agree not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
4. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
5. The Applicant agrees not to transfer his registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
6. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
7. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
8. The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration,

arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.

9. The Applicant acknowledges that his registration as a motor vehicle Salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
10. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of
2000.

(Signature) Joseph Nigro

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

SHERMAN

FUNERAL DIRECTORS AND ESTABLISHMENT ACT
Revised Statutes of Ontario 1990, Chapter F.36

IN THE MATTER OF
SAM SHERMAN

AND IN THE MATTER OF a DECISION
of the Complaints Committee,
Board of Funeral Services
respecting Carol Saucier, Funeral Director

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

ADJOURNMENT ORDER

WHEREAS, Sam Sherman (the "Applicant") by letter dated April 4, 2000, requested a hearing before the Licence Appeal Tribunal of a decision of the Complaints Committee, Board of Funeral Services dated March 1, 2000, respecting Carol Saucier, Funeral Director (the "Respondent");

AND WHEREAS the Tribunal appointed a time and place for the pre-hearing for June 28, 2000 and the hearing for July 26, 2000 in the above matter;

AND WHEREAS Counsel for the Respondent requested an adjournment of the pre-hearing date and hearing date;

THEREFORE the Tribunal Orders on consent of both parties that:

- 1) The pre-hearing scheduled for June 28, 2000 is adjourned *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 2:00 p.m., on Tuesday, August 1, 2000.
- 2) The hearing scheduled for July 26, 2000 is adjourned *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, August 30, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 15th, 2000

1128570 ONTARIO INC. O/A NORTHERN ESCAPE TOURS

1128570 ONTARIO INC. O/A NORTHERN ESCAPE TOURS

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE MOTOR VEHICLE DEALERS
COMPENSATION FUND

TRIBUNAL: MARJORIE L. HILEY, VICE CHAIR

APPEARANCES: JIM ROCKEY, Agent, representing the Applicant, 1128570 Ontario Inc. o/a Northern Escape Tours
LARRY BANACK, Counsel, representing the Board of Trustees, Ontario Motor Vehicle Dealers Compensation Fund

DATE OF HEARING: APRIL 10, 2000 SUDBURY

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Trustees, Ontario Motor Vehicle Dealers Compensation Fund (the "Board of Trustess"), had initially refused the claim of the Applicant by their letter of August 10, 1999. In that decision, the Trustees rejected the claim based on the Applicant not having commenced the claim within the two year time frame as stated in section 12(3) of Regulation 801 attached to the Motor Vehicle Dealers Act. The Applicant by a letter dated August 27, 1999 to the Chairperson of the Fund asked for a reconsideration of that denial. The Board of Trustees responded with their final decision dated November 26, 1999. In that decision, besides the limitation period as previously mentioned, the Trustees held that the Applicant failed to meet the requisite criteria for eligibility, that there were differences between the bank statements and the bill of sale and that there was an issue of acceptance by the purchaser (letter mistakenly states vendor's acceptance).

The Applicant by a letter dated December 6, 1999 requested a hearing before the Commercial Registration Appeal Tribunal, which as of April 1, 2000, became the Licence Appeal Tribunal. A hearing was held in Sudbury on April 10, 2000. The parties were in attendance at that time.

ISSUES:

Is the Applicant out of time to bring its claim under the Compensation Fund?

Has the Applicant met the eligibility criteria under section 12(3) of Regulation 801 to the Motor Vehicle Dealers Act?

Is the Applicant entitled to his claim of \$15,000.00 as against the Ontario Motor Vehicle Dealers Compensation Fund?

EVIDENCE:

Opening Statement of Counsel for the Board of Trustees:

The Counsel stated that the Applicant by the claim dated June 16, 1999 based the application for compensation on the bankruptcy of the dealership. The bill of sale for the motor vehicle is dated January 9, 1996 for a selling price of \$145,000.00 and a total price of \$166,750.00. There was no purchaser's signature on it. There is an outstanding lien of \$87,000.00. Initially, the Board of Trustees denied the claim based on the limitation period. Then the Board of Trustees issued a second decision that had several other grounds for the denial of the application. Those grounds include whether the Applicant suffered pecuniary loss and whether the application meets the criteria under Regulation 801 section 12(3).

Testimony of Jim Rockey:

Mr. Rockey testified that in December, 1995 he was in the market to purchase a bus. He decided to buy a bus from Braemar Coach. Which was to cost approximately \$150,000.00. He received the bus on January 9, 1996 at North Bay. He had not signed any documents.

Mr. Rockey stated he was unhappy with the condition of the bus. It was not finished in accordance with his verbal deal with Braemar Coach. He retained a lawyer, Mr. Cito, to start litigation against Braemar Coach. That litigation did not proceed after August, 1996. Braemar Coach never filed a statement of defence. Mr. Cito was then disbarred by the Law Society. Mr. Rockey lost a substantial amount of money which had been in Mr. Cito's trust account. Mr. Rockey never continued with the litigation.

Mr. Rockey stated that he had forwarded to Braemar Coach by bank draft \$100,000.00 on January 15, 1996 and a further \$56,486.00 by bank draft on January 24, 1996. Mr. Rockey complained at some point to the Ministry of Consumer and Commercial Relations and asked them to investigate Braemar Coach. He was told by officials at the Ministry that he could not file his claim for compensation until he had finished with his litigation against Braemar Coach. Despite his requests, the Ministry did not file charges of fraud against Braemar.

Mr. Rockey testified that after he received the bus, he had its brakes fixed and then had it driven back to Braemar Coach in Hamilton to have it repaired and painted in accordance with his prior agreement with Braemar. The repairs and painting never happened and eventually Mr. Rockey took the bus back to North Bay.

Mr. Rockey stated that he became aware that the bus had some liens against it. The lien holders were from the United States and they wanted the bus returned to them. Mr. Rockey retained another lawyer and paid the lien holders \$15,000.00 in settlement of their claim against the bus. He testified that he can if necessary, get proof of his payment of the lien from his bank.

Currently the Hamilton police are considering the laying of criminal charges at the insistence of the North Bay police. The charges have not yet been laid.

Under cross-examination, Mr. Rockey stated that he has been in the bus industry for a number of years and has experience in the past at purchasing buses. He testified that he does not check for liens when he purchases a vehicle from a dealer.

Mr. Rockey agreed that he received the bus after he paid the full price for it. He had paid the \$100,000.00 to get Braemar Coach to paint the bus and then paid the remainder to have the bus delivered to him. Although the bill of sale has a date of January 9, 1996, Mr. Rockey agreed that he did not get the bus until after the second payment. Mr. Rockey recalls that the bus was delivered to his garage in Sudbury sometime in early February, 1996, not January 9th as he had originally testified.

Mr. Rockey agreed that he never signed a bill of sale, and he never got any paperwork dealing with this bus. He had a handwritten note which was made an exhibit to the hearing. This note was written by Mr. Rockey while he was negotiating the deal with Braemar Coach at their Hamilton offices. That note shows the final price for the vehicle to be \$156,500.00. Mr. Rockey agreed that the statutory declaration signed by Mrs. Rockey had the wrong sales price for the bus. It stated the price of the bus to be \$166,750.00. Mr. Rockey explained that his wife has been in poor health and that she failed to notice the error.

Mr. Rockey testified that the litigation he had started in 1996 was not completed because Braemar Coach never responded to it. Mr. Rockey stated that he had not known that he could have petitioned Braemar into bankruptcy himself. He now believes that the previous owners of Braemar have started another business selling marble slate.

Closing Statements:

Mr. Rockey:

Mr. Rockey argued that he had bought the bus from a dealer so he had not checked for liens. His wife had made a mistake about the price of the bus. The officials at the Ministry had given him the wrong information about when he could file his compensation claim, and he had relied on that information. Mr. Rockey argued that he had met all of the necessary criteria to recover monies from the Compensation Fund. He felt that the Ministry officials should have charged Braemar Coach with fraud.

Counsel for the Trustees:

Counsel argued that Mr. Rockey had not provided the Trustees with the same information as was given to the Tribunal at the hearing. The Trustees found Mr. Rockey's documentation to be inconsistent with his bank statements. The Trustees had not found a loss as defined under the legislation.

Counsel argued that even if the Trustees had had the benefit of Mr. Rockey's testimony, they would have still refused his claim as he had not shown any court judgment, any criminal conviction or any bankruptcy. Counsel referred to the case of: Leila Lemon CRAT October 25, 1991 in which the Tribunal found that the Applicant did not meet the eligibility criteria as the dealership was not bankrupt. Counsel also relied on the case of Brian and Filomena Smith CRAT June 24, 1999 in which the Tribunal found that the Applicants did not meet the eligibility criteria as they did not have a claim in bankruptcy against the company, the company was not convicted of criminal charges, and though

they had commenced a lawsuit and had a judgment against the company, the lawsuit was done improperly as the company had already filed for bankruptcy.

LEGISLATION:

The relevant legislation is found in Regulation 801 of the Motor Vehicle Dealers Act at the Schedule:

Section 1: In this Schedule,

“claim” means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

Section 12 (3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participants' refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim for payment of the unsatisfied portion of the judgment and costs as assessed.
2. The participant has been convicted of an offence under the Criminal Code (Canada) involving fraud, theft or false pretences in connection with a transaction out of which the claim arose and the claim is for liquidated amount and the customer makes an application that is supported by evidence of the conviction and of the correctness of the liquidated amount.
3. The participant has become a bankrupt or a winding up order has been made or a receiver appointed in respect of the business of the participant under the Bankruptcy Act (Canada) and the claim is for a liquidated amount and the customer makes an application that is supported by evidence of the allowance of the Trustee in bankruptcy, liquidator or receiver, less any amount that may have been paid on account of the claim by the Trustee, liquidator or receiver.
4. The customer has made payment by way of deposit, down payment or otherwise to a participant with respect to an undelivered motor vehicle and the customer has not received the motor vehicle contracted for or an alternative motor vehicle that is acceptable to the customer and the claim is for a refund of the payment made to the participant where the customer has made a demand for payment from the participant and the participant has refused without legal justification to make the payment or is unable to pay by reason of bankruptcy or insolvency, but is not a claim for a refund of money paid by the customer to a participant where the customer has been provided with the motor vehicle contracted for and the demand for a refund is based on the cost, value or quality of the vehicle provided.

5. The customer has made payment for an extended warranty or service plan to a participant where the warranty or plan is not underwritten by an insurer and the term of the warranty or plan has not expired and the claim is for a non earned premium or for a repair under the warranty or plan.

Section 15(3) Where a claimant requires a hearing before the Tribunal under subsection (1) the Tribunal shall appoint a time for and hold the hearing and, after affording the claimant an opportunity to be heard, may confirm the determination of the Board or may set aside the determination of the Board with respect to all or any part of the claim and direct the Trustee to pay the amount determined by the Tribunal.

ANALYSIS:

The Compensation Fund of the Motor Vehicle Dealers Act was created to help the public who have had a financial loss from a registered motor vehicle dealer. Registered motor vehicle dealers must participate in the Fund and support it financially. The Fund was not intended to cover every type of financial loss that can be attributed to a motor vehicle dealer. Indeed, under section 12 the types of situations which permit the Fund to offer compensation to members of the public are clearly defined.

The applicable sections of section 12(3) for this fact situation are paragraphs 1, 2 and 3. Paragraph 1 requires a judgment from an Ontario Court where the appeal time has expired and there remains an unsatisfied portion of that judgment. Paragraph 2 requires that the motor vehicle dealer must have been convicted under the Criminal Code or fraud, theft or false pretences and the claimants must show an exact amount that is owing from that dealer. Paragraph 3 requires that the motor vehicle dealer has been found bankrupt or there is a winding up order or a receiver appointed under the Bankruptcy Act with the claimant having a claim which has been allowed by the Trustee in Bankruptcy but not being fully paid by that Trustee.

Unfortunately, Mr. Rockey and his company do not fall within any of these situations. Mr. Rockey did start some sort of litigation in 1996, but he admits in his evidence that it never progressed and he did not get a judgment against Braemar Coach. Mr. Rockey has been trying for years to get either the Ministry of Consumer and Commercial Relations or the police to lay criminal charges against Braemar Coach. He feels the Hamilton police will do that in the near future, but it has not happened and there are no criminal convictions against Braemar. Mr. Rockey stated in his evidence that Braemar has not gone bankrupt, and he has not put any claim before a Trustee in Bankruptcy.

There is no doubt in the mind of this Tribunal that Mr. Rockey has suffered a pecuniary loss in his dealings with Braemar Coach. Mr. Rockey did not have the documentary proof before the Tribunal, but there is a letter dated April 30, 1997 from Mr. Crawford, a lawyer in London, Ontario which deals with the discharge of liens against the vehicle by the lien holders, Associates Commercial Corporation, for the payment of \$15,000.00. The Tribunal believes Mr. Rockey when he states that he did pay off the lien holders and it did cost him that amount of money. But having a pecuniary loss does not in itself require payment of compensation from the Fund. The loss must fit within the requirements of section 12(3) of the Schedule attached to Regulation 801 of the Motor Vehicle Dealers Act.

The Tribunal sympathizes with Mr. Rockey in his predicament. He placed trust in what he thought was an established motor vehicle dealership. His trust was misplaced, and it has cost him and his wife both money and emotional stress. But the Tribunal must act within the confines of the relevant legislation. As was stated by the Tribunal in the Seaford Tye (1989) 18 CRAT 158 "We are left, therefore, to the conclusion that the Applicant cannot qualify for compensation having failed to satisfy the requirements prescribed by regulations. We sympathize with the Applicant and view the whole transaction with the distaste it deserves. Unfortunately, however, he has failed to meet the conditions which the legislation demands and we are, therefore, bound to deny the claim".

The Tribunal does not need to deal with the issue of whether or not the Applicant could meet the time deadline of "written notice of the claim to the Registrar within two years of the participants' refusal or failure to pay" as the Applicant cannot meet the eligibility conditions of section 12(3) of Schedule, Regulation 801, Motor Vehicle Dealers Act.

ORDER:

Pursuant to the authority vested in it by the Motor Vehicle Dealers Act and the regulations made thereunder, the Tribunal directs the Board of Trustees of the Motor Vehicle Dealers Compensation Fund to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley
Vice-Chair

Released: June 15, 2000

TOYOTA CREDIT CANADA INC.

TOYOTA CREDIT CANADA INC.

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DEREK ISRAEL
Vice-Chair

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

PAUL CHUMAK, Q.C., Counsel for and representative of
Tatiana Manevskiaia, agent for Toyota Credit Canada Inc.

DATE OF HEARING: June 13, 2000

DECISION RELEASED: June 14, 2000 Toronto

REASONS FOR DECISION

A hearing was held on June 13, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Toyota Credit Canada Inc. (the “Applicant”)
Motor Vehicle:	2000 Lexus RX300, Plate #AFYN 760 (the “vehicle”)
Date of Appeal:	May 23, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner filed an appeal based on the ground of exceptional hardship [section 50.2(3)(d)] which ground of appeal the Tribunal found did not apply by virtue of section 50.2(4). The owner thereupon with the consent of the Registrar amended the ground of appeal to that of “due diligence” more fully referred to in section 50.2(3)(c).

The owner therefore now appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on June 13, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Appeal of Toyota Credit Canada Inc.
LAT File # 0085/MVIA/00/019

AMMENDMENT TO APPEAL

Statement of Tatiana Manevskaia

RE: DUE DILIGENCE

On May 15th, 2000, I became very sick with a viral infection. I did not sleep at all the entire nights of May 16 and 17, 2000. I was sick to my stomach throughout both these nights.

My common-law husband, Andrei was living separate and apart from me from November 1999 until April 2000. He returned in April 2000.

I knew he had an accident but I never knew the status of my common-law husband's driving privileges. When I would ask about the accident he would say, "no problem, it's ok". I took him at his word.

On May 7, 2000 I had just started a new business, Quizno's Classic Subs and I was working 15 to 19 hours per day 7 days a week. I was exhausted.

When the police arrested Andrei I was suffering the after effects of my sickness and overwork. My son called me from the scene to tell me that Andrei was arrested and that his license was suspended. I lost my temper and said some very dumb things to the policeman for which I sincerely apologize.

I am a law abiding, responsible person in all my dealings both business and personal. I believe that in the circumstances of my illness and exhaustion I acted out of character as I have a great deal of respect for the police and people in authority.

I exercised due diligence in asking Andrei about his accident. I took him at this word. This I regret and it will never happen again.

(Exhibit 1)

Tanya (Tatiana) Manevskaia testified that she leased the vehicle from Toyota Credit Canada Inc. She used the vehicle for her business which she commenced to operate on May 7, 2000. She is in a common law relationship with Andrei Balakai. She describes the relationship as "stormy". During the period November 1999 until May 2000, Manevskaia and Balakai lived apart. Manevskaia, at the time of the vehicle's impoundment, was again living with Balakai as well as her seventeen year old son and a two year old son whose father is Balakai.

The impounded vehicle is owned by Toyota Credit Canada Inc. which leased the vehicle to Manevskaia in December 1999 on a four year lease. Manevskaia stated she was ill with a viral infection when Balakai used the vehicle to take her 17 year old son to the bus station on the morning of May 17, 2000. Manevskaia received a telephone call from her son who told her that the police had stopped Balakai when driving the vehicle and had arrested him. Manevskaia proceeded to the scene and spoke with the arresting officer. The vehicle was impounded by the police.

Manevskaia further stated that Balakai does not always tell her the truth; that Balakai had driven her seventeen year old son in the vehicle "at least on one occasion" during the week of the vehicle's impoundment.

Under cross-examination, Manevskaia stated that she was aware that Balakai had been, prior to the impoundment, involved in an accident and that liquor was involved in that accident. Subsequent to the accident she asked him about the accident and was told by him that "the Ministry" had given him permission to drive although the "Court had not yet made a decision". She also stated that she was aware Balakai did not drive from February 1999 after the above accident took place and had been driven by his partner. Manevskaia stated that Balakai "had not been forthcoming regarding the accident". However, he told her it was "ok for him to drive" and she believed him. She never asked to see his driver's licence and did not tell Balakai he could not drive the vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment was Andrei Balakai who had been convicted of the offence of impaired driving causing bodily harm under the *Criminal Code of Canada* pursuant to which the driver's licence of Balakai was then suspended until May 19, 2001.
2. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Toyota Credit Canada Inc. as owner;
3. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Andrei Balakai;
4. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle for 180 days dated May 21, 2000;
5. Copy of Order by the Registrar of Motor Vehicles dated May 8, 1999 to impound a 1992 Toyota motor vehicle for 45 days which vehicle at the time of impoundment was owned by Toyota Credit Canada Inc.;
6. Copy of Order by the Registrar of Motor Vehicles dated September 1, 1999 to impound 1998 Lexus GS4 motor vehicle for 90 days which vehicle at time of impoundment was owned by Toyota Credit Canada Inc.;
7. Affidavit of Detective Constable J. Mark Collins dated June 1, 2000;
8. Tatiana Manevskaia's notice of appeal to the impoundment order of the vehicle.
9. Registrar's impoundment order relating to the vehicle dated May 21, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Facts Found Proven

The following are the facts found by the Tribunal to have been proven:

1. Toyota Credit Canada Inc. is the owner of the motor vehicle that was subject to the impoundment order.
2. Toyota Credit Canada Inc. has had two other motor vehicles impounded in terms of section 50.2 of the Act.
3. Toyota Credit Canada Inc. leased the vehicle to Tatiana Manevskaja in December 1999 on a four year lease.
4. At the time of the impoundment order, the Applicant's motor vehicle was driven by Andrei Balakai.
5. At the time of the impoundment of the Applicant's motor vehicle, Andrei Balakai's driver's licence was under suspension due to a conviction under the *Criminal Code of Canada* for impaired driving causing bodily harm.
6. Toyota Credit Canada did not attempt to determine that Andrei Balakai's driver's licence was not under suspension at the time of the vehicle being impounded.

To succeed in this appeal, Applicant, Toyota Credit Canada Inc., must establish that it exercised due diligence to determine that Andrei Balakai's driver's licence was not under suspension at the time of the vehicle being impounded.

The Tribunal finds that Balakai was driving the vehicle at the time of its impoundment and that Balakai's driver's licence was then under suspension.

The Tribunal further finds that two motor vehicles owned by Toyota Credit Canada Inc., other than the vehicle under impoundment, had previously been impounded in terms of section 50.2 of the Act.

Section 50.2(3)(c) of the Act requires the owner of the vehicle, in this instance Toyota Credit Canada Inc., to exercise due diligence in attempting to determine that Balakai's driver's licence was not suspended at the time of the vehicle's impoundment. The Act is clear and unambiguous. It is the owner of the vehicle that is required to exercise due diligence. Manevskaia is not the owner of the vehicle. The Act does not include a lessee in the definition of an owner and the Tribunal does not agree with Manevskaia's Counsel's position that the owner of the vehicle by inference includes a lessee. The owner of the vehicle on the evidence before the Tribunal did not exercise due diligence.

For Manevskaia to contend that she exercised due diligence is not material to the issue. Even if Manevskaia's Counsel's position were correct (and the Tribunal reiterates that it believes it is not correct) the evidence clearly indicates that Manevskaia took no active steps to determine that Balakai's driver's licence was not under suspension particularly when she acknowledged that Balakai was not always honest with her, that she was aware he had been suspended from driving "and that after his accident his partner drove him".

The Tribunal finds that the Applicant has failed to establish that the owner of the vehicle, Toyota Credit Canada Inc., exercised due diligence as required by the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: *June 14, 2000*

RAHAL

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ABRAHEEM RAHAL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 15th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ABRAHEEM RAHAL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on June 29, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal *peremptory* adjourns the hearing *against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, August 25, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 16th, 2000

STEVENS

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
SAMUEL AND DRAGICA STEVENS

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

SAMUEL AND DRAGICA STEVENS

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

GILGROVE DEVELOPMENTS INC.

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on June 12-16, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, July 13, 2000, and to continue July 14, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 15, 2000

MARAR

GEORGE MARAR

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the AAct@), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELMER MERKLEY
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

GEORGE MARAR, Applicant

DATE OF HEARING: June 13, 2000

DECISION RELEASED: June 15, 2000 Windsor

REASONS FOR DECISION

A hearing was held on June 13, 2000, at Windsor, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended (AHTA@ or the AAct@).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the AAct@).

The Registrar of Motor Vehicles (the ARegistrar@), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: George Marar (the AApplicant")
Motor Vehicle: 1995 Dodge Avenger, plate # AFSV 985 (the Avehicle")
Date of Appeal: May 31, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the ATribunal@) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on June 13, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I wish to appeal on two different grounds. One of the grounds I wish to appeal on, is the fact that I, George Marar, the owner of the vehicle, exercised due diligence to determine that the driver's licence was not suspended. I also wish to appeal on the ground that the loss of my motor vehicle, for the time of 45 days, will result in exceptional hardship to me and my family.

In support of due diligence, the Applicant stated that he had recently purchased a new vehicle and met Mr. Michael A. McCormick at a mutual friend's house. The Applicant knew Mr. McCormick from high school and offered to provide him a ride home. Mr. McCormick asked to drive the new vehicle and permission was given after Mr. McCormick responded "yes" to the direct question, "Do you have a driver's licence?" On the way home, the car owned by the Applicant and driven by Mr. McCormick was involved in a "no fault" accident while turning left into a private driveway. At that point, the police and fire trucks arrived and the vehicle was impounded.

In respect to Mr. McCormick's driver's licence status, the Applicant conceded that he made no inquiries whatsoever beyond the verbal question, "Do you have a driver's licence?" He relied on his high school friend to tell him that his licence was currently suspended under the Criminal Code of Canada for the offence of driving with more than 80 mg of alcohol in blood.

Regarding exceptional hardship, the Applicant emphasized the inconvenience caused by the loss of the motor vehicle as it was used by him to get back and forth to St. Clair College five days per week, attend his late afternoon and evening job at the Keg Restaurant four days per week, as well as allow him to do pizza deliveries with his own vehicle during weekends. He also provided transportation for his 24-year-old brother to and from his place of employment.

The Applicant stated that he earns about \$1,020.00 per month in wages and tips from his Keg Restaurant job and approximately \$300.00 every two weeks in wages and tips for pizza delivery. Since the motor vehicle's impoundment, he has been unable to deliver pizzas and questions whether he will get his job back after his car is released and repaired.

The Applicant further stated that he stays at home with his mother and father and helps out with groceries from time to time, but concedes that he has no rent commitment. However, he has responsibility for his car payment, telephone and internet service. Since the impoundment, he is spending about \$240.00 per month on taxi cabs for school and work, particularly at times when school or work friends are unavailable.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael Andrew McCormick;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 21, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Facts Found Proven

The following are the facts found by the Tribunal to have been proven:

1. The Applicant is the owner of the motor vehicle that was the subject of the impoundment order.
2. At the time of the impoundment order, the Applicant's motor vehicle was driven by Michael A. McCormick.
3. At the time of the impoundment of the Applicant's motor vehicle, Michael A. McCormick's driver's licence was under suspension due to a conviction under the Criminal Code of Canada for driving with more than 80 mg of alcohol in blood.
4. The Applicant, since the impoundment, has relied on taxi cabs and friends to get to and from work and school. The Applicant conceded that the savings in gasoline costs alone were close to the dollars expended for taxi cabs.
5. The loss of income suffered by the Applicant due to the impoundment of his motor vehicle is about \$150.00 weekly since he cannot perform the pizza delivery service. Nevertheless, car expenses have decreased as well.
6. The impoundment of the Applicant's motor vehicle has had no impact on the Applicant's brother as he has been given rides and has not lost any work days.

Onus of Proof

The onus of proof, based on the balance of probabilities, rests upon the Applicant.

Did the owner exercise due diligence respecting the driver's licence of the driver of the impounded vehicle?

The Applicant conceded that he did not inspect the driver's licence of Michael A. McCormick; he simply asked him, "Do you have a driver's licence?" and accepted his "yes" answer. He did not ask if the driver's licence was valid.

The Applicant's evidence is clear; to merely ask Mr. McCormick whether he had a driver's licence is not due diligence. Mr. Marar's actions were passive. He showed no measure of prudence in his inquiries that would normally be expected of a reasonable person in the circumstances.

The Tribunal therefore cannot conclude that the Applicant exercised due diligence within the meaning of Section 50.2(3)(c) of the Act.

Exceptional Hardship

The Applicant continues to attend school and his work at the Keg Restaurant due to the assistance of his friends and the use of taxi cabs on occasion. His brother has managed to obtain rides to and from work and has not lost any work days to date.

While the Applicant's overall income has been reduced by \$150.00 weekly for pizza delivery services, his car expenses have also decreased.

The Applicant admits that he is coping with the loss of his vehicle during the impounded period. Nevertheless, he testified that he is greatly inconvenienced and frustrated with the entire process.

In consideration of all the evidence presented, the Tribunal finds that the Applicant has not demonstrated exceptional hardship as circumscribed by Section 22 of Ontario Regulation 632/98 amending Ontario Regulation 574 under the Highway Traffic Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: *June 15, 2000*

BORBOROS

GEORGE CHRISTOPHER BOBOROS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE REAL ESTATE AND BUSINESS BROKERS ACT

TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, VICE-CHAIR, Presiding
TERENCE WARDROP, VICE-CHAIR

APPEARANCES: GEORGE CHRISTOPHER BOBOROS, representing himself
GEORGE DRAMETU, Counsel, representing the Registrar, Real
Estate and Business Brokers Act

DATE OF
HEARING: JUNE 8, 2000 TORONTO

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing which arises from a written Notice of Proposal dated February 8, 2000 issued by the Registrar under the Real Estate and Business Brokers Act (the "Act") to refuse the registration of George Christopher Boboros (the "Applicant") as a salesperson under the provisions of the Act. This appeal was heard by the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal).

THE ISSUES:

The Registrar bases his Proposal to refuse the Applicant registration under Section 6(1)(b) of the Act, which reads as follows:

6(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

b) the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty;

In support of his Proposal to refuse registration the Registrar alleges that:

- 1) The Applicant was originally registered as a salesperson under the Act from September 6, 1994 to September 11, 1997.

- 2) The Applicant initially made application for registration as a salesperson on July 26, 1994.
- 3) In the July 26, 1994 application, the Applicant answered "No" to question number 6 in that application which reads as follows:

Have you ever been convicted or found guilty of an offence under any law or are any charges now pending? If yes, attach full particulars on a separate signed and dated statement.

NOTE: Where the applicant has been previously registered, list only those convictions which have occurred since the date of last filing.

- 4) On July 19, 1996 the Applicant applied to the Registrar for renewal of his registration as a salesperson and in so doing completed and signed an application. Question number 10 in that application read as follows:

Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered:

NOTE: Where the applicant has been previously registered, list only those convictions, conditional discharges, absolute discharges or charges which have not been previously disclosed.

In answer to the above quoted question the Applicant answered "No".

- 5) The Applicant's registration terminated on September 11, 1997 and on April 13, 1999 the Applicant applied to the Registrar for registration as a salesperson. In the Applicant's aforementioned application, he answered "Yes" to question 10 in the Application. Question 10 reads as follows:

Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? This includes where a conditional discharge or an absolute discharge has been ordered. If yes, attach full details on a separate signed and dated statement.

Attached to the September 11, 1999 application the Applicant disclosed in a written statement that there were three criminal charges against him, namely:

- a) Possession of Cocaine for the Purposes of Trafficking under Section 4(2) of the Narcotic Control Act (hereinafter referred to as "Cocaine Trafficking Possession")
- b) Possession of Stolen Property under Section 354(1) of the Criminal Code (hereinafter referred to as "Stolen Property Possession")
- c) Possession of Proceeds of Crime under Section 19.1 of the Narcotic Control Act (hereinafter referred to as "Proceeds of Crime Possession").

Applicant also stated in his written statement that the status of the above three charges was respectively as follows:

- a) found guilty on Aug. 98. Sentenced to two and 1/2 years incarceration. Verdict (Conviction) and Sentence currently under appeal
 - b) \$500.00 fine
 - c) still pending
- 6) The status of the aforementioned three charges, as at April 13, 1999, was:
 - i) Between November 17, 1995 and February 26, 1996, the Applicant was charged.

- ii) On February 16, 1999 the Applicant pleaded guilty to the charge of Stolen Property Possession and was fined \$500.00 which he paid.
 - iii) On August 17, 1998 the Applicant was convicted by a jury of the charge of Cocaine Trafficking Possession and was sentenced to 30 months incarceration which conviction and sentence the Applicant appealed.
 - iv) The charge against the Applicant in respect of Proceeds of Crime Possession was still pending before Court.
- 7) In response to the Registrar's request to the Ontario Provincial Police for a CPIC report, the Registrar received confirmation of the charges and disposition thereof in relation to the Stolen Property Possession and the Cocaine Trafficking Possession.
- 8) At the request of the Registrar, the Applicant furnished to the Registrar a copy of a pre-sentence report by the Applicants' Parole Officer relative to the Cocaine Trafficking Possession charge. The Applicant also furnished the Registrar with copies of character testimonials.
- 9) The Applicant, on August 11, 1999, forwarded to the Registrar a document titled "clearance certificate" from the Niagara Police as well as a transcript of the proceedings at the sentencing hearing of the Applicant on the charge of Cocaine Trafficking Possession.
- The "clearance certificate" revealed that on September 26, 1979 the Applicant had been convicted on two counts of possession of Narcotics and was sentenced to a \$100.00 fine and in default of payment to 10 days imprisonment of each charge.
- 10) On November 24, 1999 the Applicants' Solicitor advised the Registrar that the Applicant had;
- i) withdrawn his appeal to his conviction and sentence relative to the Cocaine Trafficking Possession charge and had surrendered himself into custody to serve the 30 month term of imprisonment and;
 - ii) in regard to the charge of Proceeds of Crime Possession plead guilty and was fined \$100,000.00.
- 11) The fine of \$100,000.000 had been paid by the Applicant.

THE EVIDENCE:

The evidence in this matter consisted of both documentary and oral evidence.

Two persons testified at the hearing for the Registrar. They were Winnie Yap and Brian Schlotzhauzer.

Ms. Yap stated that she is employed as a registration officer at the offices of the Real Estate Council of Ontario, a regulatory body that administers the Act. Her duties include the reviewing of applications filed by Applicants or Registrants with the Registrar, the reviewing of such applications and the gathering of information to enable full consideration of an application. In her aforesaid capacity she dealt with the Applicant's April 13, 1999 application.

During her review of the Applicant's application of April 13, 1999, Ms. Yap became aware of Applicant's answer to question 10 in which he had disclosed the fact that he had been charged and found guilty in respect of certain criminal charges. The charges related to possession of cocaine, possession of proceeds of a crime and possession of stolen property. All these charges had been laid between November 17, 1995 and February 26, 1996. Despite the laying of these charges the Applicant had not disclosed these charges in his July 19, 1996 application for renewal of registration. Only when the Applicant applied for registration on April 13, 1999 did he for the first time disclose these charges.

Furthermore, the two entirely separate charges and subsequent convictions on those two charges on September 26, 1979 of possession of narcotics had not been disclosed by the Applicant to the Registrar in any of the Applicant's applications for registration or renewal of registration. The Registrar was only made aware of those two charges and convictions in August 1999 when the Registrar was furnished with the Niagara Police "clearance certificate" disclosing those charges and convictions.

Ms. Yap referred to the Probation & Parole Officers pre-sentence report of the Applicant (Exhibit 1, Tab 8). This report of October 13, 1998 discloses that the Applicant held, for the most part, full time employment since 1971, was a devoted father and concerned and involved parent, and has a close relationship with his wife. The judge when passing sentence on the Applicant on the charge of possession of cocaine for the purposes of Trafficking referred to this pre-sentence report as being a very favourable one. However, the judge in his judgment found the offence with which the Applicant had been charged to be a very serious offence that "requires a serious penalty" (Exhibit 1, Tab 10). The Judge further stated in his judgment;

I point to the fact that there was some four or more kilos of cocaine involved over a period of time.

Ms. Yap also made reference in her testimony to having received certain testimonials from the Applicant (Exhibit 1, Tab 8). These testimonials spoke positively as to the character of the Applicant.

Ms. Yap further testified that after receiving and reviewing all the documentation from various sources, including the Applicant, the Registrar decided to proceed with the proposal upon which this appeal is founded.

The testimony of Brian Schlotzhauzer followed that of Ms. Yap. Schlotzhauzer testified that he is the Assistant Registrar under the Act and is the manager of registrations. His duties include the considering and reviewing all applications for registration or renewal that are brought to his attention by his staff.

All applicants, beyond the requirement of attaining certain academic standards, must meet the requirements of Section 6(1) of the Act. In reviewing an application, the

Registrar looks for financial responsibility, honesty and integrity on the part of an Applicant. A review encompasses an Applicant's history including, a consideration of any criminal activity and patterns that may emerge from the activities of an Applicant. The Registrar looks at honesty and integrity generally and does not confine his review solely to an Applicant's real estate related dealings. Of importance in considering an Applicant's honesty and integrity, the Registrar places importance on how an Applicant acts in his or her dealings with the office of the Registrar.

Schlotzhauzer was familiar with the Applicant's application for registration and the Registrar's proposal to refuse registration of the Applicant. The concerns of the Registrar centred around the convictions of the Applicant, the recent nature of such convictions, the non disclosure by the Applicant of his 1979 convictions, the seriousness of all the charges and convictions as well as the nature of the offences. The charges and convictions reflect directly on the honesty and integrity of the Applicant while the non disclosure to the Registrar of the charges and convictions in the Applicant's various applications gives the Registrar concern as to how honest and forthright the Applicant will be in his dealings with the public when, as evidenced by his non disclosure, he is not honest in his dealings with the Registrar.

Schlotzhauzer stated that the various testimonials submitted by the Applicant had been considered in the overall assessment of the Applicant. However, what ultimately is of paramount concern to the Registrar is the protection of the consumer which is the prime role of the Registrar.

On a general consideration of all factors, Schlotzhauzer was of the opinion that the actions of the Applicant reflected a lack of honesty and integrity and that this required the Registrar to refuse Applicant's application for registration.

The sole witness for the Applicant was the Applicant himself. The Applicant conceded that he was charged with the four offences mentioned in the Registrar's proposal and that he was convicted as charged. He also conceded that he did not disclose any charges and convictions in his July 26, 1994 application nor in his July 19, 1996 application and that in both those applications he answered "No" to questions 6 and 10 respectively. The Applicant also stated that he did not disclose in any of his applications that he had been convicted of a criminal offence in 1979.

The Applicant stated that he did not disclose the 1979 conviction as he had been granted a pardon in 1992 under the Criminal Records Act and believed that this pardon absolved him from disclosing that conviction.

As to the applications for registration of July 26, 1994 and July 19, 1996, the Applicant conceded that in answering questions 6 and 10 respectively with "No" such answers were not correct. He stated that the "outstanding charges" against him did not enter his mind when he signed the application forms of July 1994 and July 1996. He also stated that he relied on a secretary at the real estate firm where he was working to complete the answers posed in those applications. He maintains that he did not intend to mislead the Registrar by not disclosing the charges and convictions and that the non disclosure resulted from his inattention to fully reading the questions in the application forms.

The Applicant stated that he is genuinely remorseful of what had occurred, that what had occurred in the past would not reoccur, and that he wished to be given an opportunity to prove his sincerity and not have his registration denied.

FACTS FOUND PROVEN:

The following are the facts that the Tribunal finds to have been proven.

- 1) The Applicant was convicted on September 26, 1979 on two counts of possession of narcotics and was fined \$100.00 on each count. The Applicant paid the fine.
- 2) The Applicant did not disclose to the Registrar the aforementioned conviction in any application he made for registration as a salesperson under the Act or in any application for renewal of registration.
- 3) On November 17, 1995 the Applicant was charged with:
 - i) Cocaine Trafficking Possession
 - ii) Stolen Property Possession
 - iii) Proceeds of Crime Possession
- 4) On the charge of Cocaine Trafficking Possession the Applicant was, in August 1998 found guilty and on March 30, 1999 was sentenced to 30 months in prison. The Applicant withdrew his appeal to this conviction and has completed serving six months in jail in relation to this conviction and sentence.
- 5) On the charge of Stolen Property Possession the Applicant was found guilty and on February 16, 1999 was fined the sum of \$500.00 which sum he has paid.
- 6) On the charge of Proceeds of Crime Possession the Applicant pleaded guilty on November 15, 1999 and was sentenced to a fine of \$100,000.00 which fine has been paid by the Applicant.
- 7) The Applicant in his application for registration as a salesperson dated July 26, 1994 and his renewal application dated July 19, 1996 he failed to disclose any charges brought against him as more fully referred to in paragraphs 3(i), (ii) and (iii) above.
- 8) The Applicant was first registered as a salesperson under the Act on September 6, 1994.

DECISION AND REASONS:

The onus of proof falls upon the Registrar to prove that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

This Tribunal has the power in terms of s.7(4) of the *Act* to direct the Registrar to refrain from carrying out his Proposal. Southey J. in the matter of the decision of *Richard G. Brenner*, 1983 Divisional Court, CRAT 1971-1989 SCO Decisions and Orders p.58 held that the Tribunal should only refuse to carry out the Registrar's Proposal if it believes the Registrar was in error in his conclusion. Unless the Tribunal cannot find that the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty, the Tribunal should not order the Registrar to refrain from carrying out his Proposal.

The Registrar relies on a number of grounds in support of his Proposal to refuse registration.

The first ground relates to non disclosure by the Applicant of prior criminal charges and convictions. The second ground relates to the actual criminal convictions of the Applicant. Both these grounds, according to the Registrar, demonstrate that the past conduct of the Applicant affords reasonable grounds for the Registrar's belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

An examination of both grounds follows.

The Applicant has been found guilty of four separate criminal charges. The first conviction was in 1979 and the subsequent charges arose in 1995 with convictions being registered in 1999. The Applicant conceded that he has been found guilty on all four charges.

The charge against the Applicant that related to Cocaine Trafficking Possession was, as the Judge stated when sentencing the Applicant to 30 months in a penitentiary, "a very serious offence and requires a serious penalty" as "there was some four or more kilos of cocaine involved over a period of time". The sentence of the court in regard to this conviction is an indication of the serious nature of the charge and conviction (Exhibit 1, Tab 11).

On the further charge of Proceeds of Crime Possession, to which the Applicant pleaded guilty, the fine of \$100,000.00 is also indicative of the nature and magnitude of the charges.

The remaining two convictions, while not necessarily of the same magnitude of the aforesaid two charges and convictions, do nevertheless indicate to the Tribunal that when all charges and convictions are considered the Applicant was involved in illegal activities over some period of time and that the last three convictions are recent in time.

The nature of the offences with which the Applicant was charged and subsequently convicted clearly involve dishonesty and breach of the law.

While the four convictions do not directly relate to the Applicant's conduct as a real estate salesman, the convictions do relate to the Applicant's overall honesty and integrity, his unwillingness to accept that he must conduct himself within the bounds of a lawful society and abide by the rule of law. The Applicant has shown in the recent past a lack of honesty and integrity in his personal life and affairs. Integrity and honesty are at all times integral to both one's personal and business affairs and cannot be separated.

The totality of the Applicant's past conduct must be considered. This was stated in *Chopra* (1993) CRAT 514. It was further stated in that decision that further factors may be considered as significant such as "the nature of the Applicant's fraud conviction and the circumstances leading to it" and the "subsequent failure on 4 occasions to disclose the conviction". The cumulative effect of the Applicant's past conduct, much of it recent, does not imbue confidence that his future conduct will be different. See *Stuart A. Montgomery* (1998) CRAT at page 258 wherein it was stated:

It should be noted that it is the past conduct of the Applicant which must be considered, not his present intent, no matter how sincere that intent. This Tribunal had before it conduct of less than one year to override criminal conduct of 16 years' duration. This Tribunal finds that this is insufficient time for it to determine in the interest of the Ontario public that it should overrule the decision of the Registrar in refusing registration of the Applicant.

The Tribunal does not accept the Applicant's explanation for his failure to disclose his convictions to the Registrar. The Tribunal had the opportunity to observe the Applicant during the hearing and formed the opinion that he was both intelligent and astute. Having regard to these observations, the Tribunal believes that a trained real estate salesperson such as the Applicant would be well aware of the obvious necessity of reading a document of such importance as an application form with care and attention before signing such document.

Non disclosure of pending charges as well as previous convictions is a serious matter. The Registrar cannot be expected to check the veracity of answers in each and every completed application form and is entitled to rely upon the truth and correctness of answers given by Applicants. The information given by an Applicant in the application forms the foundation upon which the Registrar is entitled to rely in the assessment of the worthiness or otherwise of an Applicant to be admitted to the ranks of salespersons under the Act. The Registrar is entitled in the discharge of his duties and his obligations to consumers to receive full and true disclosure by all Applicants. The Registrar did not receive such disclosure from the Applicant.

The Tribunal has taken into account the various testimonials placed before it by the Applicant. In and of themselves, such testimonials neither address the subject of honesty and integrity nor influence the Tribunal in concluding that the Registrar was wrong in his conclusion.

The Tribunal believes that the past conduct of the Applicant, considered in its totality, supports the Registrar in his decision to deny the Applicant registration.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 9(4) of the Real Estate and Business Brokers Act, the Tribunal directs the Registrar to carry out his Proposal.

LICENCE APPEAL TRIBUNAL

Derek Israel, presiding
Vice-Chair

Terence Wardrop
Vice-Chair

Released: June 16, 2000

BANKUTI

TIBOR BANKUTI

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

No one appearing for the Applicant
ELIZABETH A. SILCOX, Counsel, representing Registrar,
Real Estate and Business Brokers Act

DATE OF
HEARING: June 19, 2000 Toronto

ORDER

WHEREAS a written Notice of Proposal dated December 17, 1999, to refuse to grant the registration of Tibor Bankuti (the Applicant) was issued by the Registrar of the Real Estate and Business Brokers Act (the Registrar) pursuant to the *Real Estate and Business Brokers Act*;

AND WHEREAS the Applicant appealed the proposal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) which appeal was to be heard in Toronto on June 19, 2000;

AND WHEREAS prior to the commencement of the hearing, the Tribunal was advised by the Applicant in writing, that he wished to withdraw his appeal;

AND WHEREAS evidence was given by Mavis McKenna, Hearings Co-ordinator for the Licence Appeal Tribunal that she had received a letter dated June 19, 2000 (Exhibit 5) and a telephone call from the Applicant to confirm the receipt of the letter whereby he withdrew his application;

NOW THEREFORE by virtue of the authority vested in it under section 8(1) of the *Real Estate and Business Brokers Act*, the Tribunal directs the Registrar to carry out his Proposal to refuse to register the Applicant as a salesperson under the Act, and therefore this matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: June 20, 2000

GOODE

JOHN GOODE

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO, Presiding member
SIMON DANN, Member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

JOHN GOODE, Applicant
Unrepresented

DATE OF HEARING: June 9, 2000

DECISION RELEASED: June 19, 2000 Toronto

REASONS FOR DECISION

A hearing was held on June 9, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: John Goode (the "Applicant")
Motor Vehicle: 1996 Chev Cavalier, Plate # AEEE 212 (the "vehicle")
Date of Appeal: May 24, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on June 9, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

A request was made by the Respondent to allow the Applicant to also make an appeal on the grounds of "exceptional hardship". She referred to the Applicant's written submission wherein he refers to a 'disability'. The Tribunal allowed the request.

There were no preliminary matters in dispute and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (**Exhibit 1**) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

ON MAY 18, 2000 METRO POLICE INFORMED ME [THE DRIVER] WAS ARRESTED FOR DRIVING WITH OUT A LICENCE, [THE DRIVER] STOLED MY CAR KEYS AS I SLEPT, AND IN NO WAY WHAT SO EVER DID I ALLOW [THE DRIVER] TO TAKE MY CAR, AS OF MAY 19, 2000 [THE DRIVER] NO LONGER LIVES AT MY RESIDENCES, AS I HAVE A DISABILITY, IT IS IMPORTANT THAT I HAVE MY CAR AS SOON AS POSSIBLE. THANK YOU

The Applicant is a single father of three children ages 16, 19 and 21. He is employed in the customer service department of a company, which manufactures electronic circuit boards. His hours of employment are 12 p.m. to 9 p.m.

The 16 year old driver has been living with the Applicant since late February 2000, after the child's first court date for the offence and suspension of *driving under the influence*. The Applicant was aware of this history.

In the early hours of the morning on May 18, 2000, the driver without consent or permission took the Applicant's vehicle who was unaware that the vehicle had been taken. The police advised him by telephone at approximately 6 a.m. that his vehicle was being impounded, and the driver had been arrested for driving while disqualified and also ability impaired. The Applicant was devastated.

In his testimony, the only house rule the Applicant imposed on the driver was a curfew. He, at no point, verbally stated to the driver that not to operate his vehicle. The Applicant felt that that was not an issue – it was understood.

No measures were taken to deny access to the car keys before this recent incident. The keys were usually kept in his jacket pocket in the closet, which is a common area. Since the impoundment, the Applicant has enforced a 10 p.m. curfew, has hidden the keys to the vehicle as well as verbally outlined the rules regarding his vehicle and how the driver does not enjoy a colour of right once it is released from impound.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner **(Exhibits 2 & 3)**;
2. Copy of Notice to the Registrar indicating, among other things, the identity of the driver of the vehicle at the time it was detained **(Exhibits 2 & 3)**;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle **(Exhibits 2 & 3)**;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving or having care or control of a motor vehicle while ability impaired under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 25, 2002 **(Exhibits 2 & 3)**.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
 - 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 - 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 - 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S., Colo, 338F.2d 787,788*. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430*.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal - Stolen:

The first issue to be considered in this appeal is whether the motor vehicle was stolen at the time in respect of which the order was made.

The burden of proof is on the Applicant to establish whether the impounded vehicle was, in fact, stolen.

The Tribunal found that the driver took the Applicant's vehicle without the Applicant's prior knowledge or consent. However, there is no evidence before the Tribunal that the actions on the part of the driver constituted theft of the vehicle.

The Applicant testified that he did not lay charges against the driver since the police were charging the driver with other things, and he did not believe the driver intended to deprive him of the benefit of ownership (or possession) permanently.

Therefore, the Tribunal finds that the Applicant has insufficient grounds for appeal under section 50.3(3)(a).

Appeal - Exceptional Hardship:

The Applicant has also requested an appeal on the grounds of "exceptional hardship" as per section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardships as described by section 22(2). In order for his claims to be considered under section 22(2), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle.

The Applicant testified that he has taken public transport to and from work and on occasion, a taxi.

The Applicant suffers from arthritis in the heel of one foot, which his doctor has prescribed some medication for this condition. He finds it difficult to stand and sit for a long period of time, but the Applicant has been able to carry out his duties at work. He has not missed any time from work because of the impoundment or any financial loss.

With regard to the Applicant's second ground of appeal that the impoundment will result in exceptional hardship, the Applicant has not established that he has or will suffer exceptional hardship as defined by Ontario Regulation 632/989, subsection 22.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

Simon Dann, Member

RELEASED: *June 19, 2000*

PREHEARING

627416 ONTARIO LIMITED O/A ROSEDALE HOMES

**APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT**

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel, representing the Applicant
MICHAEL BADER, Counsel, representing Registrar, Ontario New Home
Warranty Program

DATE OF
PRE-HEARING: June 19, 2000 Toronto

ORDER

FOLLOWING attendances on June 19, 2000 at a pre-hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of Brian Campbell, counsel representing 627416 Ontario Limited o/a Rosedale Homes (the "Applicant") and Michael Bader, counsel representing the Registrar, Ontario New Home Warranty Program (the "Registrar");

The Tribunal makes the following Order:

- 1) The parties to the hearing are the Applicant and the Program only.
- 2) The parties recorded that there has been no resolution of any of the issues in this matter.
- 3) The parties were not in a position to identify any evidence or witnesses that either party may call at the hearing.
- 4) The hearing of this matter is scheduled to commence at 9:30 a.m. on August 8, 2000 and to continue if necessary on August 9, 10 and 11, 2000 and September 11, 12, 13 and 14, 2000, at a venue in Windsor, Ontario to be advised by the Tribunal to the parties by no later than July 7, 2000.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: June 20, 2000

PREHEARING

ROSEDALE HOMES (1996) INC.

**APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER THE
ONTARIO NEW HOME WARRANTIES PLAN ACT**

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: BRIAN M. CAMPBELL, Counsel, representing the Applicant
MICHAEL BADER, Counsel, representing Registrar, Ontario New Home
Warranty Program

DATE OF
PRE-HEARING: June 19, 2000 Toronto

ORDER

FOLLOWING attendances on June 19, 2000 at a pre-hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of Brian Campbell, counsel representing Rosedale Homes (1996) Inc. (the "Applicant") and Michael Bader, counsel representing the Registrar, Ontario New Home Warranty Program (the "Registrar");

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant and the Program only.
2. The parties recorded that there has been no resolution of any of the issues in this matter.
3. The parties were not in a position to identify any evidence or witnesses that either party may call at the hearing.
4. The hearing of this matter is scheduled to commence at 9:30 a.m. on August 8, 2000 and to continue if necessary on August 9, 10 and 11, 2000 and September 11, 12, 13 and 14, 2000, at a venue in Windsor, Ontario to be advised by the Tribunal to the parties by no later than July 7, 2000.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: June 20, 2000

ATTILA

LUCIA ATTILA

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: K. M. BIEL
Representative for the Registrar of Motor Vehicles

LUCIA ATTILA, Applicant
unrepresented

DATE OF HEARING: June 19, 2000

DECISION RELEASED: June 21, 2000 Toronto

REASONS FOR DECISION

A hearing was held on June 19, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Lucia Attila (the “Applicant”)
Motor Vehicle: 1992 Honda UCD, plate # ACXD 530 (the “vehicle”)
Date of Appeal: June 2, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on April 26, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties

The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I Lucia Attila need the car back as soon as possible. I don’t have the money to pay and I personally need the car to go to work.

The Applicant testified that she needs her vehicle to get to her place of employment, to transport groceries and for other house hold chores. The Applicant's two sons also rely on the vehicle for occasional transportation to their own jobs. They were on their way to work when the vehicle was impounded. However at the time of hearing, both sons were unemployed. She stated that she is the sole income provider in her house, and she is unable to afford the cost of the impoundment fee.

Since her vehicle became impounded, the Applicant has been getting to work using public transit, and she has managed to obtain alternative transportation by getting rides from her father and co-workers. She has not missed any work since her vehicle was impounded, and she stated that the loss of the vehicle does not constitute a threat to any person's health or safety.

The Applicant's son, Raffaele Attila, who was the driver of the vehicle at the time of the impoundment whose driver's licence was then under suspension, testified that he and his brother were taking the vehicle to work the day it was impounded. Mr. Attila stated that he was asked by his brother to test drive the vehicle by backing it out of the drive way and parking it on the street in order to diagnose a sound coming from the rear suspension. Raffaele Attila's brother was then to take control of the vehicle and drive it to work that day.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Raffaele Attila;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving with more than 80 mgs. alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 11, 2001.

Mr. Biel, representative of the Registrar, submitted the sworn affidavit of Ontario Provincial Police Constable Birigitte Brosseau as a response to evidence arising out of the testimony of Mr. Raffaele Attila. This document was entered into evidence with the consent of both parties as exhibit # 5.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of

appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:
 1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
 3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;

- (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Board set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. This includes any fees associated with the impoundment and the subsequent release of the vehicle.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as set out in section 22(4) of the Regulation. Furthermore no attempt was made by the Applicant to demonstrate to the Tribunal that no other alternatives to the impounded vehicle existed. In fact, the Applicant's testimony was that she has made use of alternatives to the impounded vehicle, including public transit, rides with her father and co-workers.

Though inconvenienced, the Applicant has not suffered any loss of employment as a result of the impoundment. Furthermore, the Applicant has not presented the Tribunal with any evidence that would indicate that this loss of the vehicle would be immediate significant and lasting as set out in section 22(3)(b) of the Regulation.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *June 21, 2000*

THORNE

DAVID AND SHELLEY THORNE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice Chair, Presiding
BILL McINTOSH, Vice-Chair
TERENCE WARDROP, Vice-Chair

APPEARANCES: DAVID THORNE, representing himself and Shelley Thorne
MICHAEL BADER, Counsel representing the Ontario New Home
Warranty Program
No one appearing for the Added Party, T.D.C. General Home
Construction Inc.

DATE OF
HEARING: May 25, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by David and Shelley Thorne (the "Applicants") to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) from a decision of the Ontario New Home Warranty Program (the "Program") contained in a letter dated January 11, 2000. The letter states that the Applicants' claim for Warranty Coverage failed in that their claim does not fall within the provisions of the Ontario New Home Warranties Act, R.S.O. 1990, C 31 (the "Act").

The Agreement of Purchase and Sale under which the house was to be built obliged the purchaser to do certain work apart from that of the Contractor, T.D.C. General Homes Construction Inc ("T.D.C."), the Added Party, not appearing. The amount and nature of the work to have been carried out by the purchaser, in the opinion of the Program, not only took T.D.C. outside of the definition of a "builder" but also took the subject house outside of the definition of "home" in Section 1 of the Act. T.D.C. not being a builder under the Act, the Act does not apply to work and materials provided by T.D.C., and therefore any defects in the work of T.D.C. are not warranted under the Act by the Program.

The Applicants were duly notified by the Program in a letter dated October 8, 1999, and later confirmed by the decision letter of January 11, 2000, that their claim for compensation for the defects caused by T.D.C. in the construction of their home was denied and that the enrolment of their property under the Program was cancelled. The

Program thence proceeded to reimburse T.D.C. the enrollment fee paid by T.D.C. and charged by T.D.C. to the Applicants.

The work to be completed by the Applicants is contained in Appendix B of the Agreement of Purchase and Sale:

- (a) Supply and apply complete primer and paint to house including stain for railings.
- (b) Supply and install all doors and trim and casing.
- (c) Supply and install all hardware for doors (door knobs and hinges).
- (d) Purchaser must sand down all floor joists before installing floor-finishing materials.
- (e) Supply and install all flooring type finishing material in entire house.
- (f) Supply and install permanent interior railing.
- (g) Supply and install kitchen and bath cabinets and counter tops.
- (h) Supply and install ceramic accessories in bath.
- (i) Supply and install mirror in bathroom.
- (j) Purchaser to supply all light fixtures (see Appendix A)

FACTS:

In April 1999 the Applicants notified the Brampton Regional office of the Program of defects in the construction of their home. Their attempts to have the defects remedied by T.D.C. had failed. Notification was sent by the Program to both the Applicants and T.D.C. as to the required steps to have the matter resolved. No satisfactory resolution was reached between the Applicants and T.D.C., and the Applicants invoked the Conciliation procedure under the Act.

The Applicants listed the following defects on their Conciliation Request Form:

- (a) two cracks in basement foundation
- (b) missing screen
- (c) eaves have no grade
- (d) cold air returns destroyed
- (e) weather stripping wrecked
- (f) door to cold storage missing

A conciliation appointment was arranged for August 13, 1999; both the Applicants and T.D.C. were notified. Mr. Johnston from the Program attended at the property and carried out his inspection in the presence of Mr. Thorne. T.D.C. did not attend. A conciliation report was issued by the Program on August 16, 1999, finding the above-noted items a, b, d and f, warranted under the Act and items (c) and (e) were found to have "no defects" or "otherwise "normal wear and tear".

Mr. Johnston did not have Appendix B to the contract between the Applicants and T.D.C. during his inspection of the Applicant's home on August 13, 1999. There was some discussion with regard to the work on the home carried out by Mr. Thorne. The Tribunal is satisfied that there was no attempt by Mr. Thorne to conceal any of his participation in the additional work to the house, and no such allegation is put forth by the Program.

The Program notified T.D.C. by letter dated August 17, 1999 outlining the repair work for which it was responsible. The letter was ignored by T.D.C. and on September 2, 1999 a Final Notice informing T.D.C. that if there was no resolution of the matter by September 16, 1999, repair work would proceed for which T.D.C. would be invoiced. This warning was similarly ignored by T.D.C., and by letter of September 21, 1999 Mr. Johnston informed T.D.C. of the Program's intention of proceeding with the work.

Subsequent to these warnings, Mr. Johnston met with the principal of T.D.C., Mr. DiCroce at some time between September 21, 1999 and October 8, 1999, without the Applicants being present. They discussed the respective degrees of work done by T.D.C. and Mr. Thorne. Despite the fact that T.D.C. had enrolled the home with the Program in the first place, Mr. DiCroce seems to have convinced Mr. Johnston that the not only should enrolment of the home be cancelled and the enrolment fee be reimbursed to T.D.C., but also this cancellation of the enrolment would relieve T.D.C. of any obligation to repair, as its work would no longer be warranted by the Program. Further to their discussions, T.D.C. sent a copy of Appendix B to Mr. Johnston.

By letter of October 8, 1999 the Program informed the Applicants that their enrolment had been cancelled and that the defects previously deemed warranted in Mr. Johnston's Conciliation Report could no longer be the subject of a claim under the Act. The enrolment fee, a responsibility of the purchaser under the Agreement of Purchase and sale, was refunded directly to T.D.C. without any opportunity to the Applicants to object to this unilateral procedure.

The work which was the obligation of T.D.C. is set forth in Appendix A of the Agreement of Purchase and Sale between the Applicants and T.D.C. This work included a seeded lawn, driveway, the wiring, drywall, plumbing, furnace and hot water, sinks, tubs, and toilets. It was a condition of the Agreement of Purchase and Sale that the purchaser (the Applicants) not enter the premises to do any of their work prior to the delivery of the Certificate of Completion and Possession by T.D.C., including the installation by T.D.C. of temporary railings to permit occupancy.

It is clear from the evidence that what was handed over to the Thornes by T.D.C. on closing was a functioning house in the everyday sense of the word. Whether this fact is sufficient to establish that T.D.C. was a "builder" under the Act so that the work and materials supplied by T.D.C. are covered by the warranty under the Act became the question for the Tribunal.

ISSUES:

The issues before the Tribunal in this case are:

- 1) Is T.D.C. a builder and is the subject house a home within the meaning of the Act?
- 2) If so, have the Applicants established that their claims are covered by the warranties provided in the Act?

THE LAW:

The Act provides the following definitions of "builder", "home", and "vendor" under Section 1 of the Ontario New Home Warranties Plan Act:

"builder" means a person who undertakes the performance of all the work and supply of all the materials necessary to construct a completed home whether for the purpose of sale by the person or under a contract with a vendor or owner; ("constructeur")

"home" means,

- (a) a self-contained one-family dwelling, detached or attached to one or more others by common wall,
- (b) a building composed of more than one and not more than two self-contained, one-family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements, or
- (d) any other dwelling of a class prescribed by the regulations as a home to which this Act applies,

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes; (logement")

"vendor" means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner; ("vendeur")

Section 14 of the Act provides for compensation as follows:

14(1) Where,

- a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
- c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

- (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.
- (3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

Section 13 of the Act provides for a number of warranties in subsection 13(1) and a number of exclusions in subsection 13(2) as follows:

13(1) Every vendor of a home warrants to the owner,

- a) that the home,
 - i) is constructed in a workmanlike manner and is free from defects in material,
 - ii) is fit for habitation, and

- iii) is constructed in accordance with the Ontario Building Code;
- b) that the home is free of major structural defects as defined by the regulations; and
- c) such other warranties as are prescribed by the regulation.

13(2) A warranty under subsection (1) does not apply in respect of,

- a) defects in materials, design and work supplied by the owner;
- b) secondary damage caused by defects, such as property damage and personal injury;
- c) normal wear and tear;
- d) normal shrinkage of materials caused by drying after construction;
- e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- f) damage resulting from improper maintenance;
- g) alterations, deletions or additions made by the owner;
- h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- i) damage resulting from an act of God;
- j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- k) damage caused by municipal services or other utilities;
- l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

APPLICATION OF LAW TO FACTS:

In order to succeed in their appeal to have any defects in any workmanship and materials supplied T.D.C. fall under the warranty provisions of the Act, the onus is upon the Applicants to bring their claim within the terms of the Act. First, they must show that T.D.C. falls within the definition of "Builder" as provided for in Section 1, which provides the following definition:

"Builder" means a person who undertakes the performance of all the work and supply of all the material necessary to construct a completed home..."

A home is defined under the Act as follows:

"Home" means,

(a) a self-contained one-family dwelling, detached or attached to one or more others by common wall, ...

In the present case, T.D.C. was both the builder and the vendor of the home. As such, it is capable of giving the vendor warranty under section 13 as it falls within the definition of "vendor" provided for in Section 1:

"vendor"...includes a builder who constructs a home under a contract with the owner.

The Act also takes into account in such "vendor-builder" situations the common practice within the homebuilding industry of the "owner-purchaser" doing some of the work on the home. Section 13(2)(a) provides that among other exclusions to the vendor's warranty shall be:

"defects in material, design and work supplied by the owner".

To give effect to the legislation of allowing a homebuyer recovery from a builder and at the same time ensuring that warranty protection extends only to work and materials supplied by a builder under the Act, these sections of the Act must be reconciled.

The issue for determination therefore becomes whether T.D.C. delivered to Mr. Thorne a "completed home" as contemplated by Section 1 and therefore falls within the definition of "builder", or whether the work undertaken by Mr. Thorne takes the property in question outside of these definitions and therefore outside of the warranty provisions of the Act.

The position of the Program is that on the evidence the value of the contribution of Mr. Thorne was in the order of \$25,000 being \$12,000 for materials and doubling that amount to include his labour.

Mr. Thorne testified that the original deal struck with T.D.C. was \$154,000 reduced to \$143,000 to account for Mr. Thorne's anticipated contribution as provided for in Schedule "B". There was further testimony to the effect that T.D.C. purchased the land for \$12,000 per acre but that the land is worth considerably more today. There was a suggestion that this figure is in the region of \$50,000, but a suggestion is all this amount can remain as it is not substantiated by testimony from any witness having direct knowledge. In any event, the property dimensions in the Agreement of Purchase and sale (148ft by 221ft) amount to 32,000sq ft or about three-quarters of an acre. Any irregularities in the land may have reduced or enlarged the actual square footage, there is no evidence either way. It must be concluded that the value of the land compared to that of the house is problematic at best.

By the Program's reckoning, the cost of the land should be subtracted from the overall sale price and the value of labour and materials supplied by the purchaser applied to that figure. In the present case the Program set the value of the house at approximately \$90,000, being \$143,000 less \$50,000. Then the Program applied the estimate of Mr. Thorne's contribution (\$25,000) to the approximation of \$90,000 and concluded that the resultant percentage took the house beyond the definition of "completed home". This result was based upon a calculation established by the Canadian Mortgage and Housing Corporation (CMHC) to determine which type of work done on any given house represents a particular percentage of completion. For example if there remains painting to be done this represents 5% of the cost of work and materials; interior doors 2% and so on.

The tally of the work and materials supplied by Mr. Thorne according to the Program amounted to over 20% of the total, sufficient in their view to remove the property from the definition of "completed home" under the Act. One difficulty with the CMHC "Percentage of Construction Completion" sheet is that the percentages listed total 91% not 100%. This does not invalidate the sheet as a guide but is raised to further point out the tenuous and rather arbitrary nature of the evidence as to value. It appears to the Tribunal that this difficulty would be present in many cases of this nature, a situation which appears to be born out by the cases cited in argument.

A most useful survey of the Act was provided by MacDonnell Prov.J in *Ontario New Home Warranty Program v McPhail* [1997] O.J. No. 4570. He was dealing with an appeal by the Program from an acquittal of a contractor for failure to enroll the home in the Program and pay the prescribed fee contrary to section 12 of the Act. The lower Court decided that the degree of participation by the contractor in the construction of the subject house was too low to allow the company to fit within the definition of "builder". Any charges laid against the company in that capacity under the Act therefore could not be sustained. The Program

appealed on the basis that the lower Court had defined "builder" too narrowly. The Appeal was allowed and the acquittal set aside.

The Court reasoned on page 7 that when read together the definition of "builder" in section 1 and the exclusion of warranty in section 13(2)(a) "...the Act plainly contemplates that a home may be complete even though work and materials remain to be supplied by the owner." In the absence of a definition of "completed home" the Court looked at cases on point brought before the Tribunal and concluded on page 8 that:

"The approach of the Tribunal, it appears, is to focus not on whether the contractor undertook to perform all of the work and to supply all of the labour on a residential construction project but rather on whether what the contractor undertook to do would produce, in substance, a completed home."

One of the cases relied upon was *John J Crate* [1991] 22 CRAT 604. In *Crate*, as in the present case, the respective tasks of the vendor-builder and the purchaser were set out in schedules to the Agreement of Purchase and Sale. It also stipulated that the purchaser was not to enter the property unless accompanied by a representative of the vendor. Subsequently 25 of the items listed in the vendor's schedule were struck out, and a letter was given to the purchaser allowing him unaccompanied entry onto the property during construction. The Tribunal rendered its decision on page 608:

"The Tribunal was told at the hearing that the Program has a general rule of thumb to the effect that the undertaking of the builder must include the services-plumbing, heating, electrical, etc. In this case, the undertaking of Sun-Spec[the contractor] did not include those services and in looking at the total picture, the Tribunal must come to the conclusion that the contribution undertaken by the Applicant in this contract...was so extensive that Sun-Spec was not a builder who undertook all of the work and supplied all of the material to construct a completed home."

In the case of *Webb* [1994] CRAT 148, the Agreement of Purchase and Sale stipulated that the purchasers were to provide, among other things, all plumbing work including fixtures, all electrical work, and all heating and cooling systems. Again, the Tribunal accepted the rule of thumb that the undertaking of the builder must include plumbing, heating, and electrical work and materials and disallowed the appeal of the purchasers as against the vendor.

In *Harris* [1997] CRAT 166, the Tribunal similarly held that a purchaser's claim against the decision of the Program disallowing his claim must fail due to the nature and extent of the work excluded from the undertaking of the builder. That work, along with other items such as windows and exterior doors included heating, and sewer and water services. The Tribunal held that items excluded from a contractor's undertaking cannot include those that are "...essential to any home.", as these patently were.

Taken together, these cases appear to say that the undertaking of the construction of a "completed home" as contemplated under the definition of "builder" in section 1 means the delivery by the contractor for possession of a functioning house in the ordinary meaning of that term.

Common sense dictates that a "completed home" could not be absent heat, light, running water, exterior doors and windows, sewers, or connected electrical system. In short, the Act contemplates a dwelling that is reasonably, not barely habitable.

In the present case all of these essentials were part of the undertaking of T.D.C.. Mr. Thorne unquestionably undertook considerable additional work as listed in Schedule B, but this work cannot be considered necessary to the construction of a "completed home" in the sense the cases and common sense would dictate. As well, the Tribunal gives weight to the fact that the purchaser was barred from entry to the construction site until completion of the work by T.D.C. unlike the situation in *Crate*, above.

Finally, the Tribunal finds the approach of applying respective values to the work done by purchasers and contractors in these situations to arrive at a percentage of the construction cost above which the contractor ceases to be a "builder" too arbitrary and therefore unsatisfactory.

The evidence as to the cost to repair the defects caused by T.D.C. can be summarized as follows:

- (a) cracks in the basement walls (repaired by Mr. Thorne himself) \$400.00
- (b) missing screens \$200.00
- (c) repair cold air return \$50.00
- (d) cold room door \$160.00

The Program did not dispute that these monetary figures were accurate and that these repairs were warranted under the Act, if T.D.C. were found to be a builder under the Act.

DECISION:

Pursuant to the authority vested in it by Section 16(3) of the Ontario New Home Warranties Act, the Tribunal finds that T.D.C. is a builder under the Act in the circumstances of this case, that the defects claimed by the Applicants' respecting the work of the Added Party are warranted under Section 13, and Orders that:

- 1) the Program pay to the Applicants the amount of \$410.00 being the cost of the remaining repairs;
- 2) such payment of \$410.00 shall be made within 45 days of the date of the release of this Order; and
- 3) such payment of \$410.00 shall be in full satisfaction of the Applicants' claims respecting the defects set out above as missing screens \$200.00; repair cold air return \$50.00; and cold room door \$160.00.

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair, Presiding

Bill McIntosh
Vice-Chair

Terence Wardrop
Vice-Chair

Released: June 27, 2000

0090/ADLS/00/011

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF HEARING: June 12, 2000 Toronto

DECISION

A hearing was held on June 12, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: *June 13, 2000*

FILE NAME: 0090.adls

0090/ADLS/00/011

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY M. LEE D.C.
Presiding Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF
HEARING: June 12, 2000

DECISION
RELEASED: June 13, 2000 Toronto

REASONS FOR DECISION

A hearing was held on June 12, 2000, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 13, 2000 with reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated May 17, 2000, and was received by the Tribunal on May 24, 2000 together with the prescribed fee of \$100.00.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

AI was unable to provide the required breath sample because of a medical reason.”

Preliminary Matters

There were no preliminary matters. The documents presented to the Tribunal were entered into evidence with the consent of both parties. The Registrar’s agent provided the true and certified copies of the driver’s record and Notice to Registrar. These documents were added to the documentation found in Exhibit # 3.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal-dated May 17, 2000
- b) Exhibit # 2 Copy of Notice to Registrar - dated April 27, 2000

By the Respondent:

- a) Exhibit # 3 MTO Submissions 13 pages, received June 1, 2000.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (HTA@) states:

50.1 (1) AA person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a

sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) Aa report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

- (f) whether the medical practitioner is a specialist and, if so, the field of specialty.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

AA person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant, was affirmed and gave testimony. The Applicant testified that on April 27, 2000 at approximately 12:50 a.m., while driving a 1997 Nissan Pathfinder, he was stopped by York Regional Police. According to the Applicant, the reason for stopping his vehicle was that there was a Dealer plate affixed to the rear of the vehicle. The Dealer plate was recorded as 749 DFH. During this vehicle check, P.C. Officer # 1 asked the driver, who was identified as the Applicant, to produce a driver's licence, vehicle ownership and proof of insurance. According to the Applicant, the officer asked

him if he had any alcohol to drink that evening. The Applicant stated that he had two beers. The Applicant was asked to exit the vehicle which he complied. According to the Applicant, he was handed the roadside screening device and asked to blow into the machine to provide a sample of his breath. The Applicant further stated that he was not read the demand for breath nor was he instructed upon the use of the roadside screening device. According to the Applicant, he attempted to provide a sample of his breath on four occasions. According to the Applicant, after the third attempt, P.C. Officer # 1 commented that "Asthmatics can give a sample". It was at this point that the Applicant indicated that he had a medical condition. P.C. Officer # 1 cautioned the driver about failure to provide a breath sample and that he would be arrested if he did not comply. A fourth attempt was made, however no sample was obtained. The Applicant was arrested, handcuffed and placed in the police cruiser. After he was processed, he was released on a form 9, promise to appear.

Under cross-examination, the Applicant stated that he had seen a specialist for his medical condition. This condition was described as severe allergies and asthma. However, no report was provided from the specialist indicating what tests were performed and the results of any tests. According to the Applicant, the specialist listened with a stethoscope to his chest and said he has asthma. The Applicant provided no corroborative report. The Applicant further stated that he did not have his medication with him when stopped by the police officer and did not seek medical attention once released from police custody.

The Applicant called his brother, Witness #1 to testify on his behalf. The witness was affirmed. The witness confirmed the events as previously told by the Applicant while on the stand. The witness was asked under cross-examination if he observed his brother having any problems breathing on the evening in question or at the time that the police requested a breath test. The witness stated that he did not see his brother having difficulty breathing but stated that his brother has allergies and asthma.

The Respondent called to the stand, P.C. Officer # 1. The officer was sworn and gave the following evidence. He stated that in the early morning on April 27, 2000, he was on duty in a marked York Regional police cruiser. He observed a white Nissan Pathfinder exiting the parking lot of Father's Bar and Grill. What drew the officer's attention to this particular vehicle was the fact that there was no front licence plate. Given the area and lateness of the hour, he decided to institute a routine traffic spot check to ascertain if the vehicle was stolen. P.C. Officer # 1 testified that there was a dealer plate on the rear of the vehicle. The driver was identified as the Applicant. The Applicant was cooperative with the officer. P.C. Officer # 1 also testified that when he was speaking with the driver, he detected an odour of alcohol emanating from the vehicle. The officer asked the driver if he had anything of an alcoholic nature to drink that evening. The driver replied that he had two beers. The officer then requested that the driver provide a roadside breath test. According to the officer, he was explaining how to perform the test. At the same time as he was trying to explain the procedure, a male, unknown to the officer was attempting to get close to the vehicles. This individual was later identified as the Applicant's brother, Witness #1. According to the officer, not knowing who this individual was, also wanted to keep the area secure so he called for assistance.

Officer Officer # 1 testified that he is not a doctor but he has taken first aid and also suffers from asthma. Officer Officer # 1 testified that at no time did the Applicant exhibit

any signs of respiratory distress. In fact, he testified that the Applicant inhaled fully before attempting to provide a sample and blew into his cheeks.

The Applicant was subsequently charged with failing to provide and released. The Applicant was in police custody for approximately one and one-half hours.

There was no cross-examination of the officer by the Applicant and the witness was excused.

The Tribunal accepts the evidence of P.C. Officer # 1.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this kind, section 13 of Regulation 574 places the onus on the Applicant to substantiate his position. Under section 50.1(2), the ground of appeal which the Applicant must establish is that he had a present medical condition which precluded him from providing a breath or blood sample.

Also, under section 15 of Regulation 574, medical reports to be used as evidence at a hearing must meet certain conditions. Dealing first with the medical evidence of the Applicant, the report of Physician # 1, M.D. Family Physician, fails to meet the specific requirements of Section 15 (1) of Regulation 574 of the *Highway Traffic Act* in the following respects:

Physician # 1 does not provide any subjective test results to substantiate the Applicant's assertion that due to his medical condition he was unable to provide a proper breath sample. There was no mention of referral to a specialist. There was also no mention of any pulmonary function tests or indication of any type of measurements taken to indicate reduced breathing capacity. Physician # 1 does not indicate that he has knowledge of what is actually required to perform the breathalyzer test. The report indicates the last office visit prior to the suspension was on March 21, 2000. The visit was for right ear infection. There was no mention at this visit of attendance for airway obstruction.

Physician # 1 merely speculates that it is entirely plausible that Applicant was unable to provide an adequate breath sample as a result of his asthma and concurrent allergies. A blood alcohol sample would have been the appropriate test." Physician # 1 saw the Applicant on the 29th of April 200 for allergies.

The Tribunal, after careful review of the medical information submitted by Physician # 1 is of the opinion that this report is speculative in nature and does not support the position of the Applicant. The Tribunal attaches very little weight to this report.

After reviewing the foregoing facts, the Tribunal finds that the Applicant has not shown a relationship between his medical condition and the ground of appeal under section 50(1)(2)(b).

The evidence indicates that the Applicant refused to provide an adequate sample of breath but not for a medical reason. The evidence submitted suggests the actions of the Applicant were such as to lead the Tribunal to believe that he had no intention of giving a proper breath sample. The evidence presented by P.C. Officer # 1 indicated

that the Applicant on each attempt to provide a sample, drew air into his lungs and blew into his cheeks and not into the mouthpiece as instructed. These are actions to prevent a suitable sample from being retrieved and not the actions of someone having difficulty providing a sample because of a medical condition.

The Tribunal finds that the Applicant has not discharged the onus to establish a valid medical reason for his failure to provide a breath sample when demanded under section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by the Applicant to appeal the suspension order dated April 27, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act (HTA) and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee D.C.
Presiding Member

RELEASED: *June 19, 2000*

009-ALLERGY

0009/ADLS/00/001

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: June 14, 2000 Hamilton

DECISION AND ORDER

A hearing was held on June 14, 2000, at Hamilton, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *June 15, 2000*

0009/ADLS/00/001

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF
HEARING: June 14, 2000

DECISION
RELEASED: June 15, 2000 Hamilton

REASONS FOR DECISION

A hearing was held on June 14, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 15, 2000, with reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of

an oral hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated April 5, 2000, and was received by the Tribunal on April 16, 2000, together with the prescribed fee of \$100.00.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Respondent submitted certified copies of documents previously submitted

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – dated April 5, 2000
- b) Exhibit # 2 Applicant's submissions – received May 26, 2000

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions 24 pages
- received June 9, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant

to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's driver's licence was suspended "*March 16 2000*" as per Notice of Appeal (Exhibit # 1)

A copy of a prescription shows the drug "*ARTHROTEC*" was prescribed and purchased by the Applicant, on March 14. (Exhibit # 2)

In his own words, the Applicant details the events that led to the incident. The Applicant believes that his erratic driving was caused by the medication he had taken prior to leaving the house. Further, the Applicant contends that his inability to provide a breath sample was due to an allergy reaction to arthrotec. (Exhibit # 2)

The Applicant affirms that he told the officer *"...very clearly and repeatedly ... I had a severe headache , my ears are ringing and hurting and I felt pressure in them when I try to blow, and I also told him that I am feeling short of breath and not feeling well...The Police officer should have ... gotten me immediate medical attention..."*.(Exhibit # 2)

Physician # 1, in a letter dated March 30, 2000, confirms that the Applicant *"...had a similar episode in... 1997 after taking Aspirin and non-steroidal anti-inflammatory medications..."* Physician # 1 recommends that the Applicant's *"...driving license to be reinstated immediately..."*.(Exhibit # 2)

According to Physician # 2, allergy specialist, *'On March 16, ...after taking arthotec ...he developed a systemic allergic reaction ...generalized swelling of his face, lips and tongue, breathlessness and disorientation ...It is likely that the allergic reaction was responsible for the symptoms..."*(Exhibit # 2)

Physician # 3 states, in a letter dated May 11, 2000, that the Applicant consulted her for a second opinion regarding his allergy. Physician # 3 describes *"...A typical anaphylactic reaction involves significant respiratory distress with varying degrees of hypotension ...unable to perform the breathalyzer test.. could have very well been as a result of him having an anaphylactic reaction to Arthrotec on May 15 and May 16..."* (Exhibit # 2)

The Respondent provided the following documents:

- Notice to Registrar, certified May 15, 2000.
- Driving Record of the Applicant, certified May 15, 2000
- Vehicle Record, certified May 16, 2000
- Notes of PC Officer # 1, Ontario Provincial Police, dated March 16, 2000
- Medical report of Dr. Eva Mate, MD, FRCP (C), dated June 8, 2000

The Applicant's driver's record, since 1990, shows two speeding offences and one driving with *"more than 80 mgs alcohol on blood in 1992"*. (Exhibit # 3)

Notes of PC Officer # 1 describe the events surrounding the charge and the subsequent arrest. (Exhibit # 3)

Dr Eva S. Mate, FRCP (C), a consultant in respiratory medicine with St. Michael's Hospital, in a letter dated June 8, 2000, qualifies that she has been in practice since 1982, and that she has *"...extensive experience in the management of chronic respiratory illness such as obstructive lung disease and asthma."* Dr. Mate goes on to describe her qualifications: *"...lengthy experience with performance and interpretation of pulmonary function tests... Assistant Professor at the University of Toronto ...know the background evaluation of instrumentation such as Intoxilyzer 5000 cc and also Alcotest ...aware of breath sampling criteria required to provide acceptable information using the above instrumentation."* Dr. Mate concludes that *"...there is no objective indication ...that the accused was exhibiting any type of cardiorespiratory distress or that he had any complaint about itchiness or swelling of the mouth or tongue..."*. (Exhibit # 3)

At the hearing, the Applicant re-iterated the comments made in his letter to the Tribunal. The Applicant insisted that his inability to provide a breath sample was due to the allergic reaction he was experiencing. The Applicant felt very strongly that the Officer should have called for medical assistance, as the Applicant told him that he was suffering from dizziness, a severe headache and ringing in his ears.

The Applicant further objected to Dr. Mate's report as he believes she took only the words of the Police Officer.

In cross-examination, the Applicant admitted that he did not seek medical attention immediately after the incident. When he attended his doctor's office, the symptoms had subsided and he stopped taking the medication. None of the physicians that the Applicant consulted actually saw the symptoms of the allergic reaction, but relied on the information provided by the Applicant.

The Applicant also affirmed that at times his head was '*cloudy*,' but he did '*clearly several times...*' tell the officer he had ringing in his ears.

The Respondent called PC Officer # 1, badge number (#), Downsview OPP, as a witness. PC Officer # 1 testified by referring to his notes. PC Officer # 1 observed that the Applicant "*puffed his cheeks but there was no air going into the alcotest...*". During the second attempt, the Applicant was observed to be blowing and stopping his breath short of allowing any breath to go into the instrument. After the fifth attempt, the Applicant advised the officer that he had a problem with his ears. After the sixth attempt, the Applicant told the officer he was unwilling to try anymore.

PC Officer # 1 did not notice any swelling of the face or tongue nor any other distress symptoms on the part of the Applicant. P C Officer # 1 noticed the Applicant's face being flushed which he felt was consistent with an intoxicated state.

After the Applicant was placed in a cell, PC Officer # 1 had difficulty awakening him. PC Officer # 1 noticed that the Applicant was "*...mumbling...*" and offered to call him a cab. The Applicant refused and was driven home by the officer. At no time did the Applicant ask to be taken to the hospital.

APPLICATION OF THE LAW TO FACTS:

The issues are, how does the medical condition of the Applicant relate to Section 50.1 (2) (b), and did this medical condition cause him to fail or not comply with the breath demand? Pursuant to Section 13 of Regulation 574 (Amended), the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed the medical evidence provided for the hearing by the Applicant's physicians. The Tribunal is satisfied and accepts the diagnosis that the Applicant has an allergy to ASA. The Tribunal notes, that all physicians agree that the symptoms described by the Applicant are consistent with an allergic reaction. Nonetheless, neither physician saw the Applicant while he was demonstrating the symptoms at issue. Reports were written according to the history related by Applicant after the fact. (Exhibit # 2)

The Tribunal has no alternative but to rely on the direct observations of PC Officer # 1. The Applicant maintains his face and tongue were swollen. These are not symptoms that would go unnoticed. Yet, PC Officer # 1 was explicit in his testimony that he did not notice any such symptoms.

The Respondent contends that no medical reason caused the Applicant's failure to provide the required breath sample and that the Applicant did not demonstrate any symptoms of discomfort at the time the breath demand was made. The latter statement is corroborated by PC Officer # 1's evidence.

The Tribunal finds that the Applicant's testimony was contradictory. The Applicant did not testify that he had any difficulty speaking, but, rather, insisted that he "*clearly*" told the police officer that he had ringing in his ears. The Tribunal questions how the Applicant could speak "*clearly*" with a swollen tongue.

By his own admission, the Applicant testified that he did not ask for medical assistance during the incident nor seek assistance at the time he was released. Although the Applicant stated that he was seen by his physician the morning of the incident, there is no conclusive evidence to substantiate this testimony. Physician # 1's letter to the Tribunal is dated March 30, 2000, and makes no mention of the date of the consultation. (Exhibit # 2)

The onus is on the Applicant to establish the merit of his appeal. However, no new evidence was provided by the Applicant in his own defence. Based on the evidence before the Tribunal, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffered from a medical condition which would have prevented him from providing a breath sample when requested by the police officer.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated March 16, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *June 19, 2000*

0065/ADLS/00/009

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
Agent for Applicant

DATE OF HEARING: June 19, 2000 Toronto

DECISION

A hearing was held on June 19, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *June 20, 2000*

0065/ADLS/00/009

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF
HEARING: June 19, 2000

DECISION
RELEASED: June 20, 2000 Toronto

REASONS FOR DECISION

A hearing was held on June 19, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 20, 2000, with reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the Highway Traffic Act was dated May 12, 2000, and was received by the Tribunal on May 12, 2000, together with the prescribed filing fee of \$100.00.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant's agent submitted two reports from neurologist Physician # 1, dated "*May 08, 1998*" and "*December 02, 1997*".

The Respondent did not object, but did ask the Tribunal to note the date of the report. Said report was entered, in evidence, on consent, and filed as Exhibit # 3.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated May 12, 2000
- b) Exhibit #3 Two reports from neurologist Physician # 1, dated "*May 08, 1998*" and "*December 02, 1997*" – received June 19, 2000

By the Respondent:

- a) Exhibit #2 MTO submissions – 15 pages – received June 14, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the Highway Traffic Act, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the Highway Traffic Act ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), Highway Traffic Act at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's driver's licence was suspended "April 15 2000" as per Notice of Appeal (Exhibit # 1)

The Notice of Appeal, prepared Physician # 2, the Applicant's family physician for "9 years," details and diagnosis the Applicant's present condition as: " *Hypertension; unstable angina, myocardial infarction, stroke; emphysema (smoker); History of Condition: hypertension diagnosed 1991, could have been longer standing; unstable angina - requires nitro (illegible) spray 2 - 3 x / month; 1996 myocardial infarction; 1996 transient ischemic attack; emphysema - secondary to smoking*" (Exhibit # 1)

According to Physician # 2, the Applicant visits her office "...monthly for medication ...Blood pressure has been controlled ...reports the use of nitroglycerine spray 2-3 x/month..." (Exhibit # 1)

Physician # 1, in a letter dated "May 08, 1998" confirms the Applicant had suffered a stroke, but the MRI showed nothing that could explain the headache.

In a letter dated December 2, 1997, Physician # 1 details the Applicant's neurologic symptoms and cardiac difficulties.

The Respondent provided the following Documents:

- Notice to Registrar.
- Driving Record.
- Vehicle record as of occurrence date
- Medical report of Dr. Roger S. Goldstein, MB,ChB MD, FRCP (UK), FCCP

The Applicant's driver's record since 1986, shows five convictions of driving with more than of 80 mgs of alcohol in blood in 1972, 1974, 1980. 1985, 1986." (Exhibit # 2)

In a letter dated May 29, 2000, Dr. Roger S. Goldstein, MB,ChB,FRCP(UK)FRCP(C) FCCP, Professor of Medicine and Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a "...consultant respirologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis... familiar with the Alcotest and the Intoxilyzer 5000C...". After reviewing the information provided to him by the Ministry, Dr Goldstein notes that "...It is important to know whether at the time of the episode in question, the Applicant was noted to be having any difficulty with breathing, cough, wheeze, shortness of breath or whether, however, were he to be having active angina, it would likely have interfered with the tests. In summary, the medical report ... does not provide... sufficient information...to determine whether the Applicant's failure to provide a satisfactory breath sample related to ... underlying respiratory condition." (Exhibit # 2)

At the hearing, the Applicant insisted that at the time he felt “...*pressure in head, and heavy chest...*”

In cross-examination, the Applicant admitted that he did not ask for medical assistance or seek medical attention immediately after the incident. The Applicant did not attend his doctor’s office until two weeks later, for his regularly scheduled appointment.

The Respondent called PC Officer # 1, of the OPP Prince Edward Detachment as a witness. PC Officer # 1, has been a police officer for sixteen years and a breath technician for twelve.

PC Officer # 1, testified that the Applicant outright refused to provide a breath sample. When asked to do so, the Applicant just sat there. After being explained the consequences of his actions, the Applicant stated “ *I do not want a breath sample.*”

The Applicant did say that he had suffered a heart attack, nonetheless, he did not ask for any medical assistance during the time that he was detained. PC Officer # 1 did not notice any signs of respiratory distress on the part of the Applicant. There was no difficulty talking or breathing, no wheezing or coughing.

APPLICATION OF THE LAW TO FACTS:

The issues are, how does the medical condition of the Applicant relate to Section 50.1 (2) (b) of the Act, and did this medical condition cause him to fail or not comply with the breath demand? Pursuant to Section 13 of Regulation 574 (amended), the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The facts are clear in this matter. The Applicant made no attempt to provide a breath sample. According to PC Officer # 1, the Applicant “...just sat there...” and expressed his intent by remarking “ *I do not want a breath sample.*”

The Applicant contends that he was aware he would not be able to provide a breath sample due his medical condition.

The Tribunal reviewed the medical evidence provided for the hearing by the Applicant’s physician. The Tribunal is satisfied and accepts the diagnosis that the Applicant has had a stroke and a myocardial infarction, and that presently he is afflicted with “*Hypertension; unstable angina, emphysema*” (Exhibit # 1)

The Tribunal concurs with Dr. Goldstein’s comments “*It is important to know whether at the time of the episode in question, the Applicant was noted to be having any difficulty with breathing, cough, wheeze, shortness of breath or whether, however, were he to be having active angina, it would likely have interfered with the tests*”. In order to reach a decision, in this matter, the Tribunal relies on the direct observations of P C Officer # 1, whose testimony was explicit in that he did not notice any symptoms of distress.

By his own admission, the Applicant testified that he neither asked for medical assistance during the incident nor sought medical assistance after he was released.

The onus is on the Applicant to establish the merit of his appeal. However, no new evidence was provided by the Applicant, to support his appeal before this Tribunal.

Based on the evidence, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he has not demonstrated that he suffered from a medical condition which prevented him from providing a breath sample when requested by the police officer.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated April 15, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *June 22, 2000*

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C., Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
Agent for the Applicant

DATE OF HEARING: June 27, 2000

ORDER

WHEREAS a hearing was scheduled to be held on June 27, 2000 in Toronto in the above matter;

AND WHEREAS at the commencement of the hearing before the Tribunal the agent for the Respondent made a Motion for Adjournment;

AND WHEREAS the Tribunal heard submissions from both parties and considered the motion to adjourn.

TAKE NOTICE, upon consent of all parties, the Tribunal Orders that this matter is adjourned to be heard on **Tuesday, July 4, 2000 at 9:30 a.m.** at the **Licence Appeal Tribunal, Hearing Room # 1, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;**

AND TAKE FURTHER NOTICE that upon failure to participate at the aforesaid time, the Tribunal may make a Decision in your absence and without further notice to you.

THE LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C., Presiding Member

RELEASED: *June 27, 2000*

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to Section
47(1) of the Highway Traffic Act;

AND IN THE MATTER of

0081/MED/00/010

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Friday,
June 23, 2000 at the Tribunal;

AND WHEREAS a letter dated June 5, 2000 was filed by the Respondent requesting an
adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 9:30 a.m. on Friday, October 13, 2000 at the
Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: *June 15, 2000*

PREHEARING

ISRAEL AND SHEILA MOSKOVITCH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

JOSEPH CONSENTINO, Counsel, representing the Applicants
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
STEVE STARKMAN, Agent, for the Added Party, Grand
Metropolitan Developments Ltd.

DATE OF
PREHEARING: June 27, 2000 Toronto

ORDER

Following attendances on June 27, 2000 at a prehearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) of Joseph Cosentino, counsel for Israel and Sheila Moskovitch (the "Applicants") and Netanus Rutherford, counsel, for the Ontario New Home Warranty Program (the "Program"), and Steve Starkman, agent for Grand Metropolitan Developments Ltd. (the "Added Party");

The Tribunal makes the following Order:

- 1) The Parties present at the prehearing recorded that there was no resolution of any of the issues in this matter.
- 2) The hearing of this matter is scheduled to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on September 11, 2000, and to continue on the September 12, 13, and 14, 2000, if necessary, at the Tribunal's above Chambers.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: June 28, 2000

GMAC LEASECO LTD.

GMAC LEASECO LTD.

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*, R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FOR AN ORDER OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION 55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK, Member

APPEARANCES: KIM BEINTEMA, Representative of Registrar of Motor Vehicles

PETER SOMMER, Agent for GMAC Leaseco Ltd.

DATE OF HEARING: June 27, 2000 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H. 8 as amended, GMAC Leaseco Ltd. (the "Applicant") appealed a decision of the Registrar of Motor Vehicles (the "Registrar") made under section 55.1 of the Act to impound a certain 1999 Pontiac Sunfire motor vehicle, plate number ADMJ 006;

UPON MOTION, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's ground of appeal of exceptional hardship as a ground to be heard at a hearing to take place on July 4, 2000.

ON READING the exhibits and hearing submissions of the representative of the Registrar as well as submissions by the Applicant's agent, this Tribunal finds that the ground of exceptional hardship [section 50.2(3)(d)] upon which the Applicant relies in this appeal, does not apply by virtue of section 50.2(4) as a previous order to impound under section 55.1 was made with respect to another motor vehicle then owned by the Applicant.

THIS TRIBUNAL grants the motion of the Respondent and orders that the ground of exceptional hardship be dismissed.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Member

RELEASED: June 28, 2000

CAR-O-LINE AUTO'S

CAR-O-LINE AUTO'S

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STEPHEN KELLY
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

COLIN ABBOTT
Agent for the Applicant

DATE OF HEARING: May 23, 2000, June 2, 19, 2000,

DECISION RELEASED: June 28, 2000 Ottawa

REASONS FOR DECISION

A hearing was held on May 23, June 2, and 19, 2000, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar") made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Car-o-Line Auto's (the "Applicant")
Motor Vehicle:	1992 Ford Taurus GL, Plate # ADJS 966 (the "vehicle")
Date of Appeal:	May 2, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the licence of the driver was not under suspension as provided in section 50.2(3)(b) of the Act.

This matter came before this Tribunal on May 23, June 2, and 19, 2000, and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

In essence, the Applicant's position is that the vehicle was in fact being driven by a Kevin Bowman, who had left the vehicle and his passenger, James Cooper, after the vehicle had broken down, so that he could obtain his own vehicle and then return to pick up Mr. Cooper. The Applicant's position is that, while Mr. Cooper was impaired and his licence was under suspension, he was not the driver of the vehicle.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

The Applicant called two witnesses: Ms. Elizabeth Cooper and Mr. Kevin Bowman.

The evidence of Ms. Cooper was that she was the lessee of the subject vehicle. Her son, James Cooper, was in the fish supply business. Kevin Bowman, was engaged to Ms. Cooper's daughter. Mr. Cooper and Kevin Bowman attended at Ms. Cooper's home on the evening of April 13, 2000 for a family dinner. Mr. Cooper received a call from a supplier, but as he had been drinking, Ms. Cooper was not prepared to allow him to drive

her vehicle. She asked Mr. Bowman to driver her son to a customer's home. Mr. Bowman was allegedly not prepared to use his vehicle as he was concerned it would not make the trip. Ms. Cooper offered the subject vehicle to Mr. Bowman. Ms. Cooper gave evidence that Mr. Cooper and Kevin Bowman left between 9:00 and 9:30 p.m. She was later advised that the vehicle had broken down, Mr. Cooper had been charged with criminal offences, and the vehicle had been impounded. Finally, Ms. Cooper's evidence was that when she obtained possession of the vehicle following the impoundment, the engine would turn over but would not start.

Mr. Bowman's evidence was consistent with that of Ms. Cooper's up until the time that he and Mr. Cooper left her premises; therefore, there is no need to repeat the same. According to Mr. Bowman, he drove Mr. Cooper to the client's home. Mr. Cooper went into the home with Mr. Bowman waiting in the car. Mr. Cooper was in the home for close to two hours. When he exited the home, it was apparent to Mr. Bowman that Mr. Cooper had consumed more alcohol while visiting with the client.

Although there was no trouble with the vehicle on the way to the client's, it stopped working on the way home, and Mr. Bowman had to pull over on the side of the highway. Although Mr. Cooper was impaired, Mr. Bowman indicated he left the keys in the car because Mr. Cooper would not be able to driver it because the vehicle was inoperable. He left to retrieve his own car by walking and hitchhiking to his home. When he returned, the police were at the scene. He tried to explain that Mr. Cooper had not been driving the automobile, but the officers would not listen to him. He confirmed that Mr. Cooper was placed under arrest and taken away by the officers.

Evidence for the Registrar

A summary of the evidence for the Registrar follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that Mr. M. Cooper was driving the vehicle at the time it was detained;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 29, 2001.

The Tribunal heard from Officers Paul Murphy and Sylvain Ladouceur who were called by the Registrar to give evidence.

Officer Murphy is employed with the Ontario Provincial Police Force and had been so employed for 12 years. At approximately 12:30 a.m. on April 14, 2000, Officer Murphy, who was in a police cruiser with Officer Ladouceur, noticed the subject vehicle on the north shoulder of the westbound lanes of Highway 401. Officer Murphy approached the vehicle. He observed Mr. Cooper in the driver's seat behind the steering wheel. The keys were in the ignition. Mr. Cooper was talking on a cell phone, and subsequently advised Officer Murphy that he was speaking to someone to try to get help and that his vehicle had broken down. He also indicated that he had tried to start the vehicle. It was the impression of Officer Murphy that Mr. Cooper was impaired. He subsequently failed a breathalyzer test and was placed under arrest. The Applicant acknowledged that Mr. Cooper was impaired and his licence was under suspension at the time of the incident.

Officer Ladouceur, who had been with the Ontario Provincial Police for four years, confirmed Officer Murphy's testimony with regard to the positioning and activity of Mr. Cooper. It was Officer Ladouceur who spoke to Mr. Bowman when Mr. Bowman arrived on the scene. According to Officer Ladouceur, Mr. Bowman advised that Mr. Cooper had phoned him approximately 10 minutes ago indicating he was having car problems and needed a ride. According to Officer Ladouceur, Mr. Bowman never indicated that he had been the driver of the vehicle on that occasion.

Wherever the evidence of the officers conflicted with that of Ms. Abbott or Mr. Bowman, the Tribunal accepts the evidence of the officers. At the time of the incident, Mr. Bowman was soon to become a member of Ms. Cooper's family. It is difficult to accept that he would drive Mr. Cooper to a customer's home and then remain in the car for close to two hours waiting. It is also difficult to believe that, when there was a cell phone in the car, Mr. Bowman would not use the same to call for help, but would instead walk and hitchhike back to his home to retrieve his own vehicle. Finally, it is also difficult to accept that Mr. Bowman would leave the keys in the vehicle when he knew of the state of impairment of Mr. Cooper. While the vehicle would not turn over when being tried by Mr. Bowman, there was always the risk that the vehicle might start if Mr. Cooper tried the same. Further, in his condition, Mr. Cooper was a threat to himself in that he might get out of the vehicle and be struck by the traffic on the highway. If Mr. Bowman had been at the scene it is not likely that he would have left Mr. Cooper alone in the car with the keys. The Tribunal finds as a fact that Mr. Bowman had not driven the vehicle on the occasion in question, and that Mr. Cooper was in fact the driver of the vehicle.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(b).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified;
- and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized snow vehicle Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section, is thereupon suspended

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

(4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,

- (a) an order directing that the accused be discharged is made under section 736 of the *Criminal Code* (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

APPLICATION OF LAW TO FACTS:

As Mr. Cooper was the driver of the motor vehicle, which was the subject of the order to impound, and as his licence was under suspension at the material time, the Registrar's order to impound under subsection 55.1(3) of the Act was appropriate.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stephen Kelly, Presiding Member

RELEASED: June 28, 2000

KOLLAR

FUNERAL DIRECTORS AND ESTABLISHMENT ACT
Revised Statutes of Ontario 1990, Chapter F.36

IN THE MATTER OF
EVE T. KOLLAR

AND IN THE MATTER OF a DECISION
of the Complaints Committee,
Board of Funeral Services
respecting Geoffrey P. Lougheed, Funeral Director

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision

ADJOURNMENT ORDER

WHEREAS, Eve T. Kollar (the "Applicant") by letter dated January 18, 2000, requested a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of a decision of the Complaints Committee, Board of Funeral Services dated November 3, 1999, respecting Geoffrey P. Lougheed, Funeral Director (the "Respondent");

AND WHEREAS the Tribunal appointed a time and place for the electronic hearing for June 29, 2000, in the above matter;

AND WHEREAS the Applicant requested an adjournment of the electronic hearing date;

THEREFORE on consent of both parties, the Tribunal Orders that:

1. The electronic hearing scheduled for June 29, 2000, is adjourned *peremptory against the Applicant* to commence at 1:00 p.m. (Eastern Standard Time), on Thursday, August 3, 2000.
2. The electronic hearing will be co-ordinated by Bell Canada and the parties to the proceedings will be contacted by the Bell Operator at the above time at the telephone numbers listed below:

Eve T. Kollar, Applicant (604) 806-0604
Norman Stoner, Counsel for Respondent (705) 675-8307
Joseph Richer, Registrar, Board of Funeral Services (416) 979-5450
3. Should a party not participate in the hearing in accordance with this Order, the Tribunal may proceed without that party's participation, and the party will not be entitled to any further notice in the proceedings.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 28, 2000

BALFOUR

CATHERINE BALFOUR

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair, presiding
BRUCE F. FITZPATRICK, Vice-Chair

APPEARANCES: CATHERINE BALFOUR, appearing on her own behalf
MICHAEL BADER, Counsel, representing the Ontario New
Warranty Program

DATES OF HEARING: February 28, 29, & March 1,
& June 15, 16, 2000 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) (the "Tribunal") from a decision of the Ontario New Home Warranty Program (the "Program") contained in its letter dated February 3, 1999. In its decision letter, the Program denied the claim made by the Applicant under Section 14(1) (c) of the Ontario New Home Warranties Plan Act (the "Act").

BACKGROUND:

The Applicant, Catherine Balfour, purchased her home at 1537 Village Street, Pickering, Ontario, from Bramalea Limited and took possession November 8, 1994. Several months thereafter Bramalea Limited went into receivership. Over the following two years, the Applicant made several claims to the Ontario New Home Warranty Program, and there were two Conciliation Reports on September 27, 1995 and January 31, 1996. The Applicant settled with the Ontario New Home Warranty Program by signing a Full and Final Release for the sum of \$3,170.00 on June 18, 1996. The Full and Final Release included all items on the two Conciliation's as well as the items set out by the Applicant in correspondence of March 29, 1996 in respect of extensive cracking in the basement floor. The issues dealt with in the two conciliations are not the subject matter of this appeal.

On July 16, 1998, there was extensive rainfall resulting in flooding in several basements in the Applicant's area, including the Applicant's basement. The Applicant felt that the cracking in the basement floor had become more extensive, that there was a crowning of the floor, and noticed that the basement was damp, resulting in the appearance of

small crustaceans as well as mold. The Applicant felt that this could have been prevented had the Builder properly waterproofed the basement and that the resulting damage to the basement floor constituted a major structural defect for which she should be compensated.

THE FACTS:

WITNESSES FOR THE APPLICANT

The Applicant's first witness was Stanley H. Cooper, a Consulting Professional Engineer and Vice President of Cooper Consultants Limited. Mr. Cooper visited the Applicant's residence in October 1998 and on April 1999 and wrote a Report dated October 29, 1998 followed up with a letter dated May 4, 1999. He stated that on July 16, 1998 during a thunderstorm the Municipal drainage system failed to handle the run-off and the whole area became severely flooded. He stated that homes like this have a vertical draining system against the basement walls and a weeping tile at the top of the wall footing leading to the Municipal drain. The purpose is to prevent ground water pressure building up against the walls and causing leaks. In this case, there was a flood condition in July 1998 in which the whole Municipal drainage system was flooded and therefore, the weeping tile could not do its job and drain off the water.

It was Mr. Cooper's opinion that if there was an impermeable substrata, water could not easily enter under the foundation and the basement would flood by the drains backing up, but there would be no damage to the concrete slab. If the impermeable substrata was uneven or contained loose material, water could enter under the slab causing it to heave and crack. It was his opinion that the hydrostatic pressure underneath the floor slab caused it to move upwards and crack. When the water subsided, the slab went back down, but it never will return to normal. In his opinion, the cracks in the basement floor were not shrinkage cracks. The purpose of the slab was to maintain the walls in their present position, so the slab was an integral part of the construction. At some point, if the slab became bad enough it would be possible that the foundations could move in. Although he put much of the blame on the Town of Pickering for not designing the drainage system properly to handle the flood condition, the Mr. Cooper felt that the Builder should have made sure that the footings were founded on impermeable material and should have installed a drainage system under the concrete slab leading to a sump pump.

Mr. Cooper admitted that the type of construction with the weeping tile around the perimeter leading to the storm sewer was the normal method of construction and assumed that the Applicant's house was constructed in this manner. He suggested that release valves would have assisted in relieving the pressure but that they were not required by the Building Code. He did not take any photographs or make any drawings of the cracks on the floor, and admitted that he could not tell when the cracks first appeared. He stated that there was a crowning of the floor and estimated the crown was approximately an inch higher than the rest of the floor.

It was his opinion that there were not enough bore holes done to properly review the soils in such a large subdivision. He did not know what type of soil was under the Applicant's house. His evidence was that the concrete floor slab does affect a load bearing function, although it does not carry any load on its own and is not required by the Building Code. Although he recommended a sump pump, he stated that a sump pump is not normally used in homes above the water table. In his inspection, he did not

notice whether there were any gaps between the floor slab and the walls, and he admitted that the foundation could not move under its present condition. However, if there was another flood and if the floor folded more, the walls could cave in over time, but he could not say how long that might take. If all of these possibilities happened, he gave estimates of ten, twenty or forty years, but he could not say for sure. He admitted that his Report gave no definite solutions and was speculative in giving alternatives. He was not aware of any other times that the basement had any water seepage aside from that one flood condition.

He examined three core samples from the concrete basement floor and found that one core sample was approximately one half inch less than the Code requirement, but admitted that the floor did not fail because of this and it would not have made any difference if the floor were thicker or even if it were reinforced. It was his evidence that the concrete floor slab would not have failed if it had not been for this flood and that his recommended repair procedures were speculative. He gave no evidence of the cost of any of the procedures.

The Applicant's second witness was Andy Fawcett, a Professional Geotechnical Engineer who specialized in properties of soil and earth sciences. In 1992, the firm in which he was employed did the original site investigation for Bramalea Limited. His firm then followed through during the construction of the storm and sanitary sewers and roads. He found that the water table was high in that area and recommended fill soil be re-worked by excavating and separating organic and non-organic soils and replacing the non-organic soils with imported soil which would then be compacted. He stated the high water table would not be an impedance to building subdivisions in the area providing that provisions are made for it. He made several recommendations regarding the storm sewers, and building the subdivision. He recommended that basement perimeter drains be installed in the normal manner, however, he also recommended that the basement walls should be waterproofed. His evidence was that the Building Code required a geotextile type of damp proofing rather than waterproofing, but if he were involved in the construction he would have recommended waterproofing on the basement walls. His original recommendations did not include a sump pump, but he agreed with Mr. Cooper that this may give relief from hydrostatic pressure if combined with drains under the floor slab.

Mr. Fawcett's opinion was based on his review of the 1992 logs of bore holes in the vicinity of the Applicant's house. The results lead him to believe that the water table was located just below the foundation of the house and that the soil and ground water conditions may have contributed to the cracking of the basement floor.

Mr. Fawcett's Report of October 13, 1999, was written without ever being in Applicant's premises. The Applicant had not advised him that there had been prior cracking of the floor before the July 1998 flood. He also stated that all of the subdivision's lots were above the water table and that his October 1999 Report did not recommend waterproofing the walls as this would not have reduced the hydrostatic pressure caused by the excessive rainfalls and resulting flood. Even if the drainage system were working properly, hydrostatic pressure would still have built up, but he did not know if it would have been enough to crack the floor. The inability of the storm sewer to handle the excessive storm water was a factor, but he could not say how much of a factor. Since he did not examine the basement himself, he did not know if it was damp proofed or waterproofed and admitted that water tables fluctuate. He testified that it would take a fairly significant rainfall to allow the hydrostatic pressure build-up that caused the water

leakage in the Applicant's basement and that with the storm that occurred in July 1998, the basement would have flooded even if it were waterproofed.

The Applicant, Catherine Balfour, gave evidence on her own behalf. On November 8, 1994, she moved into her residence and Bramalea Limited went bankrupt five months later. In the first two years, the New Home Owners Warranty Program were very helpful and settled a number of defects with her including complaints in a March 29, 1996 letter from her to the Program which complained of "extensive cracking in my basement floor". She admitted meeting with the warranty representative and signing a Full and Final Release, however, was told that if the cracks became significantly worse within seven years, she was still entitled to submit a claim for a major structural defect.

On July 16, 1998, there was a storm resulting in flooding in various areas of Pickering. The Applicant came home a few hours after the storm and saw some water on her floor in the basement. She saw water stains up to about four inches high on the sides of cardboard boxes. She swept the puddles, but did not take any steps to dry the basement as she was leaving for Europe ten days later. A few months later, she noticed crustaceans on areas of the basement floor and fungal growth on the corners of the floor and walls. There was no fungal growth before the flood. She also noticed the cracks in the basement appeared to be getting worse. She took some of the fungal growth and crustaceans to a lab for testing and received a microbiology report stating that the mold was a commonly occurring *Penicillium* which could be controlled by cleaning the affected areas with one percent bleach and reducing the level of moisture in the basement. The crustaceans were found to be millipedes that inhabit damp and shady places.

The Applicant stated that she had lost the use of her basement, although she still stored some things there. She removed a cardboard wardrobe and some clothes and keepsakes from the basement and stored other things on shelves or tubs. She believed that she could no longer store her vacuum cleaner or suitcases there and could not finish the basement until the source of the water problem was corrected. She also felt that her home was reduced in value \$10,000.00 to \$20,000.00, although no evidence was produced of any reduction in value. She stated that she had severe allergy problems and had to wear a mask when she went down to the basement because of the fungal growth, however, no medical evidence was produced.

The Applicant produced a video tape of the cracks in her basement and photographs showing the fungal growth and millipedes. The tape was taken February 13, 2000. She had central air conditioning in the house. She testified that she had covered the cold air duct in the basement with cheese cloth to prevent any fungal growth from getting into the rest of the house. She admitted that some of the fungal growth had dried up with the heat on during the winter. She stated that there were now more millipedes than immediately after the flood. In her opinion, it appeared that during the flood of 1998, the cracks in her basement became worse. Since the flood, there has been more fungal growth and more millipedes.

The photographs and video tape showed that items were still stored on built-in shelving units and on plastic tubs on the floor. She had not had time to empty the cardboard boxes. They were still there, although she had removed a few plastic bags. Her freezer was still located in the basement and connected. The Applicant felt that the value of her home had been significantly decreased and that she had lost the use of thirty percent of her home as she could no longer use the basement. She referred to the photographs

and the video tape showing curled up millipedes in areas along the cracks in the floor and in the corners and mold growing in areas along some cracks and corners.

On cross-examination, she admitted the settlement of all of the conciliation matters and the cracking in the floor, but the Full and Final Release was meant to exclude any further cracking in the floor. The reason that she had not cleaned the basement since the flood was that she was allergic to chemicals and would have had to have someone else to clean the mold. She acknowledged the microbiology report which stated that the mold could be cleaned with one percent bleach and also acknowledged that she occasionally used bleach in her laundry. Regardless of this, she did not clean the basement herself nor have anyone else clean it. She also did not sweep up the dead millipedes from the floor and acknowledged that she had never seen a live millipede.

The Applicant said that the moisture in the basement had a reading of between thirty-two to thirty-eight percent humidity and that she has not had to turn on the humidifier on her furnace in the last two years. She felt that twenty-five percent humidity would be arid and that is when most people would turn on the air humidifiers to put moisture into the air. When questioned on why she did not put a dehumidifier in her basement, she stated that her neighbor had a dehumidifier and it runs all the time and all that it would do would be to make the basement air dry. A dehumidifier would not get rid of the water which is in the soil under the floor. She acknowledged that the person who did the microbiology report advised her that if she got rid of the moisture she would get rid of the millipedes.

The Applicant also testified that, aside from a prior small leak in one window and once from a drain pipe in the kitchen, she had not seen any water enter the basement either before or since the flood in July 1998.

It was the Applicant's argument that there was a defect in construction. The home was built on a site that had been determined by the soils report in 1992 to have water and soil conditions consistent with the presence of hydrostatic pressure and, therefore, the basement walls of the homes should have been waterproofed. Section 9.13 of the Ontario Building Code provided that floors on ground and exterior surfaces of walls below ground level be waterproofed where hydrostatic pressure occurs. It also provides how the waterproofing should be done. It was her position that since the waterproofing was not done on her home, there was a defect in workmanship or materials which amounted to a major structural defect which had a seven year warranty under the Act. The adverse effect on the Applicant because of the defect is the effect on her health and in her use of the basement.

WITNESSES FOR THE PROGRAM

The Program's first witness was Tibor Pal, a professional Engineer and a specialist in structural engineering. He was familiar with Mr. Cooper's reports, and he attended to inspect the Applicant's basement on July 6, 1999. Mr. Pal observed and measured the cracks on the floor and stated that most of them were hairline cracks, except one which was one-sixteenth of an inch wide. He found the floor generally level and removed the three core samples to measure the concrete and the soil under the floor slab. He found no relative movement of the floor slab at cracks, foundation walls, floor drain or sanitary pipe locations and no signs of upward movement of the floor slab from hydrostatic pressure. He probed out the soil under the stone beneath the concrete slab and found

no free water to a twelve inch depth. The soil was hard and he could not penetrate it any further.

His opinion was that the cracks in the floor had no impact on the structural integrity of the house and that there was no failure of a load bearing portion of the house. He disagreed with Mr. Cooper's recommendations which he felt would cause pressure to build up on the outside of the foundation walls. There was already impervious material under the floor. He concluded that the basement was constructed with materials and workmanship in compliance with the Ontario Building Code sections pertaining to drainage, footings and foundations and slab on ground. The July 1998 storm resulted in such a quantity of rain that it backed up the Municipal storms sewers to which the weeping tiles are connected. It was natural that water would escape the weeping tiles and go into the surrounding clear stone resulting in hydrostatic pressure on the slab and water coming through the cracks in the floor.

On cross-examination, Mr. Pal maintained that the water table under the Applicant's house is not directly under the footings. He referred to the fact that when sanitary sewers were dug the walls of the trenches did not need shoring because the earth was hard enough that there was no water that permeated the walls requiring shoring. The sections of the Ontario Building Code that referred to waterproofing requirements on basements did not apply in this situation.

He had spent about an hour in the Applicant's basement with the Applicant and found the humidity to be between forty-five to fifty percent. He admitted that there was a three-eighth of one inch slope on the floor adjacent to the stairs, but the pattern of cracks in the basement floor were consistent with shrinkage and to be expected. If the floor had moved, one side of the crack would normally be higher than the other, and he could find no difference on the height on either side of the cracks.

He had reviewed the original site soils report and concluded that a high water table was not likely to occur with the type of soil present in that area. He referred to the road part of the report where it was stated that the ground could be dug to a depth of 4.6 meters without any problems and earlier in the report where it indicated that till interface inhibited proper measurement of ground water level. The soil investigation, therefore, did not establish a water table. The Ontario Building Code only required damp proofing in these circumstances.

He concluded that a dehumidifier would reduce the humidity in the basement. Since there is always some amount of moisture in the soil, any basement below grade is normally cooler and containing more humidity than areas above ground.

The Program's next witness was Andy Ferguson, a client service representative with the Ontario New Home Warranty Program who had twenty-five years experience in building. On June 7, 1996, he attended at the Applicant's house, viewed the extensive cracking in the basement floor, ran his hands over the cracks and found that the level of the concrete on both sides of the cracks was even. It was his opinion that the cracking in the floor was the result of normal shrinkage.

On June 18, 1996, the Applicant signed the release which included the extensive cracking in the basement floor. Although he did not recall a conversation excluding further cracks, it was acknowledged that shrinkage cracks are not covered under the warranty and would be released by the Full and Final Release. However, if this

Tribunal found that there was a major structural defect, it would not be released by the Full and Final Release.

The Program's third witness was Chad Foresheew, a warranty representative of ONHWP since 1994 and before that, a building official for three Municipalities with responsibility for the Ontario Building Code. He attended at the Applicant's house with the Applicant and Mr. Pal on July 6, 1999 to investigate the Applicant's claim of major structural defect. He also took photos and made notes in her home at that time. He had seen the Applicant's diagram of the cracks, viewed the basement himself and reviewed the reports of Mr. Cooper dated May 4, 1999 and October 29, 1998. He also reviewed the microbiology report.

When he examined the basement floor in July of 1999, he was advised by the Applicant that it was still in the same condition as it was the day of the flood in July 1998. He observed random meandering cracks which were hairline cracks, in his opinion. After running his hands along the cracks he found no differences in the level of both sides of the cracks. He did not observe any crowing or anything else which would indicate any type of uplift occurred in the floor. The cracks were consistent with hairline cracks. He observed that the Applicant was still using the basement for storage and the freezer was operational in the basement. His field notes which were made at the time of the inspection were entered into evidence and indicated the above findings. They also indicated that there was no dehumidifier which was present and the Applicant's digital hygrometer read forty-nine percent humidity at nineteen degrees centigrade in the basement. He also stated that since the Ontario Building Code did not require a concrete basement slab, it was not considered as part of the load bearing structure.

Mr. Ferguson produced a certified copy of the Climatological Station Report for the month of July 1998 recorded at Frenchman's Bay as certified by Environment Canada, along with the Precipitation Record and Map showing that the Climatological Station was near the Applicant's residence. Also introduced, were the Extreme Weather Records for Pickering and Frenchman's Bay as certified by Environment Canada. The Records show that during the recorded period of 1959 to 1990, a period of thirty-one years, the highest rainfall recorded in one day was 59.7 millimeters recorded over a seventeen hour period. The record for July 1998 showed that on July 16, 1998 a total of 84.8 millimeters of rain fell within a four hour period.

FACTS FOUND PROVEN:

The Applicant took possession of her home at 1537 Village Street, Pickering, on November 8, 1994 and that is the date that the warranty period commenced.

The Applicant purchased her home from Bramalea Limited who went into receivership several months later and, therefore, the warranty Program took over the Builder's responsibilities.

There were several claims made by the Applicant which resulted in two conciliation's and a settlement with the Ontario New Home Warranty Program on June 18, 1996.

The Applicant signed a Full and Final Release on June 18, 1996 which included all of the items on the two conciliation's, plus the complaints of the Applicant in her correspondence of March 29, 1996 in respect of extensive cracking in the basement

floor.

There were no complaints from the Applicant of water seepage through the basement floor until after July 16, 1998.

On July 16, 1998, there was a storm of such intensity that the Municipal storm sewers could not take the water away fast enough and the water backed up through the Municipal drainage system flooding several basements in the Applicant's area. There was a rainfall of 84.8 millimeters in a four hour period which was the largest amount of rainfall in any day for thirty-one years of recorded history.

The Applicant did not observe the flooding of her basement, but when she arrived home that day there were some puddles of water on her basement floor and the cardboard boxes on the floor were wet up to a height of four inches. Therefore, four inches of water was the maximum amount that was ever in her basement and possibly less taking into account the capillary action of cardboard.

The Applicant swept away some water on the basement floor but did nothing further to dry the basement.

A few months later the Applicant noticed more crustaceans curled up on the floor along some of the cracks and corners of the basement and fungal growth along some of the cracks and portions of the walls at the floor level of the basement.

The Applicant took a sample of the crustaceans and mold to have them analyzed.

The analysis of the mold indicated it was a common mold in air called *Penicillium* which could be controlled by cleaning the affected areas with one percent bleach and reducing the level of moisture in the basement.

The crustaceans were found to be millipedes which are terrestrial creatures that inhabit damp and shady places.

The Applicant was not allergic to bleach as she occasionally used it in her laundry. The Applicant has not cleaned the mold from the basement in the two year period since the flood nor had anyone clean it for her.

The Applicant has not swept up any of the dead millipedes on the floor of the basement nor had anyone do it for her. The Applicant nor anyone else who examined the basement has ever seen a live millipede.

Some of the fungal growth had dried up when the heat was on in the house during the winter and the moisture level reduced.

The Applicant does not have a dehumidifier in her basement nor has she done anything to reduce the moisture level in the basement, although a humidifier would have reduced the moisture level.

The basement of the Applicant's house was damp proofed according to the requirements of the Ontario Building Code at that time.

Even if the basement had been waterproofed it would not have stopped the water back

up that occurred during the July 16, 1998 flood.

ISSUE:

Is the Applicant entitled to damages under the Act on the basis of a major structural defect?

THE LAW:

Section 13 of the Ontario New Home Warranties Plan Act states:

- (1) Every vendor of a home warrants to the owner,
 - that the home
 - (iii) is constructed in accordance with the Ontario Building Code;
 - that the home is free of major structural defects as defined by the regulations;

10. A warranty under subsection (1) does not apply in respect of,

- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (i) damage resulting from an act of God;
- (k) damage caused by municipal services or other utilities;

.....

- (4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed;

Section 14 of the Ontario New Home Warranties Plan Act states:

- (1) Where,
 -
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damages subject to such limits as are fixed by the regulations.

Regulation 892, Section 1 of the Ontario New Home Warranties Plan Act states:

"major structural defect" means, for the purposes of clause 13 (1) (b) of the Act, any defect in work or materials,

- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure, and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

APPLICATION OF LAW TO FACTS:

The Applicant took possession on November 8, 1994 and that is when the warranty period started to run. The Applicant is making her claim under a major structural defect, which the regulations provide has a seven year period in which to make a claim. The Applicant is within the seven year period for a major structural defect.

The fact that the Applicant signed a Full and Final Release on June 18, 1996 does not preclude the Applicant from making a claim against the balance of warranties available and remaining under Section 6 Regulation 892, under of the Ontario New Home Warranties Plan Act Alexander J. Holburn (1996) 28 CRAT 188.

In making this appeal, the onus is upon the Applicant to prove on a balance of probabilities, that the defect constitutes a major structural defect under clause 13(1)(b) of the Act, "major structural defect" being defined in section 1 under Regulation 892.

The definition of "major structural defect" requires the Applicant to establish a defect in work or materials with one of three elements:

- (i) that results in failure of the load bearing portion of any building; or
- (ii) materially and adversely affects its load-bearing function, or

- (iii) that materially and adversely affects the use of such building for the purpose for which it was intended".

The Applicant argues that the initial soils report in 1992 warned the Builder of the nature of the soil. The Builder had prior knowledge that there could be problems with water leakage and, therefore, should have waterproofed the basement. In his report of October 13, 1999, Mr. Fawcett did not mention waterproofing the basement. He arrived at his conclusions by reviewing the logs of the original bore holes "in the vicinity" of the Applicant's house. He was not present at the digging of the foundations of the Applicant's house, did not attend at the Applicant's house after it was built and did not view the basement either before or after the flood. This was despite the fact that he mentioned in his report that not all of the lots in the sub-division would be affected in the same manner since some houses are founded on engineered fill and others had base conditions which would allow water storage to occur. It was admitted that he did not know the actual soil conditions under the Applicant's house and also that the water table could vary depending on the season and other construction in the area.

It was stated by the Applicant's other expert witness, Stanley H. Cooper that he did not believe that there were enough bore holes done to properly review the soils in such a large sub-division and that he too did not know what type of soil was under the Applicant's house. In the Tribunal's opinion the evidence of Mr. Fawcett was to establish how the soil and ground water conditions may have contributed to the cracking of the basement floor but it was too generalized, being based on data over a large area, to establish the Applicant's particular status of residence.

The Applicant's Engineer, Stanley H. Cooper, did visit the Applicant's residence on two occasions to examine the basement floor. It was his opinion that the hydrostatic pressure underneath the slab caused it to burst upwards and crack and allow water to enter the basement. When the water subsided, the slab went back down. He did not believe that the cracks in the basement floor were shrinkage cracks. He suggested that relief valves in the floor would have assisted in relieving the pressure, although admitted that they were not required by the Building Code. He also suggested that a sump pump be installed, but admitted that they were not normally used in homes above the water table and the soils report had said that all of the lots were above the water table.

Mr. Cooper admitted that the basement slab was not a load bearing portion of the building however, the slab did affect a load bearing function as it held the walls in place. He stated that it did not carry any load on its own and was not required by the Ontario Building Code. He did find that one of the three core samples was approximately half an inch less than Code requirement in thickness, however, this would not have made any difference as the floor slab would not have failed had it not been for the flood. He admitted that some portions of his report were speculative. In support of his contention that the floor slab held up the walls of the basement, the Tribunal found that his opinion was carefully qualified in usage of the terms "could", "may", and "possible", on the conclusions contained in the report which made his report too uncertain to be persuasive.

All of the experts that gave evidence agreed that a concrete floor slab does not carry any load. Despite Mr. Cooper's assertion that the floor slab affects a load bearing

function, there is no evidence that the foundation was affected in any way or that there was any water seepage through the walls. The Tribunal finds that there was no defect in work or materials that resulted in a failure of a load bearing portion of the building or materially or adversely affected a load bearing function. Therefore, the Applicant's argument on the elements (i) and (ii), noted above fail.

The Tribunal must then turn its mind to the element "that materially and adversely affects the use of such building for the purpose for which it was intended". The Tribunal notes that since the Applicant's possession of the house in 1994 until the flood in 1998, the Applicant used the basement only for storage. After the flood and up to the date of this Hearing, the Applicant continued to use the basement for storage. The Tribunal has reviewed the applicable cases including Re Grudzinski et al. and Ontario New Home Warranty Program 32 O.R. (3d) 376 which held that "the functional deprivation of the use of one-third of a residence for any reasonable purpose could only be described as material and adverse, and it constituted a major structural defect".

Although the Applicant said there were a few items which she had to take out of the basement, the photographs and video clearly show that there were still boxes stored in the basement and a freezer connected in the basement as it had been prior to the flood. Since the Applicant continued to use the basement in a similar manner after the flood as before, the Applicant has failed to convince the Tribunal that her use of the basement was materially and adversely affected.

Having made those conclusions and findings, it is not necessary to proceed any further. However, the Tribunal feels it would be helpful to relate the result had the Tribunal found in the Applicant's favor, which it has not. Had the Applicant been able to establish a material structural defect under either (a) or (b) of section 1 of Regulation 892, it must be noted that those sections do not apply to and specifically exclude flood damage, dampness not arising from failure of a load bearing portion of the building and damage arising from acts of God.

In respect to an act of God, it is a question of fact whether the occurrence was so phenomenal or of such a magnitude as could not have been reasonably foreseen and guarded against, the capacity to foresee being based on previous experience and knowledge of nature's law, Frache vs. City of Lethbridge (1954) 13 W.W.R. (NS) 609.

It was held in the case of Garfield vs. City of Toronto xxii O.A.R. 128, that where a sewer built and maintained by a municipal corporation was free from structural defect and of sufficient capacity to fulfill all ordinary needs, the corporation was not liable for damages caused as a result of an extraordinary rainfall. In the present case, in ordinary usage, there was no evidence presented of any water leakage through the basement floor either before or after the flood of July 1998 and no evidence that there was any problem with the municipal storm sewer with normal usage aside from the flood of July 1998. Under normal and ordinary conditions, the drainage system under the Applicant's house functioned properly and it was only one time during an extraordinary rainfall that water penetrated the basement floor.

It was also established by the House of Lords Greencock Corporation vs. Caledonian Railway (1917) A.C. 556 that to fall within the description of "act of God" the occurrence is one which can only occur very seldom.

In the present case the amount of rain which fell over such a short period of time was unprecedented in thirty-one years of record keeping history. The Tribunal finds that this would be considered as an "act of God" which would fall within the exceptions listed under the definition of "major structural defect".

The Tribunal notes that although the flood occurred in July 1998, the Applicant took no steps to either clean her basement or reduce the moisture content in the basement. Although she was well aware that cleaning the basement with a one percent solution of bleach would have removed the mold, she did not proceed to do so herself nor did she obtain the services of anyone else to clean the basement. One would have wondered why the Applicant would not have taken such steps, or any steps to rid the basement of mold if she suffered from an allergy to the mold. A one percent solution of bleach is a very weak solution and after receiving advice that the mold would be removed by that solution, the Applicant did not try to remove it or have it removed to mitigate her concerns.

The Tribunal also noted that the Applicant did not use a dehumidifier when she admitted that other basements in the area have dehumidifiers to reduce moisture in the air. According to the laboratory reports, the millipedes that she found in her basement are found in damp places, and the Applicant kept a hygrometer in her basement indicating that the humidity was high. Yet she took no steps to try and reduce the humidity.

ORDER:

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta,
Vice-Chair, presiding

Bruce F. Fitzpatrick,
Vice-Chair

Released: June 29, 2000

POWELL

MARJORIE ANNA POWELL

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: SHEILA A. SPOTTON, Vice Chair

APPEARANCES:

ROBERT J. REYNOLDS, Counsel representing the Applicant
ANDREW LEWIS, Counsel representing the Ontario New Home
Warranty Program
JAMIE BRAUER, Agent representing the Added Party, Brauer
Housing Developments Inc.

DATES OF HEARING: February 28, 29 & March 1, 2, 3, &
April 3, 4, & June 22, 23, 2000

BELLEVILLE

ORDER

FOLLOWING attendances on June 22, 2000 before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) of Robert J. Reynolds, Counsel for Marjorie Anna Powell (the "Applicant") and Andrew Lewis, Counsel, on behalf of the Ontario New Home Warranty Program (the "Program") and Jamie Brauer, Agent on behalf of Brauer Housing Developments Inc. (the "Added Party");

FOLLOWING further attendance on June 23, 2000 of Robert J. Reynolds, Counsel for Marjorie Anna Powell (the "Applicant") and Andrew Lewis, Counsel, on behalf of the Ontario New Home Warranty Program (the "Program") and no one appearing on behalf of Brauer Housing Developments Inc. (the "Added Party");

WHEREAS the matter was also heard on February 28 through March 3, 2000 and April 3, and 4, 2000;

AND WHEREAS at the close of the hearing on June 23, 2000, the Applicant and Program had closed their cases, but had not commenced closing arguments;

NOW THEREFORE, this Tribunal orders that the hearing is concluded on the following terms:

- 1) Counsel for the Applicant is to provide closing arguments by written submissions within 50 days of June 23, 2000 to be delivered to the Program, Added Party and the Tribunal (due August 12, 2000);
- 2) Counsel for the Program is to provide closing arguments by written submissions to be delivered to the Applicant, Added Party and Tribunal within 34 days of receipt of the Applicant's submissions (due September 15, 2000); and
- 3) Counsel for the Applicant is to provide written reply submissions, to be delivered to the Program, Added Party and Tribunal, if any, within 20 days of receipt of the Program's submissions (due October 5, 2000).

LICENCE APPEAL TRIBUNAL

Sheila A. Spotton
Vice-Chair

Released: June 29, 2000

4x4 Headquarters...

4 X 4 HEADQUARTERS LTD., & 1190634 ONTARIO LTD. O/A
4 X 4 HEADQUARTERS, & 1351849 ONTARIO LTD., & NORMAN LOVATSI,
& DANNY LOVATSI, & GEORGE MEANCHOS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE MOTOR VEHICLE DEALERS ACT

TO REVOKE THE REGISTRATIONS OF 4 X 4 HEADQUARTERS
LTD., 1190634 ONTARIO LTD. O/A 4 X 4 HEADQUARTERS, AND
NORMAN LOVATSI, DANNY LOVATSI AND GEORGE
MEANCHOS AS MOTOR VEHICLE SALESPERSONS

TO REFUSE THE REGISTRATION OF 1351849 ONTARIO LTD.
AS MOTOR VEHICLE DEALER,

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

JOHN ROSEN, Counsel representing the Applicants, 4 x 4 Headquarters
Ltd, 1190634 Ontario Ltd. o/a 4 x 4 Headquarters, Norman Lovatsis,
Danny Lovatsis
George Meanchos, no one appearing
1351849 Ontario Ltd., no one appearing
MITCHELL GOLDBLOOM, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATES OF

HEARING: June 6 & 7, 2000

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000, is known as the Licence Appeal Tribunal) (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the Motor Vehicle Dealers Act (the "Registrar", and the "Act" respectively). The Notice of Proposal dated August 13, 1999 proposed to revoke the registration of 4 X 4 Headquarters Ltd. and 1190634 Ontario Ltd. o/a 4 X 4 Headquarters as motor vehicle dealers, and to revoke the registration of Danny Lovatsis, Norman Lovatsis and George Meanchos as motor vehicle salespersons under the Act. Further the Registrar proposed to refuse the registration of 1351849 Ontario Ltd. as a motor vehicle dealer.

BACKGROUND:

The Registrar under the Act relies upon the following grounds as set out below for the Proposal:

Pursuant to the provisions of section 6 (1) of the Act, the Registrar, having regard to the registrant's financial position, finds that the registrant cannot reasonably be expected to be financially responsible in the conduct of its undertakings as required by the provisions of section 5(1)(a) of the Act, TO WIT:

- (a) Danny Lovatsis and Norman Lovatsis were officers and directors of Norman Daniels Fine Cars Ltd. from January 1994 until January 1997. While they were officers and directors of this company, they failed to comply with the Retail Sales Tax Act with respect to filing returns and remitting Retail Sales Tax when due. On January 23, 1997 Danny Lovatsis and Norman Lovatsis resigned from the company and were replaced by George Meanchos who did not make arrangements to remit the taxes owing as calculated by the Minister of Finance in the amount of \$700,000.00. The three parties have thereby failed to act with honesty integrity or financial responsibility

The past conduct of Danny Lovatsis and Norman Lovatsis affords reasonable grounds for belief that the Registrant's or Applicant's undertakings will not be carried out in accordance with law, and with integrity and honesty, TO WIT:

Norman Lovatsis purchased a 1990 Jeep Cherokee VIN 1J4FT78L9L L152791 with 261,000 km on the odometer. Danny Lovatsis sold the vehicle to a customer with a odometer reading of 131,207 km when he knew or ought to have known that the true distance traveled was 261,000 km.

THE LAW:

Section 3 of the Motor Vehicle Dealers Act (the 'Act'), states as follows,

(1) No person shall,

(a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or

(b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Motor Vehicle Dealers Act (the 'Act'), states as follows;

(1) An applicant is entitled to registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

(c) the applicant is a corporation and

(1) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to s. 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under s. 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 18 of the Retail Sales Tax Act states as follows:

(1) Where a vendor fails to make a return or a remittance as required under the Act, or if the returns are not substantiated by the vendor's records, the Minister may make an assessment of the tax collected by such vendor for which the vendor has not accounted, and such assessed amount shall thereupon be deemed to be tax collected by the vendor.

Section 43 of the Retail Sales Tax Act states as follows:

(1) Where a corporation has failed to collect tax or has collected tax and failed to remit the tax or has failed to pay any interest or penalty relating thereto, the directors of the corporation at the time the corporation was required to collect or remit the taxes or to pay the interest or penalty relating thereto, are jointly and severally liable, together with the corporation to pay such amounts.

.....

(3) A director of a corporation is not liable for a failure described under subsection (1) if the director exercised the degree of care diligence and skill to prevent the failure that a reasonable prudent person would have exercised in comparable circumstances.

(4) The Minister may assess any person for any amount payable by the person under this section and where the Minister sends a notice of assessment, the sections of this Act respecting assessments, objections and appeals apply with such modifications as the circumstances require.

(5) Any assessment under subsection (4) of any amount payable by a person who is a director of a corporation shall not be made more than two years after the person last ceased to be a director of the corporation.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Applicant heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

669607 Ontario Ltd. c.o.b. Carrera Fine Cars, 1998 C.R.A.T. decisions

In this matter the registrar based a proposal for the revocation of the dealer's registration on the grounds of the lack of financial responsibility where there was a failure by the Applicant to comply with the requirements of the Retail Sales Act. The Applicant owed an estimated \$109,743.60. The registrant did not file Retail Sales Tax returns for "a couple of years" and the Minister of finance had made an estimate of the tax owing. The Registrant admitted that he owed money for Retail Sales Tax but disputed the amount, although no objection was ever registered. He also testified that he had a partner who did the books during the period in question; however, the Tribunal rejected this evidence. The Tribunal found that although the company was now a wholesaler, this did not wipe out the responsibilities of the Registrant or its sole officer to make arrangements to pay. Further, the Tribunal found that the Registrant ignored its

obligations to meet these debts, and it was obliged to deal with financial obligations even where they considered it inconvenient or unfair. This inaction was found to go directly to the issue of honesty, integrity, and carrying on business in accordance with law. Also, his explanation was found to cast doubt on his ability to conduct his business with honesty and integrity. The Registrar was ordered to carry out the proposal.

Re-Herman motor Sales Inc. et al and Registrar of Motor Vehicle Dealers and Salesman 29 O.R. (2d) 431 Ontario High Court of Justice Divisional Court

This matter was an appeal to the High Court of Justice from a decision of the Commercial Registration Appeal Tribunal revoking the licence of the Applicants. The basis of the application was a number of wrongful acts referred to in a criminal charge of fraud. A plea of guilty was entered, and the Defendant was fined \$10,000.00 and ordered to pay restitution to vehicle owners in the amount of \$8,750.00 to compensate them for odometer tampering. The Court accepted that the proper test to predict the probable future actions of people required placing some reliance on their past actions. In this case the many instances of odometer tampering supported the Tribunal's decision, and it, was upheld. The court found that there was no doubt that the odometer readings form a basis for assessing the value of most vehicles, and that tampering with odometers was considered a serious matter.

Ontario (Registrar of Motor Vehicle Dealers and Salesman) v Clermont (1974) 0. J. No. 1028

In this case, the Registrar appealed a decision by the Commercial Registration Appeal Tribunal which ordered the registration of the respondent as a motor vehicle salesman subject to conditions. The respondent had been registered as a real estate agent. During his registration, he used the deposit from a home buyer when the deal was not completed. He gave a refund cheque to the customer and which was returned N.S.F. He then provided to further cheques which were honored. When he lost his employment and his registration as a real estate agent lapsed, he applied for registration as a motor vehicle salesman, but was refused by the Registrar. The Applicant appealed the decision, and the Tribunal ordered that he the registered subject to conditions. The Tribunal held that "past conduct" means a course of past conduct, and does not mean one isolated incident wherein the general public suffered no harm. Although the court upheld the decision of the Tribunal, at page. 3 of the judgment the court found that:

" the past conduct referred to in the statute made in certain circumstances consist of one isolated mistake if it is of such a nature and in circumstances that there are reasonable grounds for believe that the person applying to be registered would not carry on business in accordance with law and with integrity and honesty."

In reaching this decision, the Court found that the Tribunal had the opportunity of assessing the Applicant personally and was able to weigh the evidence of the character witnesses called by the Applicant.

Mohsen Golab and Registrar of Motor Vehicles Act (December 21, 1999) Ontario Court of Justice (Divisional Court)

In this matter, the *Brenner* case was interpreted. The court found that the *Brenner* decision dealt with the test which the Tribunal was to apply and not the matter of the onus of proof which remained on the Registrar to show reasonable grounds for a belief that the registrant would not do business honestly. In the Tribunal decision, alternative penalties were not mentioned. It was argued that they had been properly considered. The court found that the Tribunal was expert in administering the acts before it, is familiar with its own powers, and there was no basis for the court to intervene. This matter dealt with serious matters of odometer tampering and an "outright lie" on application for renewal. Taken together, the Court found that these two offenses were sufficient for a revocation of the registration.

David Jervais o/a Dave's Car and Truck Sales and Service 1999 C.R.A.T. decisions

Here the Applicant's registration lapsed in 1992 and was reinstated in 1994. On October 18, 1995, the Applicant pleaded guilty to 17 counts of possession of stolen property relating to motor vehicles and motor vehicle parts. He received a jail term on each count, to be served concurrently. In four months he was released on parole. On November 20, 1996, he reapplied for his registration which was due to expire on December 19, 1996. On his application form, he correctly answered that he had been convicted of a criminal offense although he did not provide information as to the number of counts or the particulars. He invested a significant amount of money to expand his business and was the sole support of his family. In 1998, when he applied for a further renewal of his registration he did not receive any notification of registration and continued to operate his business. On the issue of past conduct, the Tribunal found on page 14 that:

"conduct must be assessed in its totality in order to determine the reasonableness of the Registrar's grounds for a proposal. In a regulated industry, past conduct is intended to be the subject of ongoing scrutiny, and acts which might at one point in time be considered insufficient toward the proposal may subsequently be reassessed when considered in conjunction with other behavior."

The Tribunal found that a serious single criminal conviction can be enough for a reasonable belief that an Applicant will not carry on the business in accordance with law, honesty, and integrity.

An issue of delay was raised. The Tribunal accepted that the Applicant would reasonably believe that the Registrar had considered the issue of the criminal conviction and had chosen not to impose any consequences on him. The Tribunal found that the Applicant's conduct in the industry since his re-registration had been marked by honesty and integrity and compliance with the law. The Tribunal found that the Registrar had failed to consider the Registrant's most recent conduct which should have been a factor in determining his future behavior in the industry. The Registrar was directed to refrain from carrying out the proposal on the basis that there had been a failure to properly evaluate all of the past conduct.

ISSUES:

Was the Registrar in error in determining that the past conduct of Danny Lovatsis, Norman Lovatsis and George Meanchos was such that they will not carry on business

honestly, with integrity, and in accordance with the law either as salesmen or as the operating mind of the corporate Applicants?

WITNESS FOR THE REGISTRAR:

Evidence was called by the Registrar, and testimony was given by Philip Mascoll, Kathleen Young, Marilyn Blazevic, and Amanda LeeDempsey.

PHILIP MASCOLL

The Registrar's first witness Philip Mascoll testified that he purchased a 1990 Jeep Cherokee from 4 X 4 Headquarters Limited, and dealt with Danny Lovatsis who was the salesman. Originally, the witness was told that the vendor was unsure of the mileage on the vehicle. The initial Bill of Sale was signed, and a deposit of \$500 was made. On the Bill of Sale, the mileage was shown as unknown. After repairs were conducted, he was advised that the vehicle may have had more than 261,000 km on it when the dashboard was replaced. This was written on the Bill of Sale and initialed by both parties. (Exhibit 3, Tab 11). It was clear that he was given the opportunity to receive his deposit back and walk away from the deal once he was advised that the mileage could be in excess of 261,000 km. However, he completed the transaction and still has the vehicle. The Vendor purchase a warranty from Lubrico, for 12 months or 12,000 km whichever came first. (Exhibit 3, Tab 12) On this warranty, the odometer reading was shown as 135,200 km, and the distance traveled was shown as "N A".

KATHLENE YOUNG

The next witness for the Registrar was Kathleen Young who is an Appeal's Officer at the Tax Appeals Branch of the Ministry of Finance. She has a designation as a Certified General Account. Ms Young testified that Norman Daniels Fine Cars was a registrant with the Ministry of Finance, and was audited in 1996. Although she was not involved in the audit, she was given the file together with the auditor's notes to review. The auditor did not provide copies of any sales invoices, and the witness did not speak with the auditor. In these notes, she found that some invoices were not accounted for, and the auditor had tried to contact some of the customers to confirm the value of some sales. According to these notes, in 25 sales that the auditor sought to verify, there were 4 occasions when the vendor's records showed a lower sale price than the information provided by the customers. Unfortunately, in these notes there was no reference to clients' names or invoice numbers or anything else identifying the transactions. (Exhibit 4, Tab 8) One invoice was obtained by the witness from Mr. Hean Leang, which showed a sale price of \$6,800.00, and on the copy of the invoice from Norman Daniels Fine Cars the sale price shown was \$4,000.00 (Exhibit 4, Tab 9).

On June 16, 1999 the witness wrote a letter to David Malach a solicitor acting for Norman Daniels Fine Cars Limited (Exhibit 4, Tab 3) setting out her position regarding the arrears under the Retail Sales Tax Act. An objection had been filed by Norman Daniels Fine Cars Limited, and a Notice of Assessment dated November 7, 1996 had been served. In this letter, she explained that since certain invoices were unavailable, the auditor had determined the fair value of vehicles by referring to the current issue of the Canadian Red Book, thereby estimating the value of the vehicles and the tax owing on the transactions. She also referred to the Leang transaction in which the vendor's

and purchaser's records showed different sale prices. The witness stated that in the absence of corroborating documentary evidence, the assessment should not be changed, and advised the registrant's counsel Mr. Malach that the information provided by the registrant for the audit period was not sufficient. There was correspondence and meetings with Mr. Malach with copies of some invoices being provided by him. Finally on November 5, 1999, Mr. Malach notified the witness by fax, that his client Norman Daniels Fine Cars Limited had instructed him not to make any further representations to her as they did not feel that the Appeals Branch would change its view of the audit. On December 10, 1999, the witness sent a memorandum to the Assistant Deputy Minister, Tax Revenue Division (Exhibit 4, Tab 6) confirming her opinion that the revised assessment amount of \$385,862.00 should be upheld.

In cross-examination, Ms Young confirmed that there were no outstanding assessments for either Norman Lovatsis or Danny Lovatsis personally. The witness also agreed that according to her materials, the reason given for the loss of some invoices by Norman Lovatsis, Danny Lovatsis, and their accountant, was that the records were stolen. The records had been picked up from the accountant by Norman Lovatsis; left in an automobile outside of his home; the vehicle was stolen; and when the vehicle was later found, the records were missing. In her evidence, the witness tried to draw an inference of dishonesty against Norman Lovatsis by testifying that she had a police report showing that the loss of records was not reported to the police. Under cross-examination she could not produce a police report, and testified that she was simply in possession of a copy of a police officer's business card with no information other than his name, badge number, Division, and telephone number. There was no source of any kind given for her statement that the records were not reported stolen. She also agreed that the auditor did a search of the Ministry of Transportation records for transactions and based the values on the "Red Book" value. There was no explanation of how the Red Book value was determined.

Ms. Young testified that a Notice of Assessment was issued on November 7, 1996 in the amount of \$732,072.96 inclusive of penalty and interest against Norman Daniels Fine cars Ltd. (Exhibit 6). A Notice of Objection dated March 17, 1997 was filed by David Malach a solicitor representing Norman Daniels Fine Cars Ltd. (Exhibit 7) In this document, the taxpayer stated that all tax was collected and remitted as required for the period in question.

On December 17, 1997 a Statement of Account was issued by the Ministry of Finance reducing the assessment by \$27,531.41 to a total of \$549,922.76 (Exhibit 8) The witness testified that an explanatory letter was sent by Mr. Wallace of the Ministry of Finance on April 9, 1998 (Exhibit 9) explaining that he found the approach taken by the Retail Sales Tax Branch to be reasonable. In this letter, he refers to his initial review and the fact that initial source documents' were not available and that the approach taken by the Retail Sales Tax Branch of referring to the Red Book values for the transactions without proper source documents was reasonable.

Ms. Young testified that where there is a finding of neglect or carelessness, a penalty of about 25% can be added to the Retail Sales Tax as assessed, and there are also provisions for reassessment at any time if there is a finding of misrepresentation, fraud, or neglect. In cross-examination, she agreed that in her letter of June 16, 1999 to David Malach, the solicitor for Norman Daniels Fine Cars Ltd. no mention is made of calls to the customers or any allegations of fraud. (Exhibit 3, Tab 3) In that letter in the third paragraph on the second page, she advised the solicitor that:

"In the absence of corroborating documentary evidence such as proof of customer payments (e.g. bank deposits, cheque payments or visa payments) to support these vehicle sales, I am not in a position to conclude that your calculation of tax on these vehicle sales was correct. Adjustments can only be made to the assessment based upon each Sales invoice and proof of customer payments. Furthermore the sales information you provided for the audit period was not sufficient for my review since it was not supported by documentary evidence."

Ms. Young agreed that she expressed her opinion of the taxpayer's failure to use due care to ensure the safety of the records so that they could be produced for audit. There was also a request for information about the one transaction in August 1996 in which the invoice obtained from the customer showed a sale price of \$6,800.00 with sales tax of \$544.00, and an invoice provided by the taxpayer to the auditor showed a sale price of \$4,000.00 with sales tax of \$320.00. An explanation of this discrepancy was requested.

The witness explained that once the decision was made and sent to the Deputy Minister, the taxpayer could either take the matter to court or accept the decision. On October 7, 1999 the witness had a meeting with Mr. Malach in which there was further discussion about the loss of the records and the assertion by the witness that there was a police report showing that the records had never been reported as stolen. In cross-examination, the witness agreed that she did not receive a police report. The witness testified that after this meeting she sent a further letter on October 18, 1999 to Mr. Malach (Exhibit 4, Tab 5) requesting documentation for 11 transactions from August 1, 1996 to August 7, 1996. This letter referred to their not being any missing records mentioned in the police report, and invited Mr. Malach to provide a police report showing that records were reported missing.

In response, she received a letter dated November 25, 1999 from Mr. Malach on behalf of Norman Daniels Fine Cars Ltd. saying that he was instructed by the taxpayer not to make any further representations, and would therefore not be answering questions in her letter of October 18, 1999. The witness stated that she attempted to contact the customers for the 21 invoices provided by Mr. Malach; however, she could not vouch for the accuracy of what she was told, and she commented that people are usually not very cooperative.

MARILYN BLAZEVIC

The next witness for the Registrar was Ms. Blazevic who testified that she is a field collections officer for the Collections Branch of the Ministry of Finance. Her evidence was that the file for Norman Daniels Fine Cars Ltd. was an active file. The Ministry hoped to collect the tax from the directors under section 43 of the Retail Sales Tax Act on the basis that the directors did not show due diligence in carrying out their duties to collect the sales tax. She stated that the policy of the Collections Branch, and the statutory time limit, is to attempt to collect from directors up to 2 years after the individuals have ceased to be directors of the company. If the matter is outside the two-year limit, the file goes to the Special Collections Branch where it is kept as an active file in an attempt to collect the funds.

In cross-examination, Ms. Blazevic agreed that the Notice of Assessment had been against Norman Daniels Fine Cars Ltd.; a Notice of Objection had been filed claiming that all tax had been paid; a Credit Note had been given reducing the assessment; and a letter had gone from the Collections Branch (Exhibit 10) to the Ontario Motor Vehicle Industry Council requesting that a Proposal be issued against Norman Daniels Fine Cars Ltd. She was also aware that the Proposal was withdrawn due to the fact that the Notice of Objection had been filed. No Notice of Assessment had ever been filed against Norman Lovatsis or Daniel Lovatsis and a company audit had been done only for Norman Daniels Fine Cars Ltd.

BRENDA NEEDHAM

The parties agreed that the following evidence of this witness could be read into the record as follows:

"On January 5, 1999, Brenda Needham purchased a 1990 Jeep Cherokee as indicated at Exhibit 3, Tab # 9. As a result of apparent defects in the car, Mrs. Needham called the dealer, when she did not receive satisfaction; she contacted the Ontario Motor Vehicle Industry Council. OMVIC performed a MTO search that revealed that the vendor of the vehicle to the dealer was Cardinal Auto Sales through the Toronto Auto Auction, Exhibit 3, Tab 7. At the time of the sale to the dealer, the odometer disclosure was 261,000 Kms. As a result of a successful mediation with OMVIC, the dealer provided a full refund in exchange for the vehicle, Exhibit 3, Tab 10."

AMANDA LEEDEMPSEY

The next witness on behalf of the Registrar was Amanda LeeDempsey who is the Manager of Inspections for the Ontario Motor Vehicle Industry Council (OMVIC). She began her employment in 1997 as an inspector, became the lead inspector, and was promoted to the position of manager. She explained that the purpose of OMVIC is to enforce the Ontario Motor Vehicle Dealers Act which is a consumer protection statute dealing with the registration of dealers and salespersons, customer complaints and mediations, inspections of dealers premises and records, and investigations of breaches of the statute. Under section 5 of the Act, there is a requirement that business should be conducted with honesty, integrity, and financial responsibility and in accordance with the law. Each time there is an application for registration or renewal, there is an examination of the background of the Applicant, and in this case her investigation was triggered by the latest application. As a result, she began to look at the past conduct of both Danny and Norman Lovatsis. She did research and concluded that there was a lack of honesty, integrity, and financial responsibility so the Proposal was issued August 17, 1999.

The facts she relied upon for her decision related to the issue of the odometer reading for the 1990 GMC Jeep Cherokee, the altered document relating to the purchase of the 1988 GMC Jimmy by Mr. Leang, the Weiland transaction and the issue of the documents and unpaid Retail Sales Tax.

Ms. LeeDempsey's evidence concerning the odometer reading was that the vehicle was purchased at auction with 261,000 km on the disclosure information. When it was sold to Brenda Needham the invoice showed that the true mileage was unknown, and the odometer reading was crossed out. She found that the vehicle had been returned for a

refund after a mediation and the vehicle was later sold to Mr. Mascoll. On this invoice there was a notation which stated that the vehicle "could have more than 261,000 km". In her opinion the dealer knew that it had more than 261,000 km. The odometer reading was relevant to the price and should therefore have been on the bill of sale. In her opinion this was a misrepresentation of facts that showed a lack of integrity, and contravened the requirements in the regulations. In cross-examination, she agreed that the vehicle had been sold "as is" and that there was no indication that the odometer was functional. She agreed that if the odometer was not functional, it would also not give a true representation of the vehicle's mileage. If the odometer is replaced, the regulations require that the new one be turned forward to the same reading as the old one; however, she agreed that no one in the industry does that, and it is an accepted practice that a record is kept of the old reading. She did not know what the standard practice of a mechanic is for odometer replacement, but she was aware that in some cases a sticker is put on or under the dashboard. When she was shown the Inspection Findings report dated November 18 and December 22, 1997 (Exhibit 13) she agreed that the Applicants had been directed by the inspector that:

"all disclosures must be accurately and clearly indicated on bills of sale - especially "TRUE KILOMETERS UNKNOWN" "

She agreed that by writing "true mileage unknown" on the bills of sale the Applicants were complying with the direction from the inspector. She also agreed that the dealer could not know the actual mileage, but said it was better if the dealer put an indication on the bill of sale showing that the mileage could be more than the number on the original odometer.

She testified that there had been a Proposal (Exhibit 11) on September 9, 1997 against Norman Daniels Fine Cars Ltd. due to the problem of the sales tax arrears. However, this was withdrawn on the basis that an Objection had been filed, and it was expected that the matter would be determined at a hearing. When she contacted the Ministry of Finance, she found that a hearing had not been held and there was still an outstanding claim. In cross-examination she said that she was aware that the Applicants had reported the theft of some records. She agreed that there is nothing in the Motor Vehicle Dealers Act requiring the records to be actually kept on the premises as the intent of the Act was simply that there is free access to books and records. After reviewing the history of the assessment by the Ministry of Finance and the Objection, Ms. Lee Dempsey agreed that she had been contacted by the Ministry of Finance, Collections Branch requesting that a Proposal be issued, followed by a letter dated August 24, 1999 (Exhibit 14) to OMVIC requesting that a Proposal be issued to revoke the motor vehicle registration for Norman Lovatsis, Danny Lovatsis, George Lovatsis and George Meandros.

The witness testified that she found the altered invoice of the Leang transaction in which the dealer provided a copy showing a sales price of \$4,000.00, and the invoice provided by the customer showed a sale price of \$6,800.00. On this basis, she determined that there had been dishonesty, as the dealer had received money in trust for the payment of the sales tax, and had not remitted it as required. In cross-examination Ms. LeeDempsey testified that this invoice had been created to replace one which was lost and was not a case of one invoice being prepared by the vendor at a lower price, and another invoice being given to the customer.

STEPHEN JOHN WEILAND

The next witness for the registrar was Stephen John Weiland who purchased a vehicle from Norman Daniels Fine Cars Ltd. In 1992 he saw a 1988 Chevrolet Blazer 4 X 4 listed for sale at \$6,950.00 in the Auto Trader newspaper. After test driving the vehicle and having minor repairs done, he went on June 24, 1992 to finalize the deal. His evidence was that he signed the Bill of Sale in blank, gave the deposit and agreed to return Friday, June 26, 1992 to pay the balance and pickup the vehicle. The price agreed upon was \$6,200.00 plus tax for a total of \$7,100.00. He testified that he dealt with Norman Lovatsis who instructed him to bring a \$5,000.00 certified cheque, and \$2,100.00 in cash. These instructions were written by Mr. Lovatsis on his business card, and a copy of was produced as part of Exhibit 15(1). The witness produced copies of the documents, Exhibit 16(1)(2), showing that his father withdrew \$7,100.00 on June 24, 1992. He testified that he did not notice that the Bill of Sale was for a different amount until he provided it to counsel in preparation for a lawsuit involving mechanical deficiencies with the vehicle.

In cross-examination, it was suggested to him that he had a fixed amount of money he was willing to spend and there was negotiation about the original asking price of \$6,950.00. He agreed that there was negotiation, but he did not agree that he knew of any misrepresentation of the sales price on the Bill of Sale. He continued to assert that he had signed a blank Bill of Sale, left without a receipt, and did not look at the figures on the Bill of Sale until the litigation. He agreed that during the litigation he made no allegations of signing the bill of sale in blank or coming back two days later. Mr. Weiland also denied that Norman Lovatsis had told him that the only way to keep the price down was for the dealer to show a reduced price and save money on tax. He agreed that during the lawsuit a mechanic sent by Norman Lovatsis inspected the vehicle, and following that he settled for \$1,200.50 inclusive of costs even though the original claim was for \$7,600.00.

WITNESS FOR THE APPLICANTS:

Evidence was called on behalf of the Applicants, and testimony was given by Danny Lovatsis and Andreas Theori.

Danny Lovatsis testified that his 37 years of age, was born in Toronto and went to work in the car business in 1984 when he was registered as a salesman. He has no criminal record, has never been bankrupt, has served as a volunteer on an association within the industry, and resigned as a director of Norman Daniels Fine Cars Ltd. in January, 1997.

His evidence was that Norman Lovatsis did some sales work but was more involved with the administration of the Norman Daniels Fine Cars Ltd. including the book keeping. The witness was aware that the books and records including the monthly contracts were kept at the office and that the paperwork was dealt with by Norman Lovatsis. Older book keeping materials and records were kept at the office of the bookkeeper. Danny Lovatsis testified that he was aware that the auditor was coming back, and that arrangements were made to get the materials from the bookkeeper's office. The witness learned that some records were lost when Norman Lovatsis' car was stolen from his driveway, and was present when the auditor was given this information. He received the Assessment from the Retail Sales Tax Branch and turned the document over to Norman Lovatsis who hired a lawyer to deal with it on behalf of the company.

Norman Lovatsis had all dealings with a lawyer and gave any instructions or information to him. When they received legal advice they removed themselves as officers and directors from Norman Daniels Fine Cars Ltd. and moved to their father's company as salesmen. George Meanchos became the director for Norman Daniels Fine Cars Ltd. in order to keep the company alive until the final outcome of the Retail Sales Tax matter. On October 22, 1999 their father George Lovatsis died and Danny Lovatsis carried on business under the numbered company operating under the trade name until January 1999 when 4 X 4 Headquarters Ltd. was set up under his name and his salesman's licence was transferred. After this company was set up, 1196034 Ontario Ltd. was wound up and 1351849 Ontario Ltd. was set up by Norman Lovatsis. They intended that Norman and Danny Lovatsis would operate separate companies as Norman wished to work in the wholesale side of the business.

On the issue of the odometer reading for the 1990 Jeep Cherokee, the witness testified that when the vehicle was purchased at auction, the odometer read 261,000; however, as it was not working, he did not know the true mileage of the vehicle. He took the vehicle to the Cosburn Auto Center and authorized them to purchase and install a used dashboard. The reading on the odometer which was installed was 131,000 km, and he testified that it was not the practice in the industry to turn the replacement odometer forward to match the setting on the replaced unit. He also stated that he would have no way to know that the original reading was correct as he did not know if that was the original odometer for the vehicle. As a result, the vehicle was sold to Brenda Needham with a notation that the true distance traveled was unknown, which was sufficient according to the practice recommended by the inspector (Exhibit 13). Mrs. Needham was not satisfied with the vehicle, and after mediation the full purchase price was refunded despite fact she had driven the vehicle from mid January 1999 until April 1999. The vehicle was then sold by him to Mr. Mascoll who test drove it, and prior to the completion of the transaction was told that the actual mileage could be more than 261,000 km at the time the dashboard was replaced. This procedure was used because Norman Lovatsis advised him that OMVIC required disclosure of the original reading. Mr. Mascoll completed the transaction after he had been given this information, and was driving the vehicle. Mr. Mascoll was given a Warranty for one year with LUBICO, and the witness explained that the total distance traveled shown on the application form was "NA" and the reading of 135,200 km. on the actual odometer installed had to be used since there was a 12,000 km limit on the warranty. When he was asked about this in cross-examination, his answers were consistent with his examination in chief.

Mr. Danny Lovatsis testified that he did not create the duplicate invoice for the Leang transaction, and was not aware that Norman Lovatsis had given the lawyer that document. His evidence was that he did not send any documents to the lawyer. This was done by his brother who took care of the paperwork. In the future, he intended to continue as a director with 4 by 4 Headquarters Ltd. At present, he is the sole support of his family. He said that he does not know any other type of work.

In cross-examination, Mr. Lovatsis testified that the odometer reading can affect the price of a used vehicle, but stated that for an older vehicle, like they sell, the condition of the vehicle will affect the price more than the odometer reading. For newer vehicles that would not have been reconditioned, he agreed that the odometer reading would be a very important factor in determining the price. On the issue of profit margin, he pointed out that the difference between the price at auction and the sale price is not the profit,

as there are the costs of reconditioning, transportation and advertising before the vehicles are sold.

The witness was not aware if his duties as a director were explained to him and did not remember meeting with a lawyer. He was aware that the taxes had to be collected and remitted to the government. When he was asked why they agreed to a second audit with the same documents missing, he said that he did not think that they had a choice. In his opinion the figures used by the Ministry were based on speculation, and he disagreed with their accuracy. The auditor appeared to use the highest book value for the best model of the vehicle in each case rather than the actual model and based on the actual condition. In the original assessment, trade-ins were also not considered.

In cross-examination, he confirmed that he did not deal with Mr. Weiland. He had some recollection of the lawsuit although he had not heard of the \$7,100.00 figure until these proceedings.

ANDREAS THEORI

The next witness was Mr. Andreas Theori who testified that he is 48 years of age, and is a Canadian citizen. He is a class A mechanic, and operates a business known as Cosburn Auto Center which employs 4 licenced mechanics and 1 apprentice.

Mr. Theori testified that he knows the Applicants and has dealt with them since 1992. They have brought cars for repairs, safety certificates and inspections. During his dealings with them, they have paid their bills and he has found them to be honest. He testified that he went to Barrie, Ontario to inspect a 1988 Chevrolet Blazer although he was unsure of the exact year that he went. Although there was supposed to be a problem with the head gasket and holes in the car, he examined the vehicle and found that there were no problems with the compression, the radiator fluid, or holes in the floor or the tail pipe.

In January of 1999, he testified that Mrs. Needham came in with a 1990 Jeep Cherokee which had purchased at auction. Some of the gauges including the odometer were not working, so it was decided to change the dashboard. Norman Lovatsis made arrangements to purchase a used dashboard from a wrecker and the unit which was obtained had a reading of approximately 130,000, km whereas the existing odometer read approximately 260,000 km. Rather than rolling the odometer forward he stated that he put stickers showing the odometer reading behind the dashboard, and on the door post so that any mechanic would know the mileage. Following that, he serviced the vehicle so that it would meet the safety requirements. His recollection was that Norman Lovatsis had a credit at the wrecking yard for returned merchandise, and used it to pay for the dashboard so there was no paperwork involved. In cross-examination, he recalled that the labor cost for the dashboard was \$90.00, and stated that it was necessary to keep a record of the odometer reading as it is a very serious matter and against the law to tamper with an odometer. In the past he had sold used cars as part of his business, but was not doing so now.

FACTS FOUND PROVEN:

RETAIL SALES TAX

In the Notice of Proposal, the Registrar at paragraph 10 of the Particulars claims that Norman Daniels Fine Cars Ltd. is indebted in the amount of \$700,000 to the Ministry of Finance for unpaid Retail Sales Tax. The Tribunal finds that the present balance is \$385,862.00 plus any applicable interest that might have accumulated. This balance was provided to Ms Young by the Collections Branch after the figure in the Credit Note (Exhibit 8) December 15, 1997 of \$545,159.00 was further reduced to account for the trade-ins and wholesale transactions.

The Tribunal finds that Norman Lovatsis and Danny Lovatsis were officers of Norman Daniels Fine Cars Ltd. commencing in January 1994 then resigned as officers and directors in January 1997 on the advice of counsel. There had been an audit of Norman Daniels Fine Cars Ltd. during which certain documents relating to August 1996 were not produced by the taxpayer and were claimed to have been stolen. No evidence was produced by the Registrar to disapprove this. Ms Young of the Tax Appeals Branch in her evidence and correspondence claimed to be in possession of a police report showing that records were not reported as stolen but under cross-examination Ms Young was only able to produce a copy of a police officer's business card. The Ministry assessed the value of vehicles through the use of the Red Book, and the taxpayer hired a lawyer to provide advice. A Notice of Objection was filed claiming that all tax was duly paid. Attempts were made to produce documents and obtain documents from customers to reconstruct the relevant time period. In the course of this, the taxpayer submitted one recreated document with figures that did not match the Bill of Sale from the customer. The Tribunal finds that this document was produced by Norman Lovatsis.

There were notations in the auditor's notes indicating that when customers were contacted, four or five provided a higher sales price from that of the taxpayer, but there were no copies of documents or specifics. The Tribunal gives this evidence very little weight as there are not enough specifics for it to be found reliable without an explanation by the maker of the notes.

There was no evidence as to how the values from the Red Book was calculated, or whether the proper models and conditions of vehicles were known, and were taken into account. This assessment was changed once in a Credit Note, and again reduced when the trade-ins were taken into account. Finally, when the assessment was confirmed on the basis that the Applicants did not provide the required documentation, the Applicants instructed counsel not to take any further steps to oppose the assessment. By this time, more than two years had elapsed since Danny Lovatsis and Norman Lovatsis had been directors of Norman Daniels Fine Cars Ltd. No assessment had been made against either of them personally, and according to the statute the two-year period for the Ministry to make an assessment against them as directors had passed.

The file for Norman Daniels Fine Cars Ltd. had been passed to the Special Collections Branch of the Ministry of Revenue; however, nothing further was done other than a request for the Proposal that is presently before this Tribunal. Based on both the oral evidence of the witnesses and the documentation, the Tribunal finds that Norman Lovatsis was involved with matters of administration and some sales, whereas Danny Lovatsis was involved in sales, and the acquisition of vehicles by the dealership. Danny Lovatsis did not take an active role in the administration of the business. In matters

relating to the Retail Sales Tax, the Tribunal finds that he left his brother Norman Lovatsis to deal with the matter, and followed the advice of counsel.

ODOMETER ALLEGATIONS

The allegations of misleading statements regarding odometer readings relate to the transactions involving the 1990 Jeep Cherokee. The Tribunal finds that this evidence relates to the conduct of Danny Lovatsis.

It is found as a fact that the reading on the odometer at time the vehicle was sold at auction was 261,000 km. based on the disclosure information provided at the auction. On the sale to Mrs. Needham the mileage was shown as "unknown". When the sale to Mr. Moscoll was to be finalized the mileage was still shown as 'unknown', but Danny Lovatsis informed Mr. Moscoll that the true mileage could have been in excess of 261,000 km when the dashboard was replaced, and allowed him the opportunity to cancel the transaction and receive a refund of his deposit if he wished. This procedure followed the advice given by the inspector to the Applicants in the Inspection Findings Report (Exhibit 13). It is disturbing that on the vendor's copy of the invoice from the Toronto Auto Auctions the mileage is blacked out, but this does not change the fact that Mr. Mascoll was told of the odometer reading shown on the Invoice from the auction.

The Tribunal also accepts the evidence of Mr. Lovatsis, as corroborated by Mr. Theori that the odometer was not functioning when the vehicle was acquired, and that the entire dashboard was replaced with the standard industry procedure being followed.

In these circumstances, this is not a case of odometer tampering, and there was adequate disclosure made.

CREATION OF DOCUMENT

There was no dispute that David Malloch, the counsel for Norman Daniels Fine Cars Ltd., provided a copy of an invoice for the Leang transaction (Exhibit 4, Tab 9) in which the figures do not correspond with the copy provided by the purchaser. The total balance on the vendor's copy was \$4,400.00 and the total balance on the purchaser's copy was \$7,500.00 with the difference in Provincial Sales Tax being \$224.00. It was conceded, and it is found by the Tribunal that this document was created by Norman Lovatsis in answer to the request for documentation during the audits.

FALSE PRICE ON INVOICE

There was a false invoice created in 1992 for the sale of the 1988 Blazer to Mr. Weiland. The Tribunal finds based on the evidence of Mr. Weiland, the notations on the business card and the bank documents, that Norman Lovatsis received \$7,100.00 on the sale of the vehicle, and provided an invoice for \$4,500.00 plus federal and provincial tax for a total of \$5,175.00. Counsel conceded that the figures were not correct, and offered the explanation on behalf of Norman Lovatsis that it was, in fact, done to reduce the tax payable and bring the price down.

The Tribunal accepts this, and does not find Mr. Weiland's evidence credible when he testified that he did not look at the bill until the lawsuit, and or have knowledge of what was happening at the time. This was a dishonest act even if done with the consent or

acquiescence of the customer. The salesman on that sale was Norman Lovatsis, and there is no evidence that Danny Lovatsis participated in the transaction.

APPLICATION OF LAW TO FACTS:

The legal issues in this case are whether the Applicants will carry on business with integrity, honesty, in accordance with the law. In relation to these issues, the Tribunal finds the following facts to be relevant past conduct

With regard to the Retail Sales Tax, there is no admission by the Applicants that they had not paid their tax and they took issue with the manner in which the amounts were assessed although the method was provided for by statute. Once the two-year limit had passed, and Norman and Danny Lovatsis were no longer subject to being personally assessed for the tax liability as directors, they chose to discontinue their opposition to the assessment.

This raises an issue of what the relevant standard of conduct should be. Is it reasonable for a person in business to continue the costs and time to oppose a claim against the assets of an inactive company and for which one has now no apparent personal liability even though the government had only a two year period in which to file an assessment against the directors personally? To answer this in the affirmative would hold a taxpayer to the standard of paying a claim which he denies, and which is outside of the time limit for which he can be personally assessed.

The Tribunal finds that if the taxpayer personally relies on protection provided by a statutory limitation period, this is not conduct which is acting other than in accordance with the law. Norman Lovatsis and Danny Lovatsis are found for the purposes of this hearing not to be personally indebted to the Ministry of Finance for the Retail Sales Tax owed by Norman Daniels Fine Cars Ltd. The Tribunal finds that this does not lead to an conclusion of dishonesty, lack of integrity or lack of financial responsibility.

Their past conduct in their capacity as the directing minds of Norman Daniels Fine Cars Ltd. is that they retained counsel to deal with the matter, filed the objection and followed counsel's advice. Their claim that the documents were stolen appears suspiciously convenient, but there is no evidence to disprove it. The creation of the Leang document was an act of dishonesty by Norman Lovatsis but did not involve Danny Lovatsis. George Meanos is an officer of the company, and now that the assessment has been affirmed, he has made no effort to pay it.

The Tribunal can make no finding of dishonesty or lack of integrity or failure to carry on business in accordance with the law from the facts concerning the odometer reading of the 1990 Jeep Cherokee, as a reasonable explanation was given as set out in the findings of fact.

The Tribunal finds that there is a concern with honesty, integrity, and carrying on business in accordance to the law in relation to the sale to Mr. Weiland of the 1988 Chevrolet Blazer by Norman Lovatsis. On the facts as found, this was a clear case of creating a false invoice to show a reduced sale price and thereby reduce tax payable. Whatever the motive may have been, this was a dishonest act and was a failure on carry on business in accordance with the law and with integrity. Similarly, the creation of an invoice in the Leang transaction shows a lack of honesty. The figures were either

selected at random or based on some other false record. In either case, recreating a document and offering it as authentic is not consistent with honesty or integrity or carrying on business in accordance with the law. There was no evidence that Norman Lovatsis had any independent recollection of the transaction.

The Tribunal finds that George Meanchos was used simply to keep Norman Daniels Fine Cars Ltd. open. He took no active role in trying to settle the affairs of the company. He did not take part in these proceedings. There is no evidence except that he is a director of a company which now has a tax liability. There is, therefore, a serious problem concerning his financial responsibility.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business in accordance with honesty, integrity and in accordance with the law. The Tribunal finds that the Registrar was not in error in proposing to revoke the registration of Norman Lovatsis and George Meanchos and refusing the registration of 1351849 Ontario Ltd., which is a company set up by Norman Lovatsis. The Tribunal finds that the Registrar was in error in revoking the registration of Danny Lovatsis. If Norman Lovatsis is no longer involved with 4 X 4 Headquarters Ltd., the Tribunal finds that the Registrar would be in error to revoke the registration of that company.

DECISION:

Therefore, by virtue of the authority vested in it under s. 7(4) of the Motor Vehicle Dealers Act the Licence Appeal Tribunal directs the Registrar:

- 1) To carry out his Proposal to revoke the registration of Norman Lovatsis, George Meanchos, and 1196034 Ontario Ltd. o/a 4 X 4 Headquarters, and to refuse the registration of 1351849 Ontario Ltd., and
- 2) Not to carry out the Proposal against Danny Lovatsis and 4 X 4 Headquarters Ltd.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: June 29, 2000

SHARPE-DUDI

WILLIAM B. SHARPE

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

WILLIAM B. SHARPE, Applicant
unrepresented

DATE OF HEARING: June 27, 2000

DECISION RELEASED: June 29, 2000 Sault St. Marie

REASONS FOR DECISION

A hearing was held on June 27, 2000, at Sault St. Marie, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	William B. Sharpe (the "Applicant")
Motor Vehicle:	1989 Mazda 626, plate # 521 VAH (the "vehicle")
Date of Appeal:	June 13, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on June 27, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent filed certified copies of Ministry of Transportation documents, previously submitted as part of the Respondent's evidence.

Documents tendered were entered into evidence as exhibits with the consent of both parties.

There no other preliminary matters.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.
Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"LICENSE APPEAL TRIBUNAL
SUITE 1200
1 ST. CLAIR AVENUE WEST
TORONTO, ONTARIO
M4V 1K6

ATTENTION: HEARING CO-ORDINATOR

I am writing in regard to the impoundment of my automobile.

I was under the impression that Edward Sharpe's license suspension was up in February 2000.

The only correspondence that Edward had received from the Ministry of Transportation stated that he had ninety (90) day suspension. No further correspondence was ever received in regard to this matter.

I feel that my car was unjustly impounded

Sincerely,

WILLIAM BURTON SHARPE"

By letter dated June 11, the Applicant and legal owner of the vehicle, William Sharpe, informs the Ministry that he feels the "*car was unjustly impounded*". (Exhibit # 2)

Mr. Sharpe states that the "*...only correspondence that Edward received from Ministry ... stated that he had a ninety (90) day suspension*". (Exhibit # 2)

Mr. Sharpe further notes, at the bottom of his letter, to call attention to the fact that the "*...officer did not sign the Vehicle Impoundment form...*" (Exhibit # 2)

At the hearing, the Applicant testified that Edward Sharpe is his son. The Applicant knew his son's driver's licence had been suspended but his son showed him a temporary driver's licence sometime in March. The Applicant did not ask to see his son's driver's licence again, and he did not ask to see it on the occasion in question.

Mr. Edward Sharpe testified that he went to the Justice of the Peace to ask for time to pay his fines, and a temporary driver's licence was issued to him at the time. Mr. Sharpe affirmed he was not aware of the automatic one year suspension after the impaired conviction, nor did he remember signing the acknowledgement form. Mr. Sharpe remembers receiving a notification of the 90 days suspension but not the one year.

In closing, the Applicant reiterated his previous remarks and stated that he feels that he should not be punished for his son's mistakes.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jason Lebreton;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 8, 2023.

The Respondent further tendered in evidence:

Court Order signed by Edward Sharpe acknowledging that his licence would be suspended "*FOR A PERIOD OF One Year commencing on ...AUG 26, 1999*"

NOTICE OF SUSPENSION OF DRIVER'S LICENCE - 1999/08/27 - SHARPE, W. EDWARD - 90 DAYS

NOTICE OF SUSPENSION OF DRIVER'S LICENCE - 1999/09/07 - SHARPE, W. EDWARD - 1 YEAR

In closing, the Respondent cited and provided the Tribunal with previous Tribunal decisions which support the Ministry's position, more particularly: Gennaro Sisera - January 27, 2000; Evelyn Alma Lampey - February 17, 2000; Lairn T. Allin - May 13, 1999; Bhagavat Pandya - March 8, 2000

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the due diligence ground of appeal as provided in subsection 50.2(3)(c) of the Act.

By his own admission, the Applicant admitted that the one and only time he asked to see his son's driver's licence prior to allowing him to drive the car was sometime in March.

The Respondent contends that the Applicant did not exercise due diligence as he did not ask to see his son's driver's licence on the occasion in question.

The Respondent's argument was substantiated by the decision of the Tribunal (then known as the Licence Suspension Appeal Board) regarding Evelyn Alma Lampey - February 17, 2000, part of which states: "*seeing... driver's licence at some unspecified time in the past, does not constitute an active initiative on the part of the Appellant, and thus cannot be considered and act of due diligence on the part of the Appellant...*"

The Tribunal concurs. In order to exercise proper due diligence the owner of a motor vehicle must take an active role in inquiring about the status of the driver's licence of the prospect driver prior to allowing the car to be driven by the individual. Thus, the Tribunal is not satisfied that the Applicant's viewing his son's driver's licence two months prior to the incident, constitutes an act of due diligence as per Section 50.2(3)(c).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: *June 29, 2000*

PREHEARING

RUSSELL CECILE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE ONTARIO NEW
HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:
by teleconference

RONALD C. REAUME, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program,
YVES FRENETTE, Agent, representing Yves Frenette Construction
Ltd., Added Party

DATE OF
PRE-HEARING: June 29, 2000 *by teleconference*

ORDER

FOLLOWING attendances by teleconference on June 29, 2000 at a prehearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of Ronald C. Reaume, Counsel on behalf of Russell Cecile (the "Applicant"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Yves Frenette, Agent on behalf of Yves Frenette Construction Ltd. (the "Added Party");

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicant, the Program and the Added Party.
2. The hearing respecting this matter shall commence on October 3, 2000 at 9:30 a.m. and thereafter, if necessary, to continue at 9:30 a.m. on October 4, 5 and 6, 2000 at a venue in Windsor, Ontario to be advised to the parties by the Tribunal.
3. (i) All parties agree that item 2 of the Program's decision letter of December 23, 1999 has been settled in full by the Program agreeing to pay the Applicant the sum of \$190.00. which payment is to be made to the Applicant on the conclusion and finalization of all claims made by the Applicant in this matter.

(ii) All parties agree that item 3 of the Program's decision letter of December 23, 1999 has been settled in full by the Program agreeing to pay the Applicant the sum of \$150.00. which payment is to be made to the Applicant on the conclusion and finalization of all claims made by the Applicant in this matter.

- (iii) All parties agree that item 9 of the Program's decision letter of December 23, 1999 has been settled in full by the Program agreeing to pay the Applicant the sum of \$850.00. which payment is to be made to the Applicant on the conclusion and finalization of all claims made by the Applicant in this matter.
 - (iv) All parties agree that item 17 of the Program's decision letter of December 23, 1999 has been settled in full by the Program agreeing to pay the Applicant the sum of \$1,500.00. which payment is to be made to the Applicant on the conclusion and finalization of all claims made by the Applicant in this matter.
 - (v) All parties agree that item 21 of the Program's decision letter of December 23, 1999 has been settled in full by the Program agreeing to pay the Applicant the sum of \$150.00. which payment is to be made to the Applicant on the conclusion and finalization of all claims made by the Applicant in this matter.
 - (vi) All parties agree that the Applicant's claim for repainting of the basement stairway has been settled in full by the Program agreeing to pay the Applicant the sum of \$200.00. which payment is to be made to the Applicant on the conclusion and finalization of all claims made by the Applicant in this matter.
 - (vii) All parties agree that Applicant's claim relating to the Applicant's west end sump pump has been settled in full by the Program agreeing to pay the Applicant the sum of \$100.00. which payment is to be made to the Applicant on the conclusion and finalization of all claims made by the Applicant in this matter.
- 4. Other than the above mentioned items the parties were not able to resolve any items in dispute.
 - 5. On receipt of documentation given to them by the Program, the Applicant and the Added Party agree to review such documentation in relation to Applicant's claims 10, 13 and 16 in the Program's decision letter of December 23, 1999 and to advise the Program whether or not they will cash settle those claims and if so, in what amount they will cash settle.
 - 6. The Applicant's Counsel undertook, as soon as he is able, to furnish to the other parties an agreed statement of facts in relation to all unresolved claims.
 - 7. The Applicant's Counsel advised that no expert had at this stage been retained by the Applicant although it is anticipated Applicant will retain an expert to testify at the hearing of this matter. The Applicant's Counsel undertakes to furnish the other parties with a copy of such expert's report as soon as possible and to in any event comply with all disclosure requirements in terms of the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: June 29, 2000

0059/MED/00/008

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: June 20, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal, by way of an electronic hearing (teleconference), by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated May 5, 2000
- b) Exhibit #2 Letter from Consulting Psychiatrist #1 – received June 15, 2000

By the Respondent:

- a) Exhibit #3 Ministry of Transportation submissions – tabs 1 – 9
- received June 9, 2000

PRELIMINARY MATTERS:

The Respondent objected to the introduction of the letter from Psychiatrist #1 on the grounds that the Ministry was not provided with a copy of this letter prior to the hearing.

An itemized list of documents provided for the hearing was submitted to the Tribunal.

FACTS:

The Applicant is appealing the suspension of her driving privileges effective "99/05/30" as per Ministry of Transportation Driver's Abstract (Exhibit # 3 Tab 9).

The Applicant came to the attention of the Ministry as a result of an unsolicited letter, dated "8/3/99". Physician # 2, informs the Ministry that the Applicant suffers from *"Bipolar disorder... lacks insight and judgment and is therefore not fit until she receives treatment ...concerned because she has indicated ...that she will not comply with ...recommendation that she not drive"*. (Exhibit # 3 Tab 1)

Physician # 3, from the Grand River Hospital, in Kitchener, writes to the Ministry on October 18, 1999. Physician # 3 details the Applicant's history and current condition *"...suffers from chronic paranoid schizophrenia ...became quite psychotic and had to be admitted to London Psychiatric Hospital ...discharged on the recommendation that she continue the Fluanxol injection 100 mgs per month ...I have seen her on a monthly basis since May. She is well stabilized on this medication and she is doing reasonably well..."* (Exhibit # 3 Tab 3)

In conclusion, Physician # 3 summarizes that *"...she is very well-controlled now with the Fluanxol injection. She is quite stable. Her sensorium is clear and she is quite lucid... there is no confusion. There is no evidence of psychosis; She has very good insight and judgment. She is quite capable of driving a vehicle again..."* (Exhibit # 3 Tab 3)

Attached to Physician # 3's letter is a report from the London Psychiatric Hospital signed by Physician # 4, Resident in Psychiatry for Physician # 5, and by Physician # 5, Psychiatrist. This report apparently dated "98 08 14" and "98 09 08" provides information on the incident that led the Applicant to be re-admitted, at this time, as well as on her condition during her admission and medication prescribed. (Exhibit # 3 Tab 3 A)

Also, attached to Physician # 3's report is an admission report detailing a prior admission to London Psychiatric Hospital on July 13 1982. This report is signed by Physician # 6 who diagnosis the Applicant as suffering from *"Chronic paranoid schizophrenia"*. (Exhibit # 3 Tab 3 B)

A Discharge Summary from the London Psychiatric Hospital, dated April 6, 1983, signed by Physician # 6, conveys that the Applicant was able to accept that her husband *"...was not desirous of maintaining the relationship ...children ...have been made Crown wards ...the Applicant would be best placed in H.S.C. placement ...arrangements were made for her to be admitted to Crestwood program ...placing her affairs voluntarily under the Public Trustee."* (Exhibit # 3 Tab 3 B)

In a letter, dated August 12, 1999, Physician # 7, of the department of Clinical Information & Records Services. London/St. Thomas Psychiatric Hospital, informs Physician # 3 of the Applicant's *"...dates of hospitalization ...February 17, 1981 - January 8, 1982 July 13, 1982 - April 6, 1983 August 11, 1998 - January 22, 1999 May 3, 1999 - Presently on Leave of Absence."* (Exhibit # 3 Tab 3 D)

MEDICAL ADVISORY COMMITTEE CASE STUDY, dated December 15, 1999, confirms the suspension on the grounds that it is *"too early to assess..."* A recommendation is made *"...1 year period free from symptoms, compliance with treatment and medication"*. (Exhibit # 3 Tab 5)

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS, dated *"March 1, 2000"*, completed by Margaret Braun, notes that the Applicant *"suffered a mental breakdown in 1978..."* and details the Applicant's history as explained by the Applicant. The Applicant states that she was *"...admitted to London Hospital in May 1999 and her relatives took her to K-W Hospital in January 2000..."* (Exhibit # 3 Tab 7)

Letter from Psychiatrist # 1, M.B. F.R.C.P. (c) consulting Psychiatrist with Hazelglen Outreach Mental Health Service, dated June 9, 2000, confirms that the Applicant *"...was most recently discharged from hospital on March 3, 2000 and since then has complied with treatment including depo antipsychotic medication. She is not showing any active signs of her illness and mental state appears to be quite stable. Her medication should not interfere with her ability to drive safely"* (Exhibit # 2).

At the hearing, the Applicant denied the diagnosis of paranoid schizophrenia. The Applicant contends that she has been misdiagnosed all these years and that her only problem is a *"mood disorder"*. She blames her husband for her misfortunes because he *"molested the children"*.

The Applicant now feels that she is better able to cope as her medication, which was a problem before, has now been changed.

The Applicant testified that she was hospitalized from the end of January until March 3, 2000.

The Respondent reiterated the contents of the information contained in the written material provided for the hearing and filed as Exhibit # 3 Tabs 1 through 9.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

The Notice of Appeal prescribed under the Act, does not state the effective date of suspension. Given the extenuating circumstances surrounding this matter, the Tribunal has used, for the record, the date shown on the Ministry of Transportation Driver's Record.

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "*any...sufficient reason...*". The Registrar originally suspended the Applicant's driver's licence after receiving an unsolicited letter dated "8/3/99" from Physician # 2. Physician # 2 informs the Ministry that the Applicant is afflicted with a "*Bipolar disorder... lacks insight and judgment...*". (Exhibit # 3 Tab 1)

Regulation 390/94, Section 14 (a) is clear in that:

"An applicant for a holder of a driver's licence must not,

- a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely..."*

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation in suspending the Applicant's driving privileges.

At issue is the mental competency of the Applicant. It appears, as is common in such conditions, that the Applicant is not cognizant of her affliction. The Tribunal substantiates this conclusion, by noting the Applicant's denial that she suffers from a mental debility, and her accusation of others as responsible for her predicament. The Tribunal also notes to the fact that the Applicant denies the facts surrounding her hospitalizations.

Over the past twenty years, the Applicant has had several lengthy hospitalizations. It seemed that there was a rather stable period between April 6, 1983 and August 11, 1998. Nonetheless, there was apparent relapse and at least three further hospitalizations ensued. (Exhibit # 3 Tab 3 D)

Physician # 3 concludes in his letter, dated October 18, 1999, that the Applicant *"...is very well-controlled ...quite stable ...sensorium is clear ...quite lucid... there is no confusion ...no evidence of psychosis ...good insight and judgment... capable of driving a vehicle again..."* is superseded by the fact that the Applicant was since hospitalized for a period of approximately three months. (Exhibit # 3 Tab 3)

The original medical findings, by all physicians involved, are indisputable. As early as July 13 1982, Physician # 6, of the London Psychiatric Hospital diagnosed the Applicant as suffering from "Chronic paranoid schizophrenia". (Exhibit # 3 Tab 3 B). Physician # 3 corroborates this assessment of October 18, 1999. (Exhibit # 3 Tab 3)

Given the Applicant's recent release from hospital, it would be premature to presume that her condition has stabilized. There is ample evidence in the past of periods of remission followed by a relapse. (Exhibit # 3 Tab 3 D)

In weighing the evidence presented, the Tribunal is satisfied that the Applicant does not meet the criteria described in Regulation 340/94 section 14(a) of the HTA. Thus the Tribunal concurs that the Applicant's driver's licence remain under suspension.

DECISION:

Upon the application by the Applicant to appeal the decision dated May 30, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Roy Melvin, M.D.
Member

RELEASED: June 28, 2000

0082/ADLS/00/010

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: SANDRA QUANDRINI
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant

DATE OF
HEARING: June 27, 2000 Sault Ste. Marie

DECISION AND ORDER

A hearing was held on June 27, 2000, at Sault Ste. Marie, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL SETS ASIDE the suspension dated April 12, 2000 imposed by the Registrar pursuant to Section 48.3 HTA.

THE TRIBUNAL ORDERS that the Applicant's driver's licence be reinstated subject to any other suspension under this Act pursuant to Section 50.1(5).

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

RELEASED: June 28, 2000

0082/ADLS/00/010

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: SANDRA QUADRNI
Representative for the Registrar of Motor Vehicles

Applicant

Solicitor for Applicant

DATE OF
HEARING: June 27, 2000

DECISION
RELEASED: June 28, 2000 Sault Ste. Marie

REASONS FOR DECISION

A hearing was held on June 27, 2000, at Sault Ste. Marie, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on June 28, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant by way of a Notice of Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990 as amended,

chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated May 16, 2000, and was received by the Tribunal on May 25, 2000, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant's driver's licence was suspended on "April 12 2000" as per Notice of Appeal (Exhibit # 1).

The Respondent presented certified copies of documents previously submitted. The Respondent also introduced the Applicant's driver's record. The driver's record, which accompanied the submissions, was erroneously filed.

The Applicant's solicitor objected to all the documentation filed by the Respondent being entered as an exhibit. The Applicant's solicitor quoted the wording of the Respondent's submission which conveys that "*...the following documents that the Registrar may use at the hearing...*" The Applicant's solicitor's complaint is that these documents got into the file and in front of the Tribunal, before he had an opportunity to raise his objections. Immediately upon receipt of the documents, the Applicant's solicitor registered his objection with the Ministry. The Applicant's solicitor contends that nowhere in the Rules of Procedures is it stated that the Registrar must file the documents with the Tribunal.

As far as the report from Dr. Mate, the Applicant's solicitor suggests that if the report was to be considered expert evidence, then he would require the Doctor to be present for cross-examination. Further, the Applicant's solicitor maintains that Dr. Mate "*proffers opinions beyond the narrow issue before the Tribunal...*" and should therefore be excluded.

With respect to the introduction of the Applicant's driver's record as evidence, the Applicant's solicitor argued that this being a hearing on medical grounds, he fails to see the relevance of the driver's record. This evidence is highly prejudicial and "*...has no probative value to the issue before the Tribunal...*" the Applicant's solicitor alleges that it is the Ministry's "*...expectation to sway the Tribunal...*" by showing the Members possible drinking convictions.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal – dated May 16, 2000
- b) Exhibit # 2 Applicant's submissions – received May 25, 2000

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation submissions – 18 pages
- received June 22, 2000
- b) Exhibit # 4 Ministry of Transportation's reply to the Applicant's solicitor
- received June 23, 2000
- c) Exhibit # 5 Driver's Record of the Applicant – received June 27, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.
- (3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Notice of Appeal prepared by the Applicant's family physician for "*at least 10 years,*" details and diagnosis the Applicant's present condition as: "*Patient seen April 12/00 complaining of difficulty breathing and chest discomfort (right side pleuritic pain if he took a deep breath). He was coughing green/yellow sputum. Physical examination revealed a bruise on the right axilla/posterior aspect of his ribs; he had tenderness palpating the area. (Air entry bilateral) Past history of? asthma and smoking. He was given the antibiotic ...refill for his asthma; ...Diagnosis: 1) Bruised R chest wall; 2) Bronchitis; 3) ?asthma (history of)*". (Exhibit # 1)

In Schedule "A", the Applicant submitted the following to the Tribunal:

- Notice of Suspension
- Suspension Reminder Notice
- Crown Screening Form advising that the charge of 254(5) to be withdrawn on first appearance date
- Copy of front and back of information number 998-1267 with the endorsement of Mr. Justice Cohen
- Transcript of proceedings before Mr. Justice Cohen in the Ontario Court of Justice - Criminal on May 15, 2000
- Medical letter of the Applicant's family physician

The transcript of proceedings before Mr. Justice Cohen registers the record was endorsed as "*withdrawn*".

On May 11, 2000, the Applicant's family physician provided a letter re-iterating the comments in the Notice of Appeal. (Exhibit # 1)

The Respondent provided the following documents for the hearing:

- Notice to Registrar.
- Driving Record of the Applicant.
- Vehicle Search as of April 12, 2000
- Medical report of Dr. Eva Mate.
- Driver's record for one R. R. Y. was adduced in error. (Exhibit # 3)

In a letter dated June 9, 2000, Dr. Eva S. Mate, FRCP (C) a consultant in respiratory medicine with St. Michael's Hospital, in a letter dated March 1, 1999, qualifies that she has been in practice since 1982, and that she has *"...extensive experience in the management of chronic respiratory illness such as obstructive lung disease and asthma."* Dr. Mate goes on to describe her qualifications: *"...lengthy experience with performance and interpretation of pulmonary function tests ...Assistant Professor at the University of Toronto ...know the background evaluation of instrumentation such as Intoxilyzer 5000 cc and also Alcotest ...aware of breath sampling criteria required to provide acceptable information using the above instrumentation"*.

Dr. Mate interprets the data made available by the Ministry and concludes that the Applicant *"...indeed has chest wall pain ...simultaneously he presented increased cough and purulent sputum which is in keeping with... bronchitis... physician failed to provide nature of his illness as well as the severity ...even if the driver has complained of chest wall pain, this did not prevent him from providing a breath sample..."* (Exhibit # 3)

At the hearing, the Applicant testified that he had been ill for approximately one week before seeing his physician on April 12, 2000. After spending several hours undergoing a respiratory examination, he was released with a prescription for an antibiotic and two types of inhalers.

After his medical visit, the Applicant went to visit a friend, but begun to feel worse and decided to go home in order to go to bed. After a short while on the road, the Applicant pulled over to the side of the road in order to use his medication. At this time, he was approached by the officer and demanded a breath sample.

The Applicant advised the officer that he was not feeling well and was allowed to take his medication. The Applicant provided a roadside breath sample and tested positive.

The Applicant was subsequently taken to the station and once again demanded a breath sample, which in his opinion he tried to provide but was unable to do so, due his illness. The Applicant stated that although he had taken the medication, he was getting worse on the way to the station.

In cross-examination, the Applicant admitted that he did not ask for medical assistance, and he did not seek medical attention immediately after the incident.

The Respondent called PC Officer # 1, OPP Badge # (number), as a witness. PC Officer # 1 has been a police officer for eight years.

During examination - in chief, PC Officer # 1 testified that the Applicant was searching for his pills and appeared to have "... *trouble breathing...*" PC Officer # 1 called for back up as he felt this would turn into a medical incident. PC Officer # 1 affirmed that he observed the Applicant take a pill and use the "*puffer*" and that he recalls being told of the Applicant's medical problems.

PC Officer # 1 demanded a roadside Breathalyzer test which the Applicant was able to provide and the result was positive.

The Respondent also called as a witness, PC Officer # 2, OPP Badge # (number). PC Officer # 2 is a qualified breathalyzer technician. PC Officer # 2 testified that the Applicant informed him he has several medical problems and was on medication.

PC Officer # 2 further testified that the Applicant was given a total of eleven opportunities to provide a breath sample but "...*failed to provide continuous steady breath.... he was blowing and stopping , blowing and stopping...*"

PC Officer # 2 noted that the Applicant sounded incoherent at the time, but confirms that this was probably due to the Applicant's accent. As to the coordination and balance tests, the Applicant failed those as well. However, PC Officer # 2 admitted that this could have been because the Applicant uses a cane and walks with a slight sway.

In closing, Officer # 2 points out that the Applicant was driving appropriately, that he signaled and cautiously pulled to the side of the road, as soon as he started to feel ill. It is a fact that the Applicant has a history of medical problems, not only respiratory, but also back pain, and colon cancer, for which he takes a "...*myriad of medications...*" PC Officer # 1, an officer with eight years experience, noted the Applicant's medical distress.

The Applicant's solicitor contends that the medical issue does not have to be one that requires emergency treatment. The issue is, does the Applicant have a medical condition that prevents him from providing a breath sample. The Applicant's inability to sustain his breath long enough to provide a breath sample is consistent with the officer's observations, the Applicant's condition, and the report from the Applicant's family physician from that same day.

In closing, the Respondent reviews the report of the Applicant's family physician. The Applicant claims to be suffering from a lung infection and fluid in the lungs, yet all that the Applicant's family physician's report says is "*bronchitis and history of asthma*". The Respondent notes that the Applicant testified that he spent four hours doing "*pulmonary tests*" yet no results are available. There is nothing in the Applicant's family physician's report that offers concrete evidence that the Applicant could not provide a breath sample on the day in question.

The Respondent contends that at no time during his ride to the station nor at the station did the Applicant request to use *"...the puffers that are supposed to help him breathe..."* For this reason, the Respondent questions his condition at the time.

The Respondent submits that his failure to provide a breath sample at the station was due to the fact that he failed the roadside test.

The documents submitted by the Respondent were submitted pursuant to the Licence Appeal Tribunal's Rules of Practice, Section 6.5 (1) (a) (b) and (2) (b) which states:

"(1) A party to the hearing shall

(a) disclose to all other parties the existence of every document and thing that the party will refer to or tender as evidence at the hearing and shall deliver a copy of such documents to the other parties, and

(b) disclose evidence and make available for inspection by every other party all things, other than documents, that the party will refer to or tender as evidence, within the limits for disclosure set out in rule 6.5(2)"

Dr. Mate's report is not being entered as an expert report, but rather as a second opinion. The Respondent quoted Dr. Mate by reading from her report: *"...the physician failed to provide objective information consistent with in spirometry or pulmonary function data verifying the nature of the his illness as well the severity. The diagnosis of asthmas-chronic obstructive lung diseases could coexist in approximately 10% of the cases and in this situation it is unclear...depending on which of these diseases prevails is the expected response from the use of an inhaled bronchodilator"*. Despite the claims by the Applicant's physician that he suffers from only bronchitis and asthma, there is no substantial evidence that these conditions could prevent him from providing a proper breath sample.

By way of replying, the Applicant's solicitor suggests that for a report to be introduced it must meet the rules of evidence. Dr. Mate's report is not an expert's report as allowed under 6.4 and does not meet the definition of "document" in 1.1 : *"...includes a sound recording, videotape, film, photograph, chart, graph, map, plan..."*, therefore should not be allowed.

Nonetheless, the Applicant's solicitor made several objections to the contents of Dr. Mate's report, as being a severely critical of the Applicant's family physician and of formulating an opinion based on information she complains she does not have. The Applicant's solicitor notes the familiarity between Dr. Mate and the Respondent by Dr. Mate's use of the phrase: *"as you know..."*. Dr. Mate speaks about the *"majority of cases"* not all cases and does not provide empirical data to support her conclusion.

The Applicant's solicitor also found Dr. Mate's statement concerning the Applicant's poor judgment in driving after taking morphine as irrelevant to issue before the Tribunal.

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for the decision, the Tribunal must rule on the objection raised by the Applicant's solicitor at the commencement of the hearing. At the time, the Tribunal noted the objections but reserved its decision.

The Respondent followed the disclosure proceedings as per article 6.5 of the Licence Appeal Tribunal's Rules of Practice. The Tribunal understands that it might appear unfamiliar, to an experienced solicitor, that the Members of a Tribunal would be privy to evidence prior to its admission as an exhibit. Nonetheless, the rules of a Quasi-Judicial Tribunal are, by way of practice, more informal than those in a Court of law.

The Applicant's driver's record is inadmissible as it was filed at the hearing and not within the time prescribed by the applicable regulation.

Dr. Mate's report is admissible, as it forms part of the Ministry's package of documents filed according to the Tribunal's rules of procedure. The Applicant's solicitor strongly stated his concern that he had no opportunity to cross-examine Dr. Mate. The Tribunal was questioned as to the weight that this report would receive given the several challenges facing it. The Tribunal considered the Applicant's solicitor's evaluation of the report and must agree that it is highly prejudicial evidence towards the Applicant. If in fact, Dr. Mate's report is intended as a second opinion to rebut the Applicant's physician, then only medical information should be provided to Dr. Mate. The Tribunal queries the merit and purpose of providing Dr. Mate with details of the incident. Dr. Mate's report will be awarded the minimal weight it deserves.

Further, the Tribunal is aware, from experience in these matters, that it is possible for certain medications, Ventolin, in particular, to affect the breath sample. A fifteen minute period must elapse, between the Ventolin inhalation and the breath test. Thus, the results of the first breathalyzer test, although a non-issue, are considered by this Tribunal as an invalid basis for drawing any conclusions as to this matter.

The issues are, how does the medical condition of the Applicant relate to Section 50.1 (2) (b), and did his medical condition cause him to fail or not comply with the breath demand? Pursuant to Section 13 of Regulation 574 (Amended), the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Respondent suggests that the Applicant could not have been having difficulty breathing as he did not use his inhaler either on the way to the station or at the station. PC Officer # 1 observed the Applicant take his medication when he was stopped at the roadside. It is a well known fact that most medications must be taken a minimum of four hours apart. It would not have been possible for the Applicant to administer a second dose during his ride to the station or while there without the possibility of overdosing.

The Applicant contends that he was not able to provide a breath sample due to his medical condition. This statement is substantiated by PC Officer # 1's initial assessment of the situation after he approached the Applicant's vehicle. PC Officer # 1's impression was that this was a medical emergency. His experienced reaction was to call for back up.

The medical evidence provided for the hearing by the Applicant's physician was reviewed. The Tribunal accepts the diagnosis of April 12, 2000, the day of the incident: *"...difficulty breathing and chest discomfort ...coughing green/yellow sputum ...given ...antibiotic ...refill for his asthma; ...Diagnosis: 1) Bruised R chest wall; 2) Bronchitis; 3) ?asthma (history of)".* (Exhibit # 1)

The Tribunal is satisfied that the Applicant was suffering from a medical condition at the time of the incident which precluded him from providing an adequate breath sample. This conclusion is consistent with the ruling by the Provincial Court decision of Judge Cohen who endorsed the charges against the Applicant, "*withdrawn*". (Exhibit # 1)

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of Section 50.1 (2) (b), in that he was able to demonstrate that he suffered from a medical condition which prevented him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated April 12, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the Highway Traffic Act ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders the suspension set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: July 5, 2000

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to Section
47(1) of the Highway Traffic Act;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Friday,
June 30, 2000 at the Tribunal;

AND WHEREAS a letter dated June 27, 2000 was filed by the Applicant's counsel
requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal shall be heard at 1:30 p.m. on Friday, July 7, 2000 at the Tribunal's
Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: June 29, 2000

1405093 ONTARIO INC. o/a PEMBROKE SUZUKI

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
1405093 ONTARIO INC. O/A PEMBROKE SUZUKI

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 23rd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1405093 ONTARIO INC. O/A PEMBROKE SUZUKI

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1405093 Ontario Inc. o/a Pembroke Suzuki, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 1st, 2000

TO: The Registrar
Motor Vehicle Dealer and Salespersons Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: 1405093 Ontario Inc.
O/A Pembroke Suzuki
846 Pembroke Street East
Pembroke, ON K8A 3M2

RE: 1405093 Ontario Inc. O/A Pembroke Suzuki

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, 1405093 Ontario Inc. O/A Pembroke Suzuki (hereinafter referred to as "the Dealer") hereby consent to the following terms and conditions to its registration as a motor vehicle dealer:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions;

1. The Dealer agrees to comply with the Retail Sales Tax Act with respect to the collection of tax and remittance when due.
2. The Dealer will not provide false or misleading information on any document or statement provided to a representative of the Ontario Motor Vehicle Industry Council, either verbally or in writing.
3. The Dealer acknowledges that its registration as a motor vehicle dealer will be revoked if it, its officers, directors or employees, breach any of the terms and conditions set out herein or if the circumstances of the convictions of David Simmonds or Richard Voskamp vary from the circumstances disclosed to the Registrar.
4. The Dealer hereby consents to an order of the License Appeal Tribunal, which may include the Terms and Conditions set out herein.
5. The Dealer hereby withdraws its appeal to the License Appeal Tribunal.
6. The Dealer hereby acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

EVANS, MICHAEL ALLEN o/a M & G AUTO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MICHAEL ALLEN EVANS O/A M & G AUTO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 8th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MICHAEL ALLEN EVANS O/A M & G AUTO

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Michael Allen Evans o/a M & G Auto, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: June 21st, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Michael Allen Evans
O/a M & G Auto
236 Main Street
King Kirkland ON P0K 1K0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Michael Allen Evans O/a M & G Auto (hereafter the "Dealer") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. Michael Evans will give full disclosure on all future applications submitted to the Registrar.
2. Michael Evans agrees, if he is charged in the future, under any law, to immediately notify the Registrar, in writing of the charges against him.
3. Michael Evans agrees, if he is convicted in the future, of an industry specific offence, his registration as a motor vehicle dealer will automatically be revoked.
4. The Dealer acknowledges and understands that he will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
5. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
6. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to store his books and records at the registered premise approved by the Registrar.

7. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify his registered name and the address of the location approved by the Registrar.
8. The Dealer agrees not to invite the public to deal at a place other than his approved location.
9. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in employment location in the form required by the Registrar.
10. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are
11. registered as a dealer under the Motor Vehicle Dealers Act.
11. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
12. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
13. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
14. The Dealer agrees that he is under a positive obligation to disclose, in writing, all material facts about the vehicles he sells to his customers. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
15. The Dealer acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
16. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke his registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.

17. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke, and his registration will be revoked.
18. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
19. The Dealer hereby withdraws his appeal to the Licence Appeal Tribunal.
20. The Dealer acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out herein.

Signed in the City of King Kirkland, this day of June 2000.

(Signature) Michael Evans o/a M&G Auto

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

KELSEY TRAIL TRUCKING LTD.

KELSEY-TRAIL TRUCKING LTD.

IN THE MATTER OF an Appeal by Kelsey-Trail Trucking Ltd.
dated August 19, 1999 for a hearing before the Licence Suspension
Appeal Board (which as of April 1, 2000 is known as the Licence
Appeal Tribunal) pursuant to Section 50(1) of the Highway Traffic Act
appealing the Suspension Order of the Deputy Registrar August 18,
1999.;

AND IN THE MATTER of the Highway Traffic Act R.S.O. 1990,
Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator
Registration CVOR 091-584-806 issued to Kelsey-Trail Trucking Ltd.;

AND IN THE MATTER of the plate portion of permits issued to
Kelsey-Trail Trucking Ltd.;

AND IN THE MATTER of the Commercial Vehicle Operating Record
of Kelsey-Trail Trucking Ltd.;

AND IN THE MATTER of outstanding fines.

BETWEEN

KELSEY-TRAIL TRUCKING LTD.

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TO APPEAL A SUSPENSION AND SEIZURE ORDER

TRIBUNAL: Lorraine Bortolussi, Presiding Member
Alan Holbrook, Member
Clarke Wallace, Member

APPEARANCES: Eileen Clunie and Cindy Evans
Representing the Applicant

Murray Forbes, Counsel
Margaret Mooney and William Hearle,
Representing the Respondent

DATES OF HEARING: Feb 28, and 29, 2000

GOSSARY OF TERMS:

CMV	Commercial Motor Vehicle
CVIR:	Commercial Vehicle Inspection Report
CVOR:	Commercial Vehicle Operator's Registration
HTA:	Highway Traffic Act, R.S.O. 1990, Chap. H.8 (as amended)
MTO:	Ministry of Transportation, Ontario
SPPA:	Statutory Powers and Procedures Act, R.S.O. 1990, Chap. S.22 (as amended)
Tribunal:	Licence Appeal Tribunal
Registrar:	Registrar of Motor Vehicles

LIST OF EVIDENCE:

1. Exhibit # 1 Notice Of Appeal - Dated August 26, 1999
2. Cheque For \$25.00 - Received August 27, 1999
3. Copy Of Suspension Order - Dated August 18, 1999 - Effective August 30, 1999
4. Ministry Of Transportation Submissions - Tabs 1-25
5. Applicant's Submissions - Tabs 1-10
6. Additional Submissions From The Ministry Of Transportation - Received February 23, 2000
7. Pre-trial Order
8. Hand Written summary & CVOR Analysis - Dated February 10, 2000
9. Tractor List - Dated February 25, 2000
10. Trailer Information Records - Dated February 25, 2000
11. Sanction Analysis With CVOR - Dated February 17, 2000 Saskatchewan Audit Profile And Safety Net November 15, 1999 and CVIR Reports

BACKGROUND:

This is an appeal to the Licence Suspension Appeal Board (known after April 1, 2000 as the Licence Appeal Tribunal) by Kelsey-Trail Trucking Ltd. (the "Applicant"), respecting the decision of the Registrar of Motor Vehicles (the Respondent) pursuant to section 47(1) of the Highway Traffic Act (Ontario) (HTA).

Kelsey-Trail Trucking Ltd. is a family owned business operating out of 12-3111 Millar Avenue, Saskatoon, Saskatchewan. Charles Gordon Clunie is named as President and Eileen Cheryl Clunie, Mr. Clunie's wife, is named as Secretary of the company. As of June 1999 the Applicant had a total fleet size of 24, power units with 51⁰/₀ Ontario travel. Ministry records as of July 15, 1999 indicate an adjusted fleet size of 13 CMVs. The Applicant is a for hire carrier transporting primarily lumber and steel products within Canada.

A pre hearing conference was held by telephone on Friday the 8th of October 1999, at 1:00 p.m.

PRELIMINARY MATTERS:

Mr. Forbes, counsel for the Respondent, asked to present an update to the Applicant's CVOR record and a Saskatchewan Audit update (Exhibit # 6). Copies were given to the Applicant prior to the hearing.

It was explained that the pre hearing order from Mr. Cork was not in the materials because the evidence books were prepared prior to its release. Copies were made and submitted to the Tribunal (Exhibit # 7).

FACTS:

The Show Cause Proceeding

A notice of suspension and seizure was issued to Kelsey-Trail Trucking Ltd. 9th of June 1999, for a 30 day period, based on their safety record and outstanding unpaid fines. The notice also set June 21st 1999 at 9:30 a.m. for a Show Cause Meeting. (Exhibit 4 tab. 14).

Eileen Clunie on behalf of Kelsey Trail Trucking Ltd. requested that the Show Cause Meeting be conducted by way of written submissions because of her husband's serious health problems. (Exhibit 4 tab.13).

This was agreed to by the Deputy Registrar of Motor Vehicles. (Exhibit 4 tab.12).

A cheque dated July 24, 1999 was sent by the Applicant to resolve the issue of outstanding fines. (Exhibit # 4) Tab11 Pg. 82.

Ms. Clunie addressed the following items in the written submissions for the Show Cause Meeting:

- a) Two facility audits had been done. One in April of 1998 and one in May of 1999. She stated that only 8 bgbook violations were found and that the Applicant was in compliance.
- b) Ms. Clunie further noted that she had fired all drivers with any fines or other convictions.
- c) Ms. Clunie stated the company takes full responsibility for complete maintenance of their equipment and that the fleet is now all 1995 model year tractors or newer. (Exhibit 4 tab 11).
- d) The fleet size was corrected to 24 CMVs from 17.

In a letter dated June 25th, 1999 the Deputy Registrar asked for more detailed information regarding a plan of improvement and verification of proper fleet size. A re-analysis was to be done based on any new information. (Exhibit 4 tab 10).

Ms. Clunie responded with more detailed information and the other documents requested by the Registrar (Exhibit 4 tab 3 a, b and c).

Based on the updated information and a re-analysis, a safety rating of UNSATISFACTORY was assigned to the carrier on August 18th 1999 and the June 3rd 1999 Notice of Suspension & Seizure was modified to provide for a 7-day suspension instead of the 30 day suspension, effective August 30th until September 6th 1999.

Registrar's Decision

WHEREAS, a Notice of Suspension and Seizure dated 3rd day of June, 1999 was issued proposing a 30 day suspension of the CVOR certificate issued to Kelsey Trail Trucking Ltd. and plate portion of permits for all commercial motor vehicles and trailers registered in the name of Kelsey-Trail Trucking Ltd. and thereafter until such time as payment is made to the courts for all outstanding fines. Plate portions of permits, or if issued by a jurisdiction other than Ontario, the permits and the number plates, will be seized;

AND WHEREAS, provided in the notice, you had the opportunity to make submissions at a meeting with the Deputy Registrar on the 14th day of June 1999 to show cause why the suspension and seizure should not be issued. You advised me that you nor any other corporate officer could attend on that date and chose to make a written submission.

AND WHEREAS, I have considered your submissions and your safety record including a re-analysis of your operating record based on your submissions which resulted in a larger fleet size Ontario. I have also reviewed your safety record including your record of convictions, accidents, vehicle detentions, vehicle out of service rate history of past dealings with the ministry and failure to pay fines on a timely basis and I remain concerned for highway safety.

Now Therefore It Is Ordered that pursuant to section 47 of the highway traffic act that as of the 30th day of August, 1999 CVOR certificate #091-

584-806 and plate portion of permits for all commercial motor vehicles and trailers issued to Kelsey-Trail Trucking Ltd be suspended for seven 7 days and thereafter until such time as all outstanding fines are paid and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits and number plates be seized.

This suspension and seizure will be effective at 8:00 a.m. Eastern Daylight Savings Time on the 30th Day Of August 1999 to 7:59 a.m. Eastern Daylight Savings Time on the 6th day of September 1999.

ISSUES:

- I. Does a voluntary, self-imposed suspension and restriction from entering into Ontario by the Applicant entitle the Applicant to avoid the Registrar's suspension under section 47 of the HTA?
- II. How does the financial impact of the suspension on the Applicant affect the decision of the Registrar in imposing the suspension?
- III. Should the Province of Ontario discipline the drivers, in accordance with the Applicant's suggestion, by way of suspension or fine when stopped and found not in compliance, instead of, in effect, sanctioning all drivers/operators registered to the Applicant's CVOR by imposing a suspension of the CVOR?
- IV. Should the *unsatisfactory* rating, and therefore the sanction, apply to all trucks registered to the Applicant's CVOR or only to those operating under the Applicant's CVOR at the time that the sanction was imposed and, or at the time the accidents, detentions and convictions were registered against the Applicant's CVOR?
- V. Should the decision of the Registrar be confirmed, modified or set aside because all the fines were paid by the Applicant?
- VI. Should convictions registered against the Applicant's CVOR be disregarded because the charges were not defended in court due to lack of time and money of the Applicant to do so?

THE LAW:

- 47.(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will

not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
(g) any other sufficient reason not referred to in clause (d) , (e) or (f).

(10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

22.(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.

(2) The Board may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

3. (3) Upon receipt of a notice of appeal under subsection (1) the Board shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the Board with all the relevant documents and other material in his or her possession.
3. (6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.

3. (7) At any hearing under this section, the Board shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute.

THE EVIDENCE:

Margaret Mooney, head of Control and Sanctions for the Ministry of Transportation, testified on behalf of the Respondent and explained how the CVOR rating system worked during the period under review. The system is automated and was designed to trigger a carrier when the carrier's record shows a need for intervention. The threshold was set at about 300⁰/₀ to 400⁰/₀ higher than the provincial average. This is based upon, on road performance regarding accidents, convictions and out of service (oos) detentions.

Further Ms. Mooney testified that 82% of carriers improve after the first contact by The Ministry of Transportation, which is in the form of a warning letter. At this point, the record is reset to zero points and an improvement in on road performance of 25% each six months is expected until the carrier comes into compliance.

If the required 25% improvement within six months is not achieved, the next step would be an interview with the operator to find out why the carrier is having a problem complying. 79% of operators interviewed need no further intervention. Facility audits and ultimately a sanction order and a Show Cause Meeting could follow if the carrier still is not complying and improving it's safety record.

Details of the CVOR system can be found in (Exhibit 4 Tab 21) (The Respondent's Appeal Book).

Ms. Mooney explained details of the National Safety Code (Exhibit 4 Tab 22) and The Commercial Vehicle Safety Alliance (CVSA), (Exhibit 4 Tab 23) and how they apply to regulations regarding CMV maintenance and safety.

The Road Check Program was also explained as a North American, 3-day random check of commercial motor vehicles based on CVSA standards. The last one showed an out of service rate of 18%.

Ms. Mooney also explained that the results of the inspections done on carrier's vehicles (the defects and oos defects found) are recorded on the Safety Net report, which records all inspections done in Ontario.

The Applicant did not cross-examine Ms. Mooney but did ask to submit into evidence updated equipment lists and a hand-written analysis of the February 10th CVOR done by the company accountant, Cindy Evans. (Exhibits 8, 9 and 10). These were to show the Applicant's commitment to improve its safety performance. Mr. Forbes objected to this evidence as the evidence post-dated the Suspension Order but he was prepared to consent to it's admission if an updated CVOR, Saskatchewan Carrier Profile, CVIRs, Sanction Analysis, Safety Net Report, Record Summary, Icon Report and Circumstances Of Drivers Report which also post-dated the Suspension Order could be submitted by the Ministry. (Exhibit 11). This material was admitted into evidence on consent with the understanding that the Tribunal would attribute the weight to it that it considered appropriate.

The respondent then called Mr. William Hearle who is employed by the Ministry of Transportation as a Carrier Safety Ratings Administrator. He gave an explanation of his dealings with Kelsey Trail Trucking Ltd. on behalf of the Ministry of Transportation.

Mr. Hearle detailed his analysis of the Kelsey-Trail Trucking Ltd. records and the history of outstanding fines, interviews with the operator, statements of the operator regarding plans to comply, Ministry interventions and information supplied to the carrier to assist them from November 1991 until the time of the Show Cause Meeting. (Exhibit 4 tabs 4 through 16).

The Safety Net Report dated February 2000 (Exhibit 11) indicates that detentions have gone from 1 in 1996, to 3 in 1997, 11 in 1998, and 16 in 1999.

Accidents have gone from 1 in 1996, to 5 in 1997, 5 in 1998, and 4 in 1999.

Outstanding fines according to Icon Reports dated February 18, 2000 stand at \$2706.25.

The Out of Service Rate stands at 57.9%.

The carrier's violation rate as of August 8, 1999 is 377% above threshold, an increase of 1.05% from November 28, 1997.

This analysis is based on a fleet size of 24, 51% Ontario travel and an adjusted fleet size of 13.

The Applicant did not cross-examine Mr. Hearle.

Eileen Clunie took the witness stand on behalf of Kelsey-Trail Trucking Ltd. The Applicant was not represented by counsel. She testified that:

- a) The Applicant could not do anything about the past and apologized for its poor record in Ontario. A serious monitoring system had been put in place in August 1999. It was the position of the Applicant that the Tribunal should look at improvements made subsequent to the suspension order to see that the Applicant is now working at improving their safety record.
- b) The company has serious cash flow problems due to narrow profit margins in the industry, high fuel and leasing costs. A 7-day sanction is expected to cost Kelsey-Trail Trucking up to \$100,000.
- c) She has hired a full time person in the office to monitor fines and realizes that the company must defend the charges in court and not simply accept them as a cost of doing business as it had done in the past simply because it was cheaper.
- d) She has leased newer equipment and in October 1999 opened a bigger shop to better service their fleet.
- e) Late payment of outstanding fines is a result of the cash flow problems and she promised to pay the fines in full 5 days.

- f) The new policies and procedures of the company were introduced and are outlined in (Exhibit 5 Tabs 6 through 9).

In cross-examination of Ms. Clunie by Mr. Forbes, it was explained that George Clunie did not run the company even though he is named as the president, but he worked as an owner/operator/driver and did some of the maintenance work. Eileen Clunie ran the office doing mainly the day-to-day bookkeeping. Gord Hilton was responsible for hiring, supervising and monitoring the drivers, as well as supervising and doing maintenance on the company vehicles. Wayne and Terri Adrian have replaced him after the Suspension Order. Terri monitors and controls hours of work and driver logbooks. Wayne controls the maintenance schedules. Lyn Parenteau is responsible for administration and dispatch. Jim Clunie, their son, does dispatch and sales and owns some equipment which he sub-leases to drivers, and which is registered as part of the Kelsey-Trail fleet.

It was not clear from Ms. Clunie's testimony, who had ultimate control over the day to day operation of the company and supervision and decision-making authority with respect to maintenance, driver safety and on road performance. Nor was it clear how, or if, information was shared with the officers of Kelsey-Trail Trucking Ltd.

Most of the power units of fleet are leased and in turn sub-leased to the drivers who are paid as owner operators on a per mile basis. The company controls the trailers. If a second or team driver is put on the truck, the sub-lessee/owner operator is responsible for paying the wages, although Ms. Clunie stated the company monitors the hours of service for the second driver.

Lease operators used to be required to provide proof of maintenance work done. Now they are required to have the work done at the new Kelsey-Trail shop so it can be more closely controlled. However, there was no evidence of a structured or regular system for calling the vehicles in for service and monitoring the maintenance. The Applicant does not have a Class "A" mechanic on staff.

CVIRs and maintenance reports were handled by Gord Hilton and not brought to Eileen Clunie's attention. Fines, and convictions were monitored by Lyn Parenteau and not brought to Eileen's Clunie attention.

Maintenance records appeared to have discrepancies and were incomplete. Ms. Clunie was at a loss to explain why. Comparing CVIRs and company work orders was difficult and the only explanation seemed to be that some work was done in Ontario and thus would not appear in the company's records but other Ontario repairs did appear on company documents. Some CVIRs showed work that was required on equipment and no documents could be found to indicate repairs had been made.

The Applicant called Cindy Evans as the Applicant's only other witness. Ms. Evans stated she is a Certified General Accountant employed by the company that does Kelsey-Trail Trucking's books and has been on site there on a monthly basis for the past ten years. She stated also that she feels the company is more committed to matters of safety and working harder to comply with the regulations. She explained that she had prepared a summary of the Kelsey-Trail Trucking CVOR record and her methodology. (Exhibit 8). However under cross-examination she admitted she had relatively little knowledge of how the CVOR system worked and did not include "out of service" detentions under the detention portion of her analysis.

Perhaps the most disturbing evidence is to be found in (Exhibit 6). Allegations were made that Kelsey-Trail trucking Ltd. was requesting, requiring or permitting drivers to falsify log books.

In a letter dated November 24, 1999 from The Saskatchewan Highways and Transportation regarding a complaint on March 2, 1999, and a subsequent investigation into alleged logbook violations and the company's complicity regarding these violations, stated that:

- 15 drivers had good logs.
- 27 had violations, 7 of which were minor and they received warnings.
- 9 drivers were charged with falsifying their logs.
- 6 drivers signed statements and were willing to testify in court that the company requested that the drivers falsify their logs. False entries ranged from booking off duty days while on duty, having phantom co-drivers, running 2 or more log books, and an accusation that a company representative actually signed a falsified log entry so that the signatures would differ.

Three charges were laid in relation to these accusations and the company plea-bargained after the 6 witnesses were subpoenaed. By entering the plea, Ms. Clunie testified that instead of a \$5,000.00 fine per charge, the company was able to pay a fine of \$2,500.00 per charge, and that was the reason for entering the plea.

APPLICATION OF LAW TO THE FACTS:

1. In regard to the voluntary suspension of operations in Ontario by the Applicant, Mr. Forbes referred to the dispatch report (Exhibit 5 Tab 6) which is a dispatch history that shows that Kelsey-Trail trucks did operate in Ontario during the week of August 30, 1999. Ms. Clunie did not deny this but stated that they had 95% compliance with this "self-imposed suspension". Further, she suggested a system where the drivers are held wholly responsible for their own on-road performance, thus not adversely affecting the company as a whole or the good drivers within that company. She suggested that there is such a system that could assist the Ministry in such enforcement against individual drivers and suggested that driver abstracts be used to monitor the on-road performance of the Applicant's drivers.

The Tribunal's mandate is to review the Commercial Operator's safety record and all other evidence presented on the appeal to determine whether the Registrar's decision should be modified or set aside. The Applicant cannot circumvent lawful sanction by pre-empting that sanction by a self-imposed sanction similar to that which the Registrar has imposed or can impose, even if the Tribunal accepts that the Applicant has done this, which the Tribunal does not.

2. In discussing the cost of the Registrar's sanction against the company, no financial records were presented on behalf of the Applicant to support Ms. Clunie's viva voce evidence that the sanction under appeal would cost the Applicant \$100,000.00 and

deprive the company of revenue needed for maintenance and licensing fees, fuel taxes and other overhead.

The Tribunal's mandate is to ensure that the proper sanction is imposed under the Highway Traffic Act. It must ensure that carriers who do not comply with the safety laws and regulations are fairly sanctioned. The cost of not complying with the laws of the Province of Ontario as a consequence of the sanction is something that the carrier must assess when deciding to comply with Ontario's safety laws and regulations or not. The number of interventions by the Ministry clearly indicates that the carrier is encouraged to do business in Ontario and the interventions are aimed at ensuring the carrier has the opportunity to know it is not complying with safety regulations and to improve its on-the road safety record. However, the interest of public safety must take priority over the financial concerns of the carrier.

3. The evidence at the hearing confirmed outstanding fines.

4. Despite Ms. Clunie's position that it is expensive to defend the charges against the company and/or drivers in court, Ms. Clunie failed to provide any evidence or situations where she felt the Applicant had a good defence or where charges were not justified. Nor did Ms. Clunie indicate specifically any convictions that could have been successfully defended in court with a proper legal defence or the circumstances that would convince the Tribunal to remove the detentions, accidents or convictions from the CVOR and/or take into consideration when assessing the carrier's safety record.

Throughout the long history of interventions since November 14th 1991 by the Ministry of Transportation of Ontario, Kelsey-Trail Trucking Ltd. has continually indicated it would take steps to achieve a level of performance that would bring its operating/safety record into compliance. This did not happen during the period under review (November 29, 1991 to May 2, 1999) nor was there any concrete evidence put before The Tribunal to indicate this carrier was interested in complying until the Registrar imposed the sanction in August 1999.

The Tribunal's mandate is to review the decision of the Registrar based on the information the Registrar had before him at the time of the sanction. Ms. Clunie freely admitted in her testimony that what is in the past is in the past, and they can not change it. Instead, she asked the Tribunal to consider what has been done *post* Suspension Order to improve the Applicant's CVOR rating. The Tribunal has been most lenient in allowing (albeit on consent of the parties) post Suspension Order evidence to examine the carrier's commitment to improve. The bigger maintenance facility may help, as may the new staff and newer equipment. However, the Tribunal remains unconvinced that the company has taken adequate steps to bring itself into compliance even after the Suspension Order. In fact, the Applicant's out of service detentions have increased between 1996 and 1999.

The current CVOR rating remains above threshold by 377 percent.

The number of accidents is down only slightly in 1999 and not by 25 percent.

There are, still, outstanding fines.

Ms. Clunie's own testimony in cross-examination failed to explain gaps in maintenance records, some dealing with annual safety inspections.

The company's answer to drivers' violations is to simply fire them as opposed to investing in training to help them perform their jobs properly, safely and in accordance with the laws of Ontario. The Tribunal heard strong evidence that the company actively encouraged drivers to violate the regulations and in the case of the 13-hour driving rule, mislead drivers, in issuing a company memo encouraging non-compliance.

Although this Tribunal is aware of the problems facing the trucking industry regarding high costs and competitive rates which drive down profit margins, it's prime concern is for the safety of all users of the Province's highways and emphasizes that the safety standards apply to all commercial vehicles using Ontario highways.

The operating record and history of Kelsey-Trail Trucking Ltd. causes the Tribunal grave concern for public safety.

DECISION:

FOR THE REASONS GIVEN ABOVE the decision of the Registrar to issue the Suspension Order for seven (7) days is modified, and it is ordered that pursuant to section 47 of the Highway Traffic Act that as of the 9th day of June, 2000 CVOR Certificate # 091-584-806 a and plate portions of permits for all commercial motor vehicles and trailers issued to Kelsey Trail Trucking Ltd. be suspended for 30 days and thereafter until such time as all outstanding fines are paid to the courts and the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits and number plates be seized.

The suspension and seizure will be effective at 8:00 am Eastern Daylight Savings time on 9th day of June, 2000 to 7:59 am Eastern Daylight time on the 9th day of July, 2000.

LICENCE APPEAL TRIBUNAL

Lorraine Bortolussi, Presiding Member

Alan Holbrook, Member

Clarke Wallace, Member

RELEASED: *June 2, 2000*

COLLINS

JOHN COLLINS

APPEAL FROM A PROPOSAL OF THE REGISTRAR OF
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE J. HILEY, Vice-Chair

APPEARANCES: JOHN COLLINS, representing himself
AVIVA R. HARARI, Counsel, representing Registrar, *Motor Vehicle Dealers Act*

DATE OF
HEARING: June 23, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter was initiated by the Notice of Proposal dated February 15, 2000 of the Registrar, Motor Vehicle Dealers Act (the "Act"), refusing to grant registration as a motor vehicle salesperson to John Collins (the "Applicant"). By his letter of February 28, 2000 the Applicant requested a hearing before the Commercial Registration Appeal Tribunal (which is as of April 1st, 2000 is known as the Licence Appeal Tribunal). A Notice of Further or Other Particulars dated June 6, 2000 was issued by the Registrar to the Applicant. The hearing was held on June 23, 2000 with the parties present.

ISSUE:

Does the past conduct of the Applicant afford reasonable grounds for the Registrar to have the belief that the Applicant will not carry on business in accordance with law and with integrity and honesty?

EVIDENCE:

Opening Statements:

By Counsel for the Registrar:

The application is one of refusing registration to the Applicant. The Applicant had been previously registered as a motor vehicle salesperson, but that registration had expired

on July 15, 1999. The application for registration by the Applicant was received at the offices of the Registrar in October, 1999. The refusal to approve the registration is based on the past conduct of the Applicant. The conduct of the Applicant relied upon by the Registrar includes the following: 1. His bankruptcy proceedings; 2. His non disclosure of criminal convictions on the application form; 3. The convictions themselves; 4. The non disclosure of driving convictions.

Counsel for the Registrar submitted that the test in such matters is that articulated in the Brenner case. One must look at the past conduct of the person, not what will be his future conduct. In the present case the Applicant has shown a lack of honesty, integrity and of failing to act in accordance with the law.

By the Applicant:

The Applicant submitted that he can provide explanations for his past conduct. Many of the charges date back many years.

Testimony of Laura Gordon:

Ms. Gordon testified that she is the director of compliance for the Ontario Motor Vehicle Industry Council ("OMVIC"). She has been in that position for three years. Prior to that she was an investigator and an inspector for the Ministry of Consumer and Commercial Relations.

She stated that OMVIC is a non profit organization that manages the motor vehicle dealers industry. It is responsible for the registration of salespeople and dealers, dealing with complaints, the conducting of investigations, and the laying of charges for non compliance with the Act and its Regulations.

Under section 5 of the Motor Vehicle Dealers Act an Applicant is entitled to registration unless his past conduct shows a lack of honesty, integrity or failure to act in accordance with the law.

Ms. Gordon testified that the Registrar's Notice of Proposal dealt with non disclosure issues, the serious pending charge and convictions. The Notice of Further or Other Particulars dealt with the conviction for fraud of over \$5,000.00. The Application of Mr. Collins for registration was received at the Registrar's Office on October 14, 1999. It was an application for reinstatement as Mr. Collins was not registered at the time he submitted the application. Mr. Collins wished to work for Polito Ford Lincoln Sales Ltd.

Ms. Gordon testified that there were a number of concerns as to the application submitted by the Applicant. Mr. Collins had stated he had not had any licence cancelled, suspended or revoked, but a search of the records found that his driver's licence had been suspended. Mr. Collins did not answer the question dealing with bankruptcy, but a search of the records showed that he had filed for bankruptcy in January, 1994 and received a certificate of discharge in November, 1994. Mr. Collins had answered "No" to the question dealing with previous convictions. A background check of his record showed he had been convicted of a failure to comply with a recognizance and for driving while impaired. The recognizance conviction was in October, 1995 and the impaired conviction was in February, 1998.

Ms. Gordon testified that, as well, Mr. Collins was found guilty of fraud over \$5,000.00 in May, 2000 arising out of a matter from March, 1990. He had been charged in June, 1999 and had an appearance in court in August, 1999, all prior to submitting his application to the Registrar. Mr. Collins was given a probation order with community service of 100 hours and ordered to repay \$16,000.00.

Ms. Gordon also testified that on a previous application in July, 1997, Mr. Collins stated that he had no convictions nor declared bankruptcy, despite having a conviction in 1995 and having filed for bankruptcy in July, 1994.

Ms. Gordon stated that the application form is the first test of an Applicant's honesty and integrity. She is concerned when it is not completed properly.

Testimony of John Collins:

Mr. Collins stated that the evidence of Ms. Gordon was correct. He should have renewed his registration in July, 1999 but it got overlooked at the dealership.

Regarding the bankruptcy, Mr. Collins testified that he had sent in to the Registrar's office a copy of his discharge from bankruptcy when his licence was renewed in 1995.

Mr. Collins testified that he had been told that he would be getting a pardon after one year from the conviction for the failure to comply with a recognizance. He had told his sales manager at the time about it, and they both felt he did not need to change his answer to that question for his 1997 renewal application.

Mr. Collins stated that his current dealer/principal knows of his convictions and the charge, which had been pending. His principal, Mr. Polito, sent a letter dated January 28, 2000 in which he stated that he knew of two incidents from 5 to 10 years old and did not think these matters were relevant to his job selling cars at Polito.

Regarding the bankruptcy, Mr. Collins stated that OMVIC knew of it as he had given them a copy of his discharge papers. He had telephoned OMVIC concerning the answer to question 9 about the convictions and had told the person at OMVIC that he believed he had pardons on them. She advised him to write a letter to OMVIC. Mr. Collins did not do that.

Regarding the recognizance conviction, it was a matter dealing with a loan transaction from 1990. Colleen Hindeman had received a loan from Linda Welch. Colleen was not making the payments. Mr. Collins wanted her to repay Ms. Welch. Ms. Welch understood that her \$16,000.00 was to be invested in third mortgages. Instead it went into loans. It had originally been planned that Mrs. Welch's money would be for a mortgage, but the paperwork was not completed and ultimately the money was lent out as loans to high risk individuals. Ms. Welch had been paid about \$4,000.00. She wanted the remainder of her money. When she could not get the money from the lenders, Ms. Welch went to the police. Because Ms. Welch complained that she had given him the money for mortgages, not loans, the police laid the fraud charge against Mr. Collins. Mr. Collins testified that he has paid all of the money back to Ms. Welch in compliance with the restitution order.

Mr. Collins stated that he has done some wrong things in his life. He hoped he could have his registration with conditions. Currently he works at the dealership but not as a sales person.

Under cross-examination, Mr. Collins stated that he had worked at RayCan Financial as a lending consultant in the late 1980's until 1992. At that time, he did not have to be separately licenced but worked under the corporate licence. In the past, he has also worked for a real estate broker but not in a selling position.

Mr. Collins agreed that he was responsible for completing his application form that was submitted to the Registrar. He stated that when he had his job interview with Mr. Polito, he told him about the conviction on the recognizance and how this conviction led to his termination of employment with the Holiday dealership. Mr. Collins stated that he told Mr. Polito about being a Crown witness with other cases arising out of his employment with RayCan Financial and about the misrepresentation in 1990. Though Mr. Polito's letter only deals with the older issues of the recognizance and the fraud charge, Mr. Collins stated that Mr. Polito knew of the impaired conviction because the dealership was obliged to pay higher insurance rates when they hired him. He agreed that his letter to OMVIC dated December 23, 1999 did not mention the impaired conviction.

Mr. Collins stated that when OMVIC told him not to continue as a salesperson, he stopped selling cars.

Closing Statements:

By Counsel for the Registrar:

Counsel argued that the Registrar had reasonable grounds to conclude that Mr. Collins did not act with honesty or integrity or in accordance with the law. She submitted that the Tribunal must look at the totality of his conduct. She argued that Mr. Collins has not provided complete disclosure to OMVIC in his applications of 1997 or 1999, and he has not provided complete disclosure of his past conduct to his employer. She urged the Tribunal to consider the nature of the convictions themselves. The fraud conviction is relevant because Mr. Collins used Ms. Welch's money for other than the accepted purpose. This is important in this matter because Mr. Collins has access to deposit monies.

Counsel referred to the Cooke (re) (1999) O.C.R.T.D. 4 case where at paragraph 16 the Tribunal speaks of the importance of the application forms being completed with full disclosure.

By the Applicant:

Mr. Collins stated that he is at fault for listening to others in how to answer the questions in the application forms. By not answering them correctly, he is at fault. Mr. Collins requested that he be given his registration with conditions. He has the backing of his dealer/principal, Mr. Polito. Mr. Collins stated that there have been big changes in his life. He wants to work and support his wife and three children.

LEGISLATION:

The relevant legislation is the Motor Vehicle Dealers Act.

Section 5(1) of the Motor Vehicle Dealers Act states:

Section 5(1)

An applicant is entitled to registration or renewal of registration by the Registrar except where,

- a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or...

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 7(4) of the Motor Vehicle Dealers Act states:

Section 7(4)

Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2) the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of the Act.

ANALYSIS:

The Motor Vehicle Dealers Act is provincial legislation that is designed for the protection of the public. Those who wish to earn a living either as motor vehicle salespersons or as motor vehicle dealers are required to comply with the restrictions set out in the Act and its Regulations. Such rules or restrictions are there to protect the public from unscrupulous dealers and salespersons who could easily take advantage of a less than knowledgeable consumer. Accordingly, dealers and salespersons are in positions of trust and must act fairly in their dealings with those in the community who wish to purchase or lease a new or used motor vehicle.

This Tribunal is aware of the competing interests of the parties on this application. The Registrar's representative speaks to the need to protect the public. The Applicant speaks of the need to be able to earn a livelihood and support his family. Both parties have serious interests, and it is the duty of this Tribunal to weigh those competing interests when it examines the evidence before it. The Registrar has a duty under the Act to have reasonable grounds for deciding that the sales person or dealer will not carry on their business in accordance with the law and with integrity and honesty. The Tribunal should not interfere with the proposals of the Registrar unless it feels, based on all the evidence before it, that the Registrar did not have reasonable grounds for making such a decision. The case of Brenner v Registrar of Motor Vehicle Dealers, a decision of the Divisional Court of March 9, 1983 has often been quoted as containing a pivotal test in such matters.

In that case, the Divisional Court held that the Tribunal must consider whether or not the Registrar was in error in applying the statutory standard as set out in section 5 of the Act based on the past conduct of the Applicant. Statements as to future or proposed conduct did not figure in this standard. As well, as has been often stated by this Tribunal, it is important for the Tribunal to consider the cumulative effect of all of the evidence. In some cases this can include evidence that was not before the Registrar at the point when a decision was made to revoke the registration of the Applicant.

There is no doubt that the past conduct of the Applicant is flawed. He has a number of convictions, some as recent as May, 2000 and some dating back to 1995. He has shown in the past that he failed to abide by the law, particularly the conviction for failure to comply with a recognizance. He used poor judgment in driving while impaired. He was involved in a financial transaction which ultimately led to the police charging him with fraud. This is a man who has made mistakes.

The Tribunal was impressed with the demeanor of Mr. Collins at the hearing. He did not hide his past conduct. He did try to give some explanation for it. He readily agreed that he had made mistakes in his past. The fraud conviction was of some concern to the Tribunal due to it being so recent and dealing with issues that can relate to the Applicant's responsibilities as a motor vehicle salesperson. But the Applicant presented an adequate examination of this matter. It arose out of transactions ten years ago when the Applicant was not working in the motor vehicle industry. The Applicant had cooperated with police. He stated he had been a Crown witness. He pleaded guilty to the charge and was given a sentence of probation. He has made the restitution required by the Court. The fraud dealt with him putting money from Ms Welch into loans rather than a mortgage. There was a misunderstanding between himself and Ms Welch. He did not benefit directly from this transaction. He was forthright in accepting blame when Ms Welch was unable to obtain her funds from those who were given the loans. Though it is of concern to the Tribunal due to the nature of the matter, the Tribunal does not feel the fact of the conviction itself warrants Mr. Collins losing his ability to work in the motor vehicle industry.

The Tribunal takes note that Mr. Collins has worked as a registered salesperson since 1999 and that there was no evidence of any wrongdoing directly attributable to his responsibilities as a registered salesperson. The Tribunal accepts the evidence of Mr. Collins, which is buttressed by the letter of support from Mr. Polito, that Mr. Polito as his dealer/principal is substantially aware of his past conduct and despite this knowledge wishes to continue to employ him at his dealership. Though the letter does not deal with the impaired conviction, Mr. Collins did state in his evidence that Mr. Polito is aware

of that conviction as employing Mr. Collins increased the insurance fees for the dealership.

The Tribunal is troubled by the fact that in 1997 and 1999 Mr. Collins did not properly complete the application forms submitted to the Registrar. The Tribunal agrees with the sentiment expressed in the case of Cooke(re) that the Registrar ought to be able to rely on the application form as the first test of honesty and integrity. But the Tribunal is satisfied by the explanations offered by Mr. Collins at the hearing.

Regarding the bankruptcy matter, Mr. Collins sent in a copy of his discharge papers with his 1995 application form. Though he should have mentioned it on his application forms for 1997 and 1999, it is reasonable that he felt the Registrar had that information on file. His explanation for failure to list his convictions and pending conviction is somewhat weaker. He states that he thought he had pardons for the two previous convictions. He stated that he had telephoned the offices of OMVIC and spoken to someone there who advised him to send in a letter with his application form. He did not do that. He received bad advice on how to answer this question. He agreed at his hearing that he is responsible for the completion of the application form. He did send further information to the Registrar when so instructed, including the letter from his dealer/principal.

The Tribunal agrees with the Registrar that the non disclosure is not a matter to be ignored, but in this case the Tribunal feels it can be dealt with by the use of terms and conditions. The Tribunal gives some importance to the fact that Mr. Collins has worked for approximately five years in the industry and there have been no issues directly attributable to his job responsibilities. He has worked for the Polito dealership since 1998 and the dealer/principal has shown his support for him. The Tribunal feels that the public can be protected by having Mr. Collins under the supervision of his dealer/principal for the next two years. His dealings with the public need to be supervised by Mr. Polito or his agent, such as a sales manager. His worksheets and completed offers need to be initialed by Mr. Polito or his designated agent, such as the sales manager. Mr. Collins is to refrain from drinking and driving. He must tell the Registrar immediately if he is charged with any matter under the Criminal Code of Canada. Any deposits from customers must be made out to the dealership and given immediately to the dealer/principal or his designated agent, such as the sales manager or business manager. Mr. Collins must tell the Registrar immediately of any irregularities with customer deposits on his sales of vehicles. There will be no transfer of Mr. Collins's registration without the prior written consent of the Registrar and there will be written confirmation of full disclosure to the new employer of the criminal convictions of Mr. Collins. In the opinion of the Tribunal, these restrictions will protect the public while permitting Mr. Collins to work within this regulated industry.

ORDER:

Accordingly, pursuant to the authority vested in it by subsection (4) of section 7 of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to grant the Applicant his registration as a motor vehicle salesperson on the following terms and conditions:

1. There will be no transfer of registration without prior written consent of the Registrar and there will be written confirmation of full disclosure to the new employer of the criminal convictions of Mr. Collins.

2. There will be written disclosure to the Registrar of any charges laid against Mr. Collins.
3. There will be written disclosure to the Registrar of any criminal convictions against Mr. Collins.
4. Mr. Collins will be supervised by his dealer/principal or designated agent of the dealer/principal and Mr. Collin's worksheets and final deals with be initialed by this person.
5. All customer deposits will be made payable to the name of the dealership, and Mr. Collins will give them immediately to his dealer/principal or designated agent. Any complaints regarding such customer deposits will be reported by Mr. Collins to the Registrar.
6. These terms and conditions will remain in effect for two years from the date of the issuance of this order.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: July 5th, 2000

SWITZER-DOWLING-EXHP

SUZANNE SWITZER-DOWLING

**Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”),
from the Order of the Registrar of Motor Vehicles
pursuant to section 55.1(3) of the Act.**

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: DEREK ISRAEL
Presiding member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

SUZANNE SWITZER-DOWLING, Applicant
unrepresented

DATE OF HEARING: July 4, 2000

DECISION RELEASED: July 5, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 4, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Suzanne Switzer-Dowling (the "Applicant")
Motor Vehicle: 1993 Ford EPR, plate # 123 YWC (the "vehicle")
Date of Appeal: June 15, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on July 4, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"I'm the owner of this vehicle. This is my family vehicle and work vehicle. I have 3 children of whom I am the sole supporter of as there birth father committed suicide in 1996. I need my vehicle as I am a nurse at a nursing home which I've worked at for 14 yrs. I live in the country which to take a taxi to work is \$40.00 per day and I find it hard to manage as I have to cut back on the necessities for my children which is a tuff lesson to learn. In the future I will not allow anyone to operate my vehicle without proper driving credentials. The person operating my vehicle is my husband who I have been married to for 2 ½ years. In Dec of 99 he said he wrote for his GL and could now drive legally with a

licensed driver due to lack of communication I never looked into this as I trusted him. He used my vehicle this day for work.

Myself and my daughters need this vehicle for our day to day activities. If I could please have a telephone conference as I have no other way. Could I also have the conference before noon as I work afternoons. It would be appreciated.

The Applicant gave oral evidence by way of teleconference call and stated as follows:

She finds it financially difficult to take cabs to and from work at a cost of \$20.00 each way.

She works as a nurse in a nursing home some fourteen miles from her home. Since the vehicle has been impounded, she has relied on taxis to go to and from her employment at the nursing home and has also relied on friends to, on occasions, give her a ride as well as her 80 year old father who has provided rides on two occasions. She has missed the occasional shift at work since the vehicle's impoundment and has had to reschedule her three daughter's dental appointments until August, 2000. She also has not been able to take her children to counselling since the impoundment. She has been made aware that this counselling is important to the children's welfare.

She conceded she is the owner of a 1984 Chevrolet Corvette but this vehicle needs repairs to it and is not capable of use at present.

Her monthly net income amounts to approximately \$2,260.00 while her approximate monthly expenses are:

2 mortgages	\$959.00
4 loans from financial institutions	<u>1,080.00</u>
	\$2,039.00

Over and above the aforementioned monthly expenses, she has to pay for food and groceries, utilities and other living expenses. Her husband (who is not the father of her three daughters) has undertaken to pay one of the above four loans from a financial institution in the amount of \$555.00 per month but has not followed through on his undertaking. Her husband gives her no other financial support and the atmosphere between them is strained. Other than the one institutional loan of \$555.00 per month and another institutional loan of \$54.00 per month all loan repayments are current. Both the impounded motor vehicle and the Chevrolet Corvette are subject to liens and the amount owing under those liens exceeds the value of the vehicles.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Peter G. Dowling;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified or prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 11, 2000.
5. Copy of Ministry of Transportation records indicating that certain 1984 Chevrolet motor vehicle plate # ACJZ 807 is owned by the Applicant.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

FACTS FOUND PROVEN:

The following are the facts found to have been proved.

1. The vehicle was impounded for a period of 45 days by Order of the Registrar dated June 13, 2000.
2. The vehicle is owned by the Applicant and was owned by her at the time of impoundment.
3. The vehicle was, at the time of impoundment, being driven by Peter G. Dowling whose driver's licence was then under suspension pursuant to Dowling having been convicted of driving while disqualified.
4. The Applicant has available to her alternatives to the impounded vehicle and has utilized such alternatives since impoundment of the vehicle.

5. The Applicant has suffered no loss of employment, education or training as a result of the impoundment of the vehicle.
6. While the impoundment may have resulted in financial loss to the Applicant, the loss will not be significant and lasting.

APPLICATION OF LAW TO FACTS:

The issue to be considered is whether the impoundment of the vehicle will result in exceptional hardship. The onus of proof is upon the Applicant to prove that she will suffer exceptional hardship as a result of the impoundment.

The Applicant did not deny or contest that her motor vehicle was being driven by her husband, Peter G. Dowling, at the time of its impoundment and that Dowling's driver's licence was at the time under suspension due to a conviction for driving while disqualified. Nor is there a denial by the Applicant that the impounded vehicle is owned by her.

Section 22(1) of Regulation 574 R.R.O. 1990 as amended by Regulation 632/98 states that the Board shall consider in its determination as to exceptional hardship, if no alternative to the impounded vehicle is available.

The evidence of the Applicant indicates that alternatives to the impounded vehicle were available and that the Applicant availed herself of such alternatives. The alternatives were the use of taxis, the assistance of friends and her father to help her get to and from work. There is little doubt that the Applicant was inconvenienced, but the Board is precluded from considering inconvenience when determining whether exceptional hardship will result from the impoundment. Furthermore, while there may have been financial loss incurred by the Applicant due to the impoundment, the Board does not consider any such loss to be an exceptional hardship. There is also, in the Board's opinion, no loss of employment or education that the Applicant will suffer. Although the Applicant's children require counselling and have, according to the Applicant, been advised to seek such counselling the Applicant has not sought same. The vehicle's impoundment cannot therefore be considered to pose or result in a threat to the health or safety of the children, particularly as the Applicant appears to place no urgency in having counselling available to the children.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Presiding Member

RELEASED: July 5, 2000

McCLELLAND

IAN AND KIMBERLEY McCLELLAND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

No one appearing for the Applicants, Ian and Kimberley McClelland
NETANUS RUTHERFORD, Counsel representing the Ontario New
Home Warranty Program
No one appearing for the Added Party, 1042147 Ontario Inc.

DATE OF
HEARING: July 5, 2000 Toronto

ADJOURNMENT ORDER

WHEREAS the Applicants appealed to the Tribunal the Decision Letter dated December 12, 1999, issued by the Ontario New Home Warranty Program to deny the Applicants claims;

AND WHEREAS a prehearing was heard on March 16, 2000 at the Tribunal;

AND WHEREAS the hearing was to be heard in Toronto on July 5-7, 2000;

FOLLOWING ATTENDANCES on July 5, 2000 of Netanus Rutherford, Counsel, for the Ontario New Home Warranty Program (the "Program") and no one appearing for the Ian and Kimberley McClelland (the "Applicants") and no one appearing for 1042147 Ontario Inc. (the "Added Party") appeared before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal);

AND WHEREAS at the commencement of the hearing on July 5, 2000, Counsel for the Program requested that the hearing be adjourned in order to permit the Applicants and the Added Party to have experts examine the septic system and prepare reports for the hearing;

NOW THEREFORE this Tribunal Orders:

- 1) The hearing of this matter on consent of all parties, is adjourned to October 23, 2000 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, and to continue on October 24-26, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: July 6, 2000

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)**

IN THE MATTER OF an Application by 1226795 and 1383546 Ontario Limited o/a Potatoland Company for a hearing before the Licence Suspension Appeal Board (which as of April 1, 2000 is known as the Licence Appeal Tribunal) pursuant to Section 50(1) of the *Highway Traffic Act* appealing the Suspension Order of the Deputy Registrar;

AND IN THE MATTER of

1226795 and 1383546 ONTARIO LIMITED o/a POTATOLAND COMPANY

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a hearing in the above matter was scheduled to be held on July 6, 2000 at the Tribunal;

AND WHEREAS a letter was filed dated June 30, 2000 by the Applicant requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned peremptorily against the Applicant; and
- (2) the appeal is scheduled to be heard at **9:30 a.m. on September 8, 2000** at the **Licence Appeal Tribunal, 1 St. Clair Avenue W., 12th Floor, Toronto, Ontario,**

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: July 6, 2000

GMAC LEASECO LTD.-NUSP

GMAC LEASECO LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DEREK ISRAEL
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

PETER SOMMER, representative for the Applicant,
GMAC Leaseco Ltd. (by teleconference)

DATE OF HEARING: July 4, 2000

DECISION RELEASED: July 6, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 4, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE BOARD RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	GMAC LEASECO LTD. (the "Applicant")
Motor Vehicle:	1999 Pontiac Sunfire, plate # ADMJ 006 (the "vehicle")
Date of Appeal:	June 19, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner's appeal in this matter is based on the grounds of exceptional hardship and that at the time in respect of which the order of impoundment was made, the driver's licence of the driver of the motor vehicle was not then under suspension, as referred to, respectively, in sections 50.2(3)(d) and 50.2(3)(b) of the Act.

The Tribunal, on a motion brought by the Registrar, found that the ground of appeal of exceptional hardship [section 50.2(3)(d)] did not apply by virtue of section 50.2(4) of the Act.

The Applicant therefore proceeds with the appeal pursuant to section 50.2(3)(b) of the Act.

This matter came before this Tribunal on July 4, 2000 and proceeded as electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant's written submission filed with the Tribunal in support of appeal states:

DEAR TRIBUNAL!

- (1) PLEASE EXCEPT THIS AS MY EVIDENCE AND OWNER'S POSITION
MY LICENCE WAS SUSPENDED ON NOV 24/98 FOR 18 MONTHS BY A
JUDGE IN OTTAWA COURTHOUSE 161 ELGIN ST. THAT 18 MONTH
PERIOD EXPIRED ON MAY 24TH 2000!
I WAS STOPPED ON MAY 27TH 2000 SO MY LICENCE SHOULD HAVE BEEN
VALID.
- (2) PLEASE BE ADVISED THAT BETWEEN MY WIFE CANDICE AND MYSELF
WE HOLD 4 JOBS TO PAY THE BILLS. WE CANNOT AFFORD DAILY
IMPOUNDMENT CHARGES OR TAXI FARES. WE THEREFORE ASK FOR
YOUR UNDERSTANDING IN THIS MATTER AND REQUEST THAT YOU
RELEASE OUR VEHICLE BEFORE WE ARE BOTH BROKE AND IN RUIN!

P.S. WE THANK YOU FOR YOUR TIME AND UNDERSTANDING!

The Applicant gave oral testimony at the hearing of this matter and stated that on November 24, 1998, he was convicted in Court in Ottawa of the offence of impaired driving in terms of section 253 of the *Criminal Code of Canada*. At the conclusion of that hearing and upon being convicted, his driver's licence was suspended for a period of 18 months calculated from November 24, 1998. Accordingly, he would have been entitled to resume driving on May 24, 2000. He conceded that he was stopped while driving a motor vehicle on May 27, 2000 when the vehicle was impounded. He states that he believed that the suspension of his driver's licence was on that date no longer of force and effect.

Other than as outlined in the foregoing, the Applicant did not contest the documentary evidence introduced by the Registrar.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Peter Heinz Sommer;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of Ministry of Transportation records indicating that at the time of the impoundment the driver of the vehicle had on March 4, 1994 been convicted under the *Criminal Code of Canada* of an offence of driving with more than 80 mgs alcohol in his blood.
5. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 24, 2000.

6. Copy of Notice of Suspension of Driver's Licence addressed to Peter Heinz Sommer from the Deputy Registrar of Motor Vehicles advising of the said Sommer's driver's licence having been suspended under sections 41 and 43 of the *Highway Traffic Act* for a period of two years effective November 24, 1998.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(b).

With respect to an appeal under subsection 50.2(3)(b) alleging that the driver's licence of the driver driving at the time of the impoundment order was not under suspension, section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42, even if it is under suspension at the same time for any other reason, the officer shall,

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

Section 41 of the *Highway Traffic Act* identify the type of appeals for which a licence is suspended in sections 41(1)(a), (b), (c), (d), and (e) and 41(7) and 42(1) and 42(5) as follows:

Section 41(1) Subject to subsections 41.1 (1), (2) and (3), the driver's licence of a person who is convicted of an offence,

- (a) under section 220, 221 or 236 of the *Criminal Code* (Canada) committed by means of a motor vehicle or a street car within the meaning of this Act or a motorized snow vehicle within the meaning of *Motorized snow vehicle Act*;
- (b) under section 249, 252, 253 or 255 of the *Criminal Code* (Canada) committed while driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (c) under subsection 254 (5) of the *Criminal Code* (Canada) committed in relation to the driving or having the care, charge or control of a motor vehicle or street car within the meaning of this Act or a motorized snow vehicle within the meaning of the *Motorized Snow Vehicles Act*;
- (d) under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
- (e) referred to in a predecessor to this sub-section, is thereupon suspended

Section 42.(1) The driver's licence of a person who is convicted of an offence under subsection 259 (4) of the *Criminal Code* (Canada) or under a provision that is enacted by state of the United States of America and that is designated by the regulations is thereupon suspended for a period of,

- (a) upon the first conviction, one year; and
- (b) upon a subsequent conviction, two years,

in addition to any other period for which the licence is suspended and consecutively there to.

- (4) This section applies in the same manner as if a person were convicted of an offence if the person pleads guilty to or is found guilty of an offence referred to in subsection (1) and,
 - (a) an order directing that the accused be discharged is made under section 736 of the Criminal Code (Canada) or under a provision that is enacted by a state of the United States of America and that is designated by the regulations; or
 - (b) a disposition is made under section 20 or sections 28 to 32 of the *Young Offenders Act* (Canada), including a confirmation or variation of the disposition. R.S.O. 1990, c.H.8, s.42 (1-4).

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

1. GMAC Leaseco Ltd. is the owner of motor vehicle plate # ADMJ 006 (the "vehicle")
2. Peter Heinz Sommer ("Sommer") is the lessee of the vehicle.
3. The vehicle was being driven by Sommer on May 27, 2000 when impounded by police.
4. Sommer's driver's licence was under suspension on May 27, 2000 as a consequence of his conviction on November 24, 1998 for impaired driving in terms of section 253 of the *Criminal Code of Canada*.
5. Sommer's had been previously convicted on March 4, 1994 under section 253 of the *Criminal Code of Canada* of driving with more than 80 mgs alcohol in his blood.
6. Pursuant to Sommer's being stopped by the police on May 27, 2000 the Registrar ordered the impoundment of the vehicle for 180 days effective May 28, 2000 until November 24, 2000 in terms of section 55.1 of the *Highway Traffic Act*.
7. Upon Sommer's conviction on November 24, 1998 for impaired driving in terms of section 253 of the *Criminal Code of Canada*, section 41(1)(g) of the *Highway Traffic Act* became effective as a result of which Sommer's driver's licence was suspended for a period of two years effective November 24, 1998.

APPLICATION OF LAW TO FACTS:

The evidence in this matter consisted of oral testimony of Sommer as well as documentary evidence introduced by the Registrar. Sommer did not contest the documentary evidence introduced by the Registrar and in fact admitted the correctness of same, save and except that he claimed that his driver's licence was not under suspension on May 27, 2000 when he was stopped by the police while driving the vehicle. He claims that the court suspended his driver's licence for eighteen months when convicting him of impaired driving on November 24, 1998 and that the suspension of his driver's licence accordingly expired on May 24, 2000, some three days prior to the May 27, 2000 incident when he was stopped by the police while driving the vehicle.

The Registrar's agent conceded that the court, when convicting Sommer of impaired driving on November 24, 1998 under section 253 of the *Criminal Code of Canada*, did in fact suspend Sommer's driver's licence for eighteen months. However, Sommer had been convicted on March 4, 1994 of driving with more than 80 mgs alcohol in his blood which conviction Sommer did not dispute. With these two convictions having been registered against Sommer, section 41(1)(g) of the *Highway Traffic Act* became effective which resulted in his driver's licence being suspended for a period of two years effective November 24, 1998.

Written notice, dated December 22, 1998, regarding this two year suspension was given by the Registrar to Sommer.

Upon consideration of all the facts and in the application of the law to the facts the Tribunal finds that the driver's licence of Sommer was under suspension at the time in respect of which the Registrar's order was made.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Presiding Member

RELEASED: *July 6, 2000*

MAGEAU

DIANE MAGEAU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

DIANE MAGEAU, representing herself
LUCY McSWEENEY, Counsel representing the Ontario New Home
Warranty Program
BRIAN CAMPBELL, Counsel representing the Added Party, Villa
Pine Homes Inc.

DATES OF
HEARING:

June 21 & 22, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1, 2000, is known as the Licence Appeal Tribunal) from a written decision of the Ontario New Home Warranty Program (the "Program") dated February 11, 2000 wherein the claim of Diane Mageau (the "Applicant") was denied by the Program.

The Applicant claims that she and Villa Pine Homes Inc. (the "Vendor") entered into an Agreement of Purchase and Sale dated June 4, 1999 (the "Agreement") for the purchase of lands and premises at Lot 4, 2121 Ghent Street, Burlington, Ontario. Pursuant to the agreement, the Vendor constructed a home upon the lot.

The agreement provided for a purchase price of \$167,000.00 with a deposit of \$10,000.00. The deposit of \$10,000.00 was paid by the Applicant to the Vendor. The agreement also provided for the transaction to close on July 29, 1999. The Applicant and the Vendor however agreed that the closing of the transaction be extended to August 31, 1999.

By letter dated August 27, 1999 addressed by the Applicant's solicitor to the Vendor's solicitor the former proposed that the closing be extended to September 15, 1999 as the Applicant contended that there was a "serious problem with water in the basement" of the home. The Applicant contended that the water problem was not satisfactorily

addressed by the Vendor and accordingly the Applicants' solicitor suggested that "a mutual release be signed by the parties" and the deposit be returned to the Applicant. The Vendor did not agree to a mutual release and insisted that the transaction proceed. When the Vendor was ready to close the Applicant refused to do so. The Applicant contended this refusal amounted to a breach of contract disentitling the Applicant to refund of her deposit and accordingly refused to refund the deposit of \$10,000.00.

THE EVIDENCE:

The evidence in this matter consisted of both documentary and oral evidence. The first witness for the Applicant was the Applicant herself.

The Applicant's Evidence

The Applicant testified that she is a registered real estate salesperson with three years experience in Ontario and further stated as follows.

1. She is somewhat familiar with the Act and was aware when she executed the agreement with the Vendor that she had the right to make a warranty claim against the Program. She knew, besides having the right to bring a claim against the Program, she had the Vendor's warranty in terms of the agreement. However she did not believe the Vendor would live up to its warranty.
2. The Applicant conceded that the original closing date of July 29, 1999 was extended by mutual consent to August 31, 1999. The reason for the extension was that water was entering into the home's basement leading to problems of mold and mildew on certain of the basement's drywall. At that time there was no heat in the home as the furnace had not been turned on.

On August 26, 1999 she was advised by her solicitor to postpone the August 31, 1999 closing and on August 27, her solicitor wrote to the Vendor's solicitor as follows:

Our client advises that there is a serious problem with water in the basement of this property.

Apparently the drywall in the basement has become infected with mildew and mould which is three feet high in places.

The purchaser cannot be expected to close this transaction on August 31, 1999 under these circumstances as the health risk in such a situation is significant.

Accordingly, we propose the following:

- (a) the closing be extended to September 15, 1999;
- (b) prior to closing the Vendor remove all of the drywall from the basement and allow the basement to thoroughly dry out;
- (c) the Vendor provide its written undertaking to re-drywall the basement during the month of October, 1999 once its been verified that the basement is thoroughly dry and free of water seepage;

- (d) this outstanding item be placed on the Home Warranty Program final inspection report.

Please confirm by return fax that all of the above is satisfactory.

(Exhibit 3, Tab 4)

She was content with her solicitor's proposal to extend the closing until September 15, 1999 as she had rental accommodation until that date. She confirmed that she was in agreement with her solicitor's proposals as stated in paragraphs (a) through (d) of Exhibit 3, Tab 4, and stated that she was not prepared to close this transaction "if the basement was still wet".

3. On September 8, 1999 she attended at the home and observed that nothing had changed regarding the drywall which had neither been removed nor replaced.

On September 14, 1999 she again attended at the home and inspected the basement at which time she observed that some "moldy drywall" had been removed and replaced.

Following this inspection her solicitor addressed a further letter to the Vendor's solicitor dated September 16, 1999 which states as follows:

Our client now advises that a re-inspection of the premises indicates that the Vendor has removed some of the moldy drywall without giving the walls a chance to dry.

In addition, there is extensive additional drywall which is moldy and has not been removed.

It seems your client does not understand that it was necessary to remove all of the drywall from the basement and allow the basement to thoroughly dryout as set out in our letter of August 27, 1999.

Additionally, there is evidence that additional water has penetrated the basement causing moisture and mould in areas the full periphery of the unit including a common wall with the adjoining unit.

Under these circumstances, we suggest a mutual release be signed by the parties and the deposit of \$10,000.00 returned in care of our office at this time.

(Exhibit 3, Tab 6)

4. She went on to state that "it was my position that all drywall had to be replaced and the basement was to be dry before I close". She also stated that at no time did she suggest to the Vendor's Mr. Guido that a pre-delivery inspection of the home be held and that the deficiencies she had observed be noted following that inspection.
5. She further testified that the Vendor's solicitor wrote to her solicitor on September 30, 1999 stating "I have advised the Vendor of your position and have been assured that they will meet with your client to resolve the matter".
6. The Vendor did not contact her and on October 6, 1999 her solicitor wrote a letter to the Vendor's solicitor requiring "the deposit be returned within seven days", failing which the Applicant would bring action for return of the deposit. (Exhibit 3, Tab 8)

7. On October 13, 1999 the Vendor's solicitor wrote and faxed to her solicitor a letter reading as follows:

Further to our telephone conversation with your office, we are advised the unit is now ready to close and we await your response as to a closing date suitable to you to reasonably organize your mortgage funds.
Please advise A.S.A.P.

(Exhibit 3, Tab 9)

8. On October 14, 1999 she went to the home again and inspected the basement. In her presence Ms. Moskal took some nineteen photographs of the basement and portions of the basement drywall. (Exhibit 6) During that inspection, she determined that the basement and drywall had not been repaired to her satisfaction, and she was not prepared to close the transaction.
9. On October 14, 1999 her solicitor responded to the Vendor's solicitor's letter of October 13, 1999 as follows:

We acknowledge your fax dated October 13, 1999.

Please refer to our letter of October 6, 1999. This transaction has become null and void and the deposit is to be returned to our office payable to our client without further delay.

(Exhibit 3, Tab 10)

She was never made aware that on October 1, 1999 the City of Burlington's Building Clerk had deemed the home to be occupiable and permitted occupancy on that date.

The Evidence of Ann Moskal

1. The only person to testify on behalf of the Applicant was Ann Moskal who testified that she is a real estate broker and works at the same real estate firm as the Applicant.
2. Ms. Moskal testified that she was approached by the Applicant to accompany her to view the home's basement. She did so on more than one occasion and observed the floor was wet around the perimeter of the basement and that mold was present on certain of the basement drywall. She noted that certain basement drywall was damp to the touch. In October 1999, she suggested to the Applicant that she take photographs of the basement and its drywall. Ms. Moskal did so on October 14, 1999. 19 photographs are in Exhibit 6. She suggested that the Applicant call the health department and municipality regarding the moisture she observed in the basement and the mold on the drywall.
3. Ms. Moskal felt that the moisture problem in the home's basement was such that a realtor would have difficulty in selling the home as there would have to be full disclosure of such a problem to a prospective purchaser and that such disclosure would detract from a possible sale. She discussed with the Applicant the options she believed were open to the Applicant and urged the Applicant to discuss her situation with her solicitor.
4. Ms. Moskal finally stated that she had herself brought two homes in the past and is somewhat familiar with Act. She had completed Certificates of Completion and

Possession (C.C.P.) for those two homes. She is aware that prior to a closing all observed deficiencies are listed on the C.C.P.

The Evidence of Anthony Guido

Anthony Guido testified as the Vendor's only witness. Guido is the Vendor's representative. Guido's evidence was as follows:

1. He confirmed that on June 4, 1999 the Vendor entered into the agreement with the Applicant and the Vendor received the \$10,000.00 deposit. When the agreement was executed, the interior of the home was a shell as the home still required kitchen fittings and fixtures to be installed, painting to be done as well as plumbing and electrical aspects to be attended to.
2. He confirmed that the agreement called for closing to be on July 29, 1999 but by consent of the Applicant and the Vendor it was extended to August 31, 1999. The August 31, 1999 closing did not take place due to the Applicant's proposal to extend the closing to September 15, 1999.
3. On or about August 28, 1999 he visited the home and observed that certain drywall in the basement was damp and discoloured and the basement itself was damp. He instructed employees of the Vendor to remove and replace the discoloured and damp drywall. This was done on September 9, 1999 when the drywall that needed replacing was cut out and replaced.
4. He reinspected the basement on September 11 or 12, 1999 and satisfied himself as to the removal and replacement of drywall, where necessary, and that the drywall was then dry.
5. On August 31, 1999, Guido stated that he and municipal building inspector, one Ed Saunders, inspected the home and noted at that time that there were only three items that needed the Vendor's attention so as to enable the building department to issue an occupancy permit. The three items related to a installation of cover for the attic on the second floor of the home, installation of a handrail for the stairs leading to the basement, and capping a pipe in the basement. The inspector did not require the basement or basement drywall to be attended to prior to the issuance of an occupancy permit. The three items stipulated by the building inspector as requiring attention were completed on September 2, 1999 at a cost of some \$200.00.
6. He stated that when the Vendor's solicitor referred the Applicant's solicitor's letter of September 16, 1999 to him (Exhibit 3, Tab 6), he reviewed that letter and concluded that adequate efforts had been made to remove and replace the affected areas of basement drywall and that total removal and replacement of drywall was neither necessary nor reasonable. Furthermore, there was no necessity for a drying out period as demanded by the Applicant in her solicitor's letter.
7. He further testified that the work on the drywall was done to accommodate and satisfy the Applicant with a view to closing the transaction. He realized that any drywall deficiency or complaint of moisture in the basement could and should be dealt with after closing. Nevertheless, he reiterated that he wished to satisfy the

Applicant by dealing with the complaints prior to the closing. He contended that he did speak with the Applicant in early October pursuant to the Vendor's solicitor's letter of September 30, 1999. (Exhibit 3, Tab 7). In that conversation he again stated that the Vendor had replaced what was necessary concerning basement drywall and that the Vendor would make no further replacements. The Applicant was not happy with his response.

8. He stated that the municipal building department had issued an occupancy permit on October 1, 1999 and that when on October 13, 1999 the Vendor's solicitor wrote to the Applicant's solicitor that the Vendor was ready to close (Exhibit 3, Tab 9), the Applicant should have closed and should have held a pre-delivery inspection of the home. A report of deficiencies claimed to be outstanding would then receive the necessary attention once the Applicant had become the owner of the home.
9. He testified further that it was quite possible that when on October 14, 1999 the various photographs were taken by Ms. Moskal (Exhibit 6) there was moisture in the basement and minor dampness in certain portions of the basement drywall. This would have been due to the fact that the furnace was then not operating, the sump pump in the basement was not on or hooked up and there was no humidifier operating. With the furnace, sump pipe, and humidifier operating, the moisture and mold would no longer be present. He referred to a letter addressed to the Applicant (disclosed in the Applicant's Book of Documents Exhibit 5, Tab 7) by the City of Burlington's Building Department in which the Manager of Inspections and By-Law Enforcement stated that in reviewing the Applicant's concerns an inspection was held at the home on November 3, 1999, when the existence of mold was confirmed and was likely caused by excessive moisture in the basement. On reinspection of the home on November 10, 1999 it was further noted in the letter that the furnace was "operational and almost all of the moist drywall and related mold was gone or easily removed by hand". The letter concluded that "at this point we were satisfied that the mold problem had been resolved".

The Evidence of Irene Swain

1. The sole witness for the Program was Irene Swain who testified that she is a Customer Service Representative with the Program. Her duties include dealing with deposit refund claims.
2. She had carriage of the file when the Applicant filed her claim and she assessed Applicant's claim and authored the decision letter of the Program. In assessing the Applicant's claim for financial loss, Ms. Swain looked for proof that:
 - Applicant entered into a contract with the Vendor for the provision of a completed home.
 - The Vendor failed to complete the transaction and transfer title through no fault of the Applicant.
 - The payment of the deposit was made in accordance with the terms and conditions of the purchase agreement.
3. On a review of the Applicant's file, Ms. Swain denied the Applicant's claim for the following reasons:

The documentation we reviewed indicates the purchaser requested termination of the agreement because she was not satisfied with the progress of the work being carried out by the vendor to rectify the dampness problem in the basement of the unit.

It is the decision of the Ontario New Home Warranty Program that this does not constitute a *failure to perform the contract* by the vendor.

(Exhibit 3, Tab 1, Page 3)

4. Ms. Swain testified that the concerns of the Applicant related to moisture or dampness in the home's basement causing mold and mildew to form on the basement drywall. That issue falls into a breach of warranty claim under section 14(1)(b) of the Act and could have been raised once the Applicant became the owner of the home. The Applicant never became "an owner" in terms of section 14(1)(b) of the Act, as she never closed the transaction.

FACTS FOUND PROVEN:

The following facts are found proven:

1. By Agreement of Purchase and Sale executed on June 4, 1999 the Vendor sold to the Applicant the lands and premises on Lot 4, 2121 Ghent Street, Burlington, Ontario for the sum of \$167,000.00.
2. The Applicant paid to the Vendor a deposit of \$10,000.00, under the agreement.
3. The agreement provided that the transaction was to close on July 29, 1999.
4. By consent of the Vendor and the Applicant, the closing date of July 29, 1999 was extended to August 31, 1999.
5. The Applicant by letter from her solicitor to the Vendor's solicitor proposed that the August 31, 1999 closing be extended to September 15, 1999.
6. On or about August 31, 1999, the Building Department of the City of Burlington inspected the home and noted three deficiencies in the home which on reinspection of the home by the Building Department of the City of Burlington on October 1, 1999 had been remedied, and the home was deemed to be fit for occupation as at that date.
7. The Vendor was prepared to close the transaction as of October 13, 1999 and notified the Applicant's solicitor accordingly.
8. The three deficiencies identified by the Building Department in paragraph 6 above did not include the concerns of the Applicant regarding the condition of the home's basement:
9. On August 31, 1999 there was moisture present in the home's basement, and certain portions of drywall in the basement contained mold and mildew.

10. The Applicant was not prepared to close the transaction or to take occupation of the home unless the home's basement was free of moisture and all the drywall in the basement had been removed and replaced with new drywall.
11. The Applicant refused to close the transaction when on October 13, 1999 she was advised that the Vendor was prepared to close the transaction.

THE ISSUES:

The issues to be determined by the Tribunal are:

1. Did the Applicant and the Vendor enter into a contract in terms of which the Vendor was to provide a home?
2. Did the Vendor fail to perform the contract?
3. Has the Applicant a cause of action in damages against the Vendor for financial loss due to the Vendor's failure to perform the contract?

THE LAW:

The Applicant's appeal is based upon the provisions of Section 14(1)(a) of the Ontario New Home Warranties Plan Act (the "Act") which reads as follows:

14(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

Section 6(1) of Regulation 892 to the Act reads as follows:

6(1) A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed \$20,000.

DECISION AND REASONS:

The onus of proof in this matter rests upon the Applicant to prove her case on a balance of probabilities.

There is no dispute between the parties that there was an agreement that the Vendor would construct a home for the Applicant and that pursuant to that agreement the Applicant paid the requisite deposit to the Vendor. There is also no dispute that the

original closing date of the transaction was to be July 29, 1999 and that by mutual consent the parties extended that closing to August 31, 1999.

The evidence of the Applicant discloses that there was a problem with moisture or dampness in the homes' basement as a consequence of which certain portions of the drywall in the basement evidenced signs of mold or mildew. The Applicant considered the moisture and mold and mildew in the basement to be a health hazard. However, she produced no evidence to substantiate her belief that there was a health hazard. The Applicant wanted all the drywall in the basement removed and replaced by the Vendor and that the basement be dry before she would take occupation and close the transaction.

The Applicant testified that she did not have faith that the Vendor would satisfy her concerns after she took occupation and closed the transaction, and for this reason she was insistent upon rectification taking place before closing.

The question is whether the Applicant was justified in refusing to close the transaction.

The Tribunal accepts that the Vendor was willing and able to close on October 13, 1999. This is supported by the letter addressed to the Applicant's solicitor by the Vendor's solicitor on that date (Exhibit 3, Tab 9) and the occupancy authorization the Vendor had received from the City of Burlington effective October 1, 1999. (Exhibit 3, Tab 16)

When, on August 27, 1999, the Applicant through her solicitor wrote to the Vendor's solicitor that she was prepared to extend the closing to September 15, 1999 she clearly intended to treat the contract as valid and in effect. Thereafter and until her solicitor's letter of October 14, 1999, she continued by her conduct to lead the Vendor to believe that the transaction remained in effect. The Vendor relied upon this conduct.

It was only when the Vendor's solicitor's letter of October 13, 1999 was received that the Applicant claimed in her solicitor's letter of October 14, 1999 that the agreement was "null and void". It was the Applicant's solicitor's letter of October 14, 1999 that unilaterally repudiated the agreement and constituted a breach of the agreement by the Applicant herself.

The Tribunal is of the opinion that the Applicant misconstrued the legal position as to her remedy in this matter. It is clear that there was a moisture problem in the home's basement, which led to mold or mildew in portions of the basement's drywall. However, there was no justification for the Applicant to require the Vendor to remove all drywall in the basement and replace with new drywall as not all the drywall was effected. The Applicant was entitled to receive a dry basement and drywall that was free of mold and mildew. In the absence of Applicant receiving a dry basement and mold and mildew free drywall, the Applicant's remedy was to close the transaction, after holding a predelivery inspection and documenting her concerns in a written predelivery inspection report. The Applicant's concerns may well have amounted to a breach of warranty in terms of Section 13 of the Act. However, the moisture, mold and mildew problems in the basement did not amount to breach of condition that would entitle the Applicant to resile from the agreement as she did when she had her solicitor write his October 14, 1999 letter. (Exhibit 3, Tab 10)

If there was a breach of warranty under Section 13 of the Act,(and there may well have been) the Applicant would on closing and on becoming the owner of the home, have had a cause of action against the Vendor in terms of Section 14(1)(b) of the Act. However, she never became the owner of the home as there was no closure of the transaction. The Vendor did not fail to perform the contract which would be the basis of the Applicant's claim before this Tribunal under section 14(1)(a) of the Act.

DECISION:

Accordingly, by virtue of the authority vested in it under section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Ontario New Home Warranty Program to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: July 6, 2000

SCHUSTER, KARL S. AND SCHUSTER REALTY INC.

PREHEARING

SCHUSTER REALTY INC. AND KARL S. SCHUSTER

APPEAL FROM A PROPOSAL OF THE REGISTRAR, REAL
ESTATE AND BUSINESS BROKERS ACT R.S.O. 1990,
CHAPTER R.4 as amended

TO REFUSE TO RENEW REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:
by teleconference

SAMUAL A. MOSSMAN, Counsel, representing the Applicants
GEORGE DRAMETU, representing the Registrar, *Real Estate and
Business Brokers Act*

DATE OF
PRE-HEARING: July 6, 2000 *by teleconference*

ORDER

FOLLOWING attendances by teleconference on July 6, 2000 at a prehearing before this Tribunal of Samuel A. Mossman, Counsel on behalf of Schuster Realty Inc. and Karl S. Schuster (the "Applicants"), and George Drametu, Counsel on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order:

1. The parties to the hearing are the Applicants and the Registrar.
2. The hearing of this matter shall commence at 9:30 a.m. on September 21, 2000 and thereafter, if necessary, to continue at 9:30 a.m. on September 22, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.
3. The Applicants admit the allegations contained in paragraphs 1 through 22 inclusive under the heading "C. Particulars" of the Registrar's Notice of Proposal dated April 7, 2000 and do not require the Registrar to prove such allegations at the hearing.

4. The Applicants do not admit the allegations contained in paragraph 23 of the Registrar's Notice of Proposal dated April 7, 2000 and put the Registrar to the proof thereof at the hearing.
5. The facts contained in the documents at Tabs 2 through 13 and Tabs 15 through 20 of the Registrar's Book of Documents, now filed with the Tribunal, are admitted by the Applicants and require no proof by the Registrar at the hearing.
6. The opinions and allegations contained at Tab 14 and Tab 21 of the Registrar's Book of Documents are not admitted by the Applicants and, the Registrar is put to the proof thereof at the hearing.
7. The Applicants intend to have testify, on their behalf at the hearing, Karl S. Schuster and three character witnesses. The Registrar intends to call two witnesses to testify on his behalf.
8. In the event of the Applicants and the Registrar resolving this matter prior to the hearing, the Registrar undertakes immediately to advise the Tribunal of that fact.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: July 7, 2000

BOILEAU

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
LUC LIONEL BOILEAU

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 26th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LUC LIONEL BOILEAU

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Luc Lionel Boileau, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 4th, 2000

file name: 0066.mvda.Boileau

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Luc Lionel Boileau
3753 Ch Drouin
Hammond ON K0A 2A0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Luc Boileau (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, in writing of the charges against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer of the charges against him and to immediately give said notification, in writing to the Registrar.
3. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
4. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
5. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
6. The Applicant agrees that he cannot take deposits, in any form, from consumers on behalf of the dealer.
7. The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
8. The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
9. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
10. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

11. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.
12. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of 2000.

(Signature) Luc Boileau

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

BIUNNO

ANTONIO BIUNNO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair, Presiding
IRVING ANDRE, Vice-Chair

APPEARANCES:

ANTONIO BIUNNO, appearing on his own behalf
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: June 27, 2000

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated March 8, 2000 proposed to refuse registration of Antonio Biunno (the "Applicant") under the Act. For the reasons hereafter set out the Tribunal directs the Registrar to carry out the Proposal.

BACKGROUND:

The Registrar under the Act proposed to refuse to renew the registration of the Applicant. The grounds relied upon by the Registrar for the Proposal are set out below:

1. Antonio Biunno applied for registration as the motor vehicle salesperson on February 2, 2000 and proposes to work for Woodbridge Toyota.
2. In the application for registration the applicant was asked if he had ever been found guilty of the offense under any law or whether there were any charges pending. The Applicant answered "No" to this question. When a criminal record check was carried out, it was found that the Applicant had pending charges of operating a motor vehicle with over 80 milligrams of alcohol in 100 milliliters of blood, possession of a controlled substance, proceeds of property obtained by crime, and producing a controlled substance.

The Applicant requested a hearing, and asserted that he was innocent until proven guilty of the charges, that he had a legal opinion that he would be found not guilty of all pending charges, that he would be forthright and honest in dealings with customers, and he had a previous licence the back to 1991 as a motor vehicle salesman and there were no complaints against him.

THE LAW:

Section 3 of the Motor Vehicle Dealers Act (the "Act"), states as follows;

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

Section 5 of the Motor Vehicle Dealers Act (the "Act"), states as follows;

- 5(1) An applicant is entitled to registration by the Registrar except where,
 -
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 -

Section 6 of the Act states as follows;

- (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion , the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a

very serious criminal record which he had disclosed in his application but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Applicant heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Re: Cooke (1999) C.R.A.T. 4

In this decision the Registrar proposed to revoke the registration of the applicant as a motor vehicle salesperson on the basis that he failed to disclose his criminal record in the application form. The Applicant had a series of 24 charges on his record and the Registrar based the Proposal on a finding that he would not carry on business in accordance with the law and with integrity and honesty. The Tribunal found that the applications were of relevance to this matter as an applicant certifies that the information is true to best of his knowledge, and the Registrar's faith in the integrity and honesty of the Applicant is destroyed when false information is provided. The fact that the Applicant filled in two different application forms falsely was found to have afforded the Registrar with reasonable grounds to believe that the Applicant would not carry on business with honesty, integrity, and in accordance with the law.

ISSUES:

The legal issue in this case is whether the past conduct of the Applicant is such that the Registrar would have reasonable grounds to find that the Applicant would not carry on business as a motor vehicle salesperson in accordance with the law, and with honesty and integrity.

WITNESS FOR THE REGISTRAR:

Evidence was called by the Registrar, and testimony was given by P.C. Robert Cullen, David Wilson, and Laura Gordon.

The Registrar's first witness, P.C. Robert Cullen, testified that he is a police officer with the York Regional Police and is presently attached to a unit investigating the production of drugs. The Applicant sought to exclude the evidence of this witness on the basis that

it was not relevant as his drug charges were still before the court and there was a presumption of innocence. The Tribunal ruled that evidence of illegal activities was relevant on the issue of past conduct, and the officer's testimony continued. Two industrial units had been rented by a company under the name Northern Enterprises. They were put under surveillance. A surveillance team, including the witness, observed of the Applicant attending the units on different dates, and when the police entered the units under a search warrant they discovered that there was a marijuana growing operation under way. This operation appeared to be ongoing as there were new plants being re-generated to take the place of existing plants when they were harvested. There was a similar operation at another house which was found to have been rented by the Applicant. When the industrial units were raided by the police approximately 1,300 marijuana plants were seized. During this time, the Applicant was not under 24 hour a day surveillance however the officers did not see him attending any place of employment outside the home. The officer tried to draw some conclusions from the Applicant's lifestyle and apparent lack of legal employment, however there was no evidence presented to the Tribunal on this point. In cross-examination, the officer agreed that he did not know anything about companies operated out of the Applicant's home, and there was no further evidence on this point.

The next witness for the Registrar was David Wilson who has been employed as an investigator for Ontario Motor Vehicle Industry Council ("OMVIC") since January 1, 2000. Prior to that employment, he was a police officer in Metropolitan Toronto for 29 years primarily with traffic duties, and was also registered as a motor vehicle salesman for 15 years.

A ruling was made by the Tribunal that the evidence of this witness should be limited to the past conduct prior to the date of Proposal as no notice had been given to the Applicant of any intention to use subsequent conduct at the hearing. Mr. Wilson testified that based on information received from an anonymous source within the dealership, he attended at Woodbridge Toyota at 7635 Martin Grove Rd., Woodbridge Ontario and requested that the manager Mr. Gabriel da Silva provide him with the sales contracts. Each contract was in an envelope and on the outside of the envelope there was a pre-printed area for the name of the salesperson. In January, 2000 there were five envelopes with Tony B. on them, and on four of these contracts other salesmen were listed by name. On one contract, the Applicant's name was written in full. In February, 2000 there were six sales contracts with the Applicant's name written on the face of the contract as salesperson, and for the month of March 2000, prior to March 8, there were five sales contracts with the Applicant's name written on them as salesperson. When the Applicant's name appeared on a sales contract, there was no salesperson's registration number, however when any other salesman's name appeared, their number was shown. In cross-examination, the witness stated that a person who is not registered is not permitted to act in any capacity in arranging the sale other than perhaps simply handing over the keys, and agreed that there was no specific reference to what the Applicant had done. Mr. Biunno also brought out under cross-examination that the investigation was started when someone apparently from the dealership called the Registrar to advise that the Applicant was acting as a salesman while unlicensed.

The next witness for the Registrar was Laura Gordon who is the Director of Compliance for OMVIC since April 1997, prior to which she was employed for eight years in different capacities by the Ministry of Consumer and Commercial Relations. She outlined that the functions of OMVIC are to monitor the Motor Vehicle Dealers Act in terms of the registration, complaint mediation, inspection, and compliance. The Act itself is a public

protection statute set up to regulate the industry and ensure that the salesperson and dealerships carry on business with honesty, integrity, and in compliance with the law as required by the Act. Ms. Gordon referred to the application form signed by the Applicant on February 2, 2000 in which he indicated that he had not been registered prior to this date, and that he had no charges pending. These answers were given by putting check marks in the appropriate box provided. The witness pointed out that there was a warning that a background check would be done to determine if there was a criminal record, and above the signature line at the end of the document there was a certification that the person signing the document understood it and certified it was true. When a record check was done, it was found that there were criminal charges pending. Ms. Gordon testified that the Registrar considers the application form to be quite important because it is the first test of the honesty and integrity of the Applicant. In cross-examination, she explained that the process of selling vehicles is more than just signing contracts and means taking part in several activities. She also confirmed that she did not have any information about any prior complaints about the Applicant's conduct during the earlier period that he was registered as a motor vehicle salesperson.

WITNESS FOR THE APPLICANT:

Evidence was called on behalf of Anthony Biunno, and he testified on his own behalf. His evidence was limited to the question of the application form. He testified that he was in a hurry, was asked to go by the sales manager from the dealership, and was also going to meet his criminal lawyer. He stated that he did not read over the document as well as he should have and did not intend to mislead the Registrar. On the issue of whether he had a criminal record or charges pending, he testified that he read to the point that he saw the question of whether he had criminal convictions and as he had not been convicted he ticked the box answering "No". His evidence was that he did not see the part of the question regarding pending charges, and that he certainly had no reason to intentionally give a false answer on the question whether he had been registered in the past as he had a clean record and nothing to hide. In cross-examination, he confirmed that he was well educated and could read English properly. He stated that he needed to apply for registration as he was going to get into the OMVIC Certification Course, but when it was pointed out to him that he already had a student number for the course, he became unsure.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that the Applicant had been frequenting a premises in which there appeared to be a marijuana growing operation ongoing. Based on the fact that there were two commercial units rented and a house, it is inconceivable that this was a case of a small amount of cultivation for personal use. When the search warrant was executed, approximately 1,300 plants were seized, and preparations were underway to replace the plants once they were harvested. There is no proof of what role, if any, the Applicant had in this operation, but the Tribunal finds that he had some connection to it as he was observed making repeated attendances at the premises. The Tribunal accepts the evidence of Officer Cullen that he personally observed the Applicant enter the premises, and in the absence of any evidence of a lawful reason, this is found to be unlawful behavior.

The Tribunal finds as a fact that the Applicant's name appeared as the salesperson on a series of sales contracts at Woodbridge Toyota during the period from January 1, 2000 until the date of the Proposal by the Registrar. No challenge was made by the Applicant to the fact that his name appeared on the contracts at the place before the salesman's name would be put, and there was no explanation given of how his name could appear there without him taking some role in the sale of the vehicles. Mr. Wilson did not see the Applicant negotiating with customers; however, in the absence of an a credible explanation, it would not be conceivable that a person's name would repeatedly be written on several contracts of sale as the salesperson when he did not take part in the sale. The Tribunal therefore finds as a fact that the Applicant acted as a salesperson without being licenced. On February 2, 2000, the Applicant applied for his licence, and he would, therefore, have been aware that he was not licenced and that a licence was necessary.

The Tribunal finds that the Applicant's description of his attendance at the office of the Registrar to fill in the application form is not credible. It is accepted that he may have been in a hurry, but he would know that this is a very important application form as he had been licenced before. It is correct that he would have no apparent reason to lie in answer to whether this was his first application; however, on the question of whether he had been charged with any offenses, there is a specific reference to charges pending. In his questions to the witnesses and his summation, he explained that he simply made a mistake and did not read the form correctly; however, in his Request for Hearing (Exhibit 2) he uses a different explanation. In that document, he explained that he did not list the pending charges because he failed to understand that it was necessary due to the fact that individuals are considered innocent until proven guilty beyond a reasonable doubt. This is different from his testimony in which he said that when he read the document, he did not look at it carefully to see that he was required to advise them of pending charges. The explanation given in the Request for Hearing Form shows that the Applicant determined that it was simply not necessary due to the presumption of innocence. This inconsistency together with his contradiction on the issue of whether he had applied for the Certification Course leave the Tribunal with serious doubts as to his overall credibility.

APPLICATION OF LAW TO FACTS:

The legal issues in this case are whether the Applicant will carry on business with integrity, honesty, in accordance with the law. In relation to these issues the Tribunal finds the following facts to be relevant past conduct.

The fact that the Applicant was in any way involved with the production of an illegal substance or was at least visiting the site of the production of an illegal substance demonstrates a willingness by him to disregard the law when it is convenient for him to do so. Even if a person does not agree with a law, he is still bound by it, and a failure to do so is a factor to be considered as past conduct.

The fact that the Applicant was working in some capacity relating to sales at the dealership prior to applying for registration as salesperson and after his application was filed and obviously no registration was received is past conduct which shows his disregard for the requirements of the *Motor Vehicle Dealers Act*. This past behavior is

inconsistent with his expressed intention to comply with the rules and is another indicator of his willingness to disregard laws or rules that did not suit his purposes.

The fact that the Application Form was not properly filled in evidence of past conduct which is either dishonest or very careless. This is a very important document which is required for the salesman to be licenced, and central to his pursuit of his future career. If the form was filled in dishonestly, the Applicant does not meet the first test of honesty required by the Registrar.

The Applicant gave two different explanations concerning the reason for the section of the form dealing with criminal charges being filled in incorrectly. This is sufficient to give the Registrar great concern as to his honesty. Even if it was merely a careless act, the Registrar would have reason to be concerned over whether he would follow the documentary requirements and procedures within the industry. Whether or not the Applicant provided correct information in the application document is a crucial matter in assessing the honesty of an Applicant, as this information is clearly intended to be relied upon by the Registrar. If any information is intentionally concealed, or if false information is given, the Registrar has good reason to have serious concerns that the Applicant will withhold information or provide false information in the future in his dealings with the public or with the Registrar. A motor vehicle salesperson deals with members of the public who are purchasing or selling products of substantial value. They are depended upon not to misrepresent the value or quality of the vehicles. By withholding or falsifying information, they are in a position to take advantage of a vulnerable consumer. The public must have confidence that the salesperson will not put their own personal interests, financial interests, or convenience ahead of their responsibility to conduct business with honesty, integrity, and in accordance with the law. The Tribunal finds that in this case the Registrar was justified in having such concerns.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business in accordance with integrity honesty and with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice Chair, Presiding

Irving Andre
Vice Chair

Released: July 11, 2000

NYITRAY, FRANK and 1002895 ONTARIO LIMITED o/a THE SIDECAR,
TRAILER TOURING

1002895 ONTARIO LIMITED O/A THE SIDECAR,
TRAILER TOURING and FRANK NYITRAY

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: F. BRUCE FITZPATRICK, Vice-Chair

APPEARANCES: FRANK NYITRAY, Agent on behalf of 1002895 Ontario Limited o/a
The Sidecar, Trailer Touring
A. Mitchell Goldbloom, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF
HEARING: June 26, 2000
Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated February 24, 2000, issued by the Registrar of the *Motor Vehicle Dealers Act* ("the Act") to revoke the registrations of 1002895 Ontario Limited o/a The Sidecar, Trailer Touring ("Sidecar") and Frank Nyitray ("Nyitray") acting as a motor vehicle salesperson pursuant to the *Motor Vehicle Dealers Act*. By an undated letter (which was received on March 3, 2000) to the Registrar of the Tribunal, Nyitray on behalf of himself and Sidecar requested a hearing before the Tribunal.

THE FACTS:

Based on the evidence, the witnesses and the documentary evidence presented at the hearing, the Tribunal finds the following as fact.

The applicant Nyitray is an officer of Sidecar which has a registered motor vehicle dealer location at premises known municipally as 4801 Keele Street in the City of Toronto.

Sidecar has been registered as a dealer under the Act since April 14, 1993. Nyitray has been registered as a motor vehicle sales person since April 14, 1995. Nyitray is an officer and director of Sidecar.

Sidecar is chronically in default of filings it is required to make pursuant to the *Retail Sales Tax Act*, R.S.O. 1990, c. R-31, as amended. Sidecar is a registered vendor within the meaning of the *Retail Sales Tax Act*. Sidecar has made one filing which covered the period March 1997 to March 1998. This return indicated that "nil" was owing to the Ministry of Revenue.

Sidecar has been involved in sales transactions of at least 140 motor vehicles, the vast majority of which are models 1997 or later. Of these 140 transactions, at least 5 have been shown to involve sales to end users for which retail sales tax would otherwise be payable by Sidecar to the Ministry of Finance. Sidecar did not remit any amounts with respect to these 5 transactions.

The Ministry of Finance has conducted an audit of Sidecar and has assessed Sidecar for unpaid retail sales tax. The estimated amount of tax owing for September 1, 1995 through November 30, 1999, is \$91,537.66. Notwithstanding the fact that this is an estimate, the Tribunal finds that there is an amount presently outstanding, which is properly due and owing to the Ministry of Finance. In March 2000, a representative of the Ministry of Finance, Mr. Sandy Bandhu, attended at 4801 Keele Street, Toronto. There was no indication of Sidecar operating a business at that location, there was no signage, no motor vehicles and nothing to indicate that a motor vehicle dealership had operated at that location for some period of time.

On January 23, 2000, an investigator from the Registrar, Matthew McKenzie, attended at 4801 Keele Street, in the City of Toronto, the purported site of the dealership. There was no physical evidence that the dealer was operating from the premises. There was no signage and the unit in question appeared to be empty. Nyitray was not present at the location at the time and neighbouring tenants did not know of his whereabouts.

Sidecar has not maintained any books and records with respect to any of its transactions in accordance with its operation as a motor vehicle dealership. Nyitray has not in the course of acting as a salesperson, kept any books and records of any transactions, service or sales of motor vehicles that he has been involved with.

Sidecar and Nyitray have not made satisfactory efforts to comply with their obligations under the *Retail Sales Tax Act* to provide documentation and/or pay any amounts properly due and owing to the Ministry in respect of transactions for which retail sales tax is properly due and owing.

Nyitray is an officer of Cachina Inc. Cachina is in default of its obligations to remit to the Ministry of Revenue in the amount of \$1.4 million dollars.

Sidecar has on at least one occasion violated Section 16 of Regulation 801 of the Act with respect to providing the appropriate information on a bill of sale involving a motor vehicle, namely providing an odometer reading.

ISSUE:

The issue in this proceeding is whether the Registrar has sufficient grounds to revoke the registration of Sidecar as a motor vehicle dealer under the *Motor Vehicle Dealer Act* and Nyitray's registration as a motor vehicle dealer salesperson under the *Motor Vehicle Dealers Act*.

THE LAW:

Section 6 of the Act provides:

.....

6(2) Subject to Section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 5 of the Act disentitles an applicant to registration where:

5(1).....

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of the business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Regulation 801 is enacted under the authority of the *Motor Vehicle Dealers Act*. Sections 15 and 16 of the said Regulation set out in detail the minimum requirements for records which must be kept by dealers. .

APPLICATION OF THE LAW TO FACTS:

In a proceeding under Section 7(4) of the Act, the Registrar has the burden of proving the reasonableness of his grounds for proposing to revoke the applicants' registrations under the Act. The Registrar proposes to revoke the registrations of Sidecar and Nyitray on the grounds that Sidecar and Nyitray cannot reasonably be expected to be financially responsible and the past conduct of Sidecar and Nyitray forms reasonable grounds for the belief that Sidecar and Nyitray will not carry on business in accordance with the law. Nyitray's personal integrity and honesty were not at issue in this matter.

1. Can Nyitray and Sidecar reasonably be expected to be financially responsible in the conduct of business?

Nyitray testifying on his own behalf and behalf of Sidecar offered no explanation as to why proper filings haven't been made to the Ministry of Finance. Nyitray offered no explanation as to why monies had not been remitted to the Ministry of Finance. Although it was admitted by a Ministry representative, Mr. Bandhu, that the amount assessed as against Sidecar was an estimate, Nyitray did not contest that some

substantial monies were properly due and owing to the Ministry and those monies have not been paid.

Nyitray's evidence was completely unsatisfactory. He indicated he was not able to remember much of what occurred prior to his being involved in an automobile accident in October 1998. He offered no medical evidence respecting his condition. He admitted that his evidence was "vague" for which he apologized, but unfortunately, this did not serve to rebut the Registrar's case and does not give the Tribunal any confidence that he or Sidecar would be able to be financially responsible in the conduct of his business. Accordingly, the Tribunal finds that Nyitray and Sidecar cannot be reasonably expected to be financially responsible in the conduct of their business on an ongoing basis.

2. Will Sidecar and Nyitray be able to carry on business in accordance with law?

The Tribunal must look at the past conduct of Sidecar and Nyitray in totality in determining the reasonableness of the Registrar's grounds. In this case, the Tribunal considers that the complete lack of answer by Nyitray and Sidecar, together with the evidence which was put forward by the Registrar, is more than sufficient for the Registrar to have reasonable grounds to believe that the applicant will not carry on his business in accordance with law nor can it reasonably be expected to be financially responsible in the conduct of the business.

The Tribunal finds that Nyitray and Sidecar have consistently failed to maintain proper records and make proper filings, which are required by the Act and the Regulations. Nyitray and Sidecar failed to produce documentation regarding transactions upon reasonable request by a person entitled by the Act to inspect same. Nyitray and Sidecar have failed to provide the appropriate information on the conditional sales contract involving motor vehicles contrary to the Regulations.

Again, Nyitray's failure to make any answer to claims made by the Registrar, lead the Tribunal to the conclusion that Nyitray is not capable of conducting the business in accordance with law.

DECISION:

Pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal hereby directs to the Registrar to carry out his proposal to revoke the registrations of 1002895 Ontario Limited o/a The Sidecar, Trailer Touring and Frank Nyitray.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick
Vice-Chair

Released: July 10th, 2000

RIZZUTO

ROLANDO AND TERESA RIZZUTO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO
NEW HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

VITO CATERINA, Agent, representing the Applicants
ANDREA YORK, Counsel, representing the Ontario New Home
Warranty Program
ANTHONY REINO, Counsel, representing Delpark Homes Limited,
the Added Party

DATE OF
HEARING: April 26, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal), from a written decision of the Ontario New Home Warranty Program (the "Program") dated December 22, 1999, which disallowed the claim of Rolando and Teresa Rizzuto (the "Applicants") relating to water penetration into the cantina of a newly constructed home. This appeal is based upon the provisions of Sections 13(1)(a) and 14(1)(b) of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended (the "Act") and Regulation 892, Part VI, s. 14.

The Applicants entered into an agreement of purchase and sale (the "Agreement") with Delpark Homes Limited ("Delpark"), accepted on the 20th day of February, 1997, for the purchase of a single family home to be constructed on Hickory Drive in the City of Mississauga.

The Agreement contained various schedules including four pages which show standard plans for the type of house selected by the Applicants together with a Schedule "D" which was entitled "Outstanding Custom Features" which on the third page has the handwritten entry "cantina to be under garage".

ISSUE:

Subsequent to taking possession of the house, the Applicants advised the Program that there were numerous deficiencies with respect to the house, including water penetration through the walls of the cantina. The only issue to be decided on this appeal relates to the claim with respect to the water penetration of the walls of the cantina.

THE LAW:

Section 13(1)(c) of the Act provides:

(1) Every vendor of a home warrants to the owner,

.....

(c) such other warranties as are prescribed by the regulations.

Section 14(1)(b) of the Act provides:

5. (1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

.....

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulation.

Regulation 892, Part VI, s. 14 of (under) the Act provides:

14. Every vendor of a new home warrants to the owner that there will be no water penetration through the basement or foundation of the home for two years after the date upon which the home is completed for possession.

THE EVIDENCE:

At the opening of the hearing, counsel for the Program tendered the Program's Book of Documents which was made Exhibit 3 in this hearing, and the Applicants tendered a Book of Documents which was entered as Exhibit 4 and a group of four photographs which were entered as Exhibits 5, A through D.

The only evidence given by the Applicants was given by Rocco Giorgio who is the son-in-law of the Applicants. He testified that he was at the building site throughout construction of the home and was aware of the water problem being experienced by the Applicants in the cantina. In his testimony, Mr. Giorgio made reference to the

conciliation inspection report issued by the Program which appears at Tab 9(a) of Exhibit 3 which report is dated August 11, 1999. It refers to an inspection which took place on August 9, 1999, with the Applicants in attendance together with Mr. Luke DiGiovanni, Mr. Luigi Nota, the builder's representatives and a Program representative, Mr. Mark Roccatagliata. The inspection report states, with respect to the water penetration into the cantina, that:

"...the cantina installed in the basement under the garage floor has been installed approximately 8" below the weeping tile. The first course of block along the west and north wall of the foundation fill up with water and penetrate into the cantina during rainstorms. The builder is to repair the weeping tile installed around the cantina to eliminate water penetration into the cantina."

The reason given for the problem was "poor workmanship".

Mr. Giorgio explained that to correct the problem Delpark applied a plastic membrane two feet up on all four walls and across the floor and that two to three inches of concrete were poured over the membrane on the floor. It was his evidence that water was still coming in as the sump pit filled up with water and sand which he believed was coming from under the garage floor.

Mr. Giorgio testified that the Applicants regularly had to wipe out the sump pit located in the cantina in order to remove what he identified as mould and mildew, building around the inside walls of the sump pit.

The pictures entered as Exhibit 5 are various views of the cantina. They show the membrane running up the walls, the concrete floor, the sump pump, sump pit, the doorway, and the step down into the cantina. The views are from the outside looking in and from across the cantina looking out.

On cross-examination, Mr. Giorgio testified that he was a preventive maintenance planner who scheduled repairs for equipment at Exhibition Place in Toronto. When presented with the plans attached to the Agreement which appear at Tab 2 of Exhibit 3, Mr. Giorgio acknowledged that there appeared to be two steps down into the cantina and that it was noted on the plan that the "number of steps may vary with grade".

The witness's attention was directed to the second conciliation report appearing at Tab 17(a) of Exhibit 3 dated October 29, 1999, which refers to the reinspection which took place on October 28, 1999 at the Applicants' residence with Mr. Rizzuto, Mr. Giorgio with Mr. Enzo Palumbo, the builder's representative, and Mr. Mark Roccatagliata. The report states the repairs were made by the installation of a drainage layer and the pouring of the concrete floor which allows any water that penetrates into the cantina through the block to drain to the sump pit behind the drainage layer. The report indicates that as the Applicants were not satisfied with this repair, the builder was refused permission to complete the repair. The report states that:

"It is the opinion of the Ontario New Home Warranty Program that the repairs made by the builder to eliminate the water penetration into the cantina is made to an acceptable tolerance of workmanship and materials. The builder is to complete the seal of the top of the drainage layer to eliminate any moisture to alleviate into the cantina."

Mr. Giorgio testified that, to the best of his knowledge, the floor was dry and the face of the membrane was dry; however, if you put your hand down between the membrane and the wall, the wall was wet. The witness again made reference to the sump pit and the condition of the water in the sump pit and to the two pictures of the sump pit which appear at Tab 9 of Exhibit 4 which, although attach to a report issued by Trow Consulting Engineers Ltd. ("Trow Consulting"), are not part of that report. The witness indicated that the Applicants had concerns with respect to mould being in the air of the cantina but acknowledged that he had no expertise in health matters. Mr. Giorgio testified that there had been no change in the cantina during the approximately five months from when the pictures appearing at Tab 16 of Exhibit 3 were taken to the date of this hearing. It was Mr. Giorgio's evidence that in heavy rains the sump pit does fill up with water.

Under cross-examination by counsel for the Added Party, Mr. Giorgio indicated that he was not sure if the sump pump was in the original plans, if it was required that there be a sump pump, or if the floor of the cantina would be below the weeping tile.

Although there was a report from Trow Consulting included in Exhibit 4, no witness was called by the Applicants with respect to that report and therefore it is not part of the evidence before this Tribunal.

The Applicants called no other evidence.

Counsel for the Program called Enzo Palumbo. He identified himself as the customer service manager for Delpark, a position which he had held since August 1999. He has experience in home building and masonry since 1983. Mr. Palumbo indicated that he was not involved with the Agreement or the plans and only became involved when the complaint with respect to the water penetration was made to Delpark, however, he could not remember the exact dates.

The witness testified that he was asked to assess the problem with respect to the bottom 16 inches of the walls of the cantina and ascertained that there was no weeping tile leading into the sump. At the time of his inspection, he did not detect any moisture on the floor. The witness further testified that he had concerns with respect to placing weeping tile around the base of the foundation of the cantina as that would then become the lowest point in the weeping tile system with the result that all of the weeping tile for the entire system around the house would flow into the weeping tile around the cantina and ultimately into the sump pit rather than into the sewer at the street.

Mr. Palumbo explained that as there was a sump pump in the cantina, it was determined that what was necessary was a method to conduct the water into the sump pit and isolate it from the living area within the room. This could be accomplished by a form of membrane or drainage layer which is laid starting at the highest point on the walls and across the floor to the sump pit. The top edges of the membrane are tacked to the concrete and are suppose to be caulked; however, because of the objections of the Applicants, this caulking had not occurred. The membrane is dimpled to allow for water to flow between the membrane and the surface against which it is placed.

Mr. Palumbo made reference to his letter to the Program of October 13, 1999 appearing at Tab 14 of Exhibit 3 wherein he explains that the repairs were made to the Applicants' residence on October 6, 1999 and that in his opinion a modification to the weeping tile

would not be effective in rectifying the problem as the weeping tile is above the level of the cold room (cantina) slab.

The witness testified that the plastic membrane could be used both internally and externally. It was designed to withstand having back-fill being placed against it, were it on the outside of the foundation.

On cross-examination, Mr. Palumbo stated that the decision as to the type of repair to make was based on his judgment and knowledge and that he did not check the building code. Particular reference was made to section 9.13.1.2 of the Building Code under the heading "Required Waterproofing".

Mr. Palumbo stated that there was no absolute way to avoid the possibility of water penetration and that the drainage layer was for both vertical and horizontal surfaces and created a permanent drainage layer. He stated that the form of membrane used was approved and required by the Code up to a few years ago and although is not required presently, is still approved as a drainage layer. In his opinion was the best solution for this situation, and he would not hesitate to use a similar solution for full basement interior walls.

Mr. Palumbo stated further that it was his opinion that there was no concern with respect to deterioration of the wall due to water penetration and referred to footings which were often placed in damp conditions. When asked about the effects of hydrostatic pressure, Mr. Palumbo indicated that as he had no knowledge with respect to hydrostatic pressure, he could not respond to questions with respect to this principle. When questioned with respect to the possibility of material from under the garage floor seeping through the walls, Mr. Palumbo stated that there would only be fine particles and in his opinion, there would be no deterioration of the soil under the garage floor as a result of this water penetration.

Counsel for the Program then called Mark Roccatagliata. He testified that he has been a warranty representative with the Program for approximately 12 years. He obtained a degree in architecture in 1984 and worked for an architectural firm for four years as both a site superintendent and designer. He testified that in his capacity as a warranty representative he had been involved in mediation, attended at homes to review complaints, issued reports with respect to warranty items and followed up on those items.

With respect to the complaint of the Applicants, Mr. Roccatagliata stated that, as a result of the receipt of a conciliation request form (Tab 7 of Exhibit 3) an inspection was conducted on August 9, 1999. Mr. Roccatagliata prepared the conciliation inspection report which appears at Tab 9(a) of Exhibit 3. He stated that the cantina did not show any moisture upon his inspection; however, there was staining on the block wall to the left side facing the door and evidence of water coming into the cantina along the bottom course of the block. Mr. Roccatagliata stated that with respect to the conciliation inspection report of August 9, 1999, he did not know for certain whether there was weeping tile or whether the weeping tile had been damaged. The conciliation inspection report was sent to the builder who then contacted Mr. Roccatagliata and asked as to the best solution. The builder was advised that the Program could not tell a builder how to fix the problem but insisted that it be completed with good work and materials and in accordance with the Ontario Building Code.

The witness testified that he received a letter from the Applicants dated October 7, 1999, (Tab 13 of Exhibit 3) which states that the Applicants were dissatisfied with the repair. Arrangements were made to inspect the work, at which time Mr. Roccatagliata took the pictures which appear at Tab 16 of Exhibit 3.

At the time of Mr. Roccatagliata's re-inspection, he checked the repair, and there was no water running into the cantina and no water running into the sump pit. The inspection occurred on October 28, 1999, and Mr. Roccatagliata issued his report on October 29, 1999.

The witness testified that subsequent to issuing the report, the type of repair performed by Delpark was discussed at a monthly staff meeting round table where it was determined that if properly installed, this type of repair would be acceptable. The witness testified that he is aware of other applications for this form of membrane where there was high water tables around elevator shafts in condominium projects. He gave as examples use in a project in Windsor near the St. Clair River or to protect underground parking and storm systems. He stated that such a membrane was approved for flat roofs and had been part of the Building Code until 1997 when it was deleted. The witness did not know why such deletion had occurred. It was Mr. Roccatagliata's opinion that 70% of builders still used the membrane where required.

It was Mr. Roccatagliata's opinion that the membrane had eliminated water penetration and therefore the cantina could be used for its intended purpose. When asked about the effect of hydrostatic pressure, it was the witness's opinion that there was no hydrostatic pressure at this house as no water was being pushed through any cracks.

On cross-examination, Mr. Roccatagliata stated that at the time of his inspection on August 9, 1999 referred to in the conciliation inspection report appearing at Tab 9(a), there was no water on the cantina floor. He agreed that the repairs did not stop the penetration of water but redirected the water which had penetrated to the sump pit. When again asked about the effects of hydrostatic pressure, it was Mr. Roccatagliata's opinion that if there was hydrostatic pressure, water would be coming through the cracks and would fill the sump pit.

When asked about the build up of calcium in the sump pit, it was Mr. Roccatagliata's testimony that this was normal in a sump pit and that the colour of the water was normal and depended on the subsoils through which the water flowed. He was also of the opinion that the system could be used in living space where there was food products but admitted that the application was new to the Program even though the product itself was known to the Program.

FACTS FOUND PROVEN:

1. The Applicants and the builder entered into the Agreement pursuant to which the builder constructed the Applicants' home on Hickory Drive in Mississauga.
2. Attached and forming part of the Agreement was Schedule "D" which provided that there was to be a cantina in the basement.
3. Also attached to the Agreement was a schedule which shows the floor plan and front elevation together with a floor plan of the basement which shows a sunken

area behind the garage and a further page which also shows the basement layout with an area designated as "cantina".

4. The house was constructed with a cantina with a floor which is approximately 8" below the floor of the basement.
5. As of August 9, 1999, there was water penetration through the block along the west and north walls of the foundations.
6. The remedial steps which the Program requested the builder to take were to repair the weeping tile installed around the cantina.
7. The builder did not do any work with respect to the weeping tile around the cantina but instead installed a plastic membrane to act as a drainage layer part way up all four walls and across the floor of the cantina and poured 2 to 3 inches of concrete over the floor of the cantina.
8. Part of the installation of the drainage layer requires that the membrane be sealed along its top edge and this was not done due to the position taken by the Applicants.
9. Since the installation of the drainage layer, the floor of the cantina is dry and the interior face of the drainage layer is dry.

POSITION OF PARTIES:

It is the Applicants' position that it was a term of the Agreement that a cantina would be built as part of the construction of the house and that it would be constructed in a good and proper manner however, this did not occur as there was water penetration into the cantina and that there continues to be water penetration into the cantina after the remedial work done by Delpark. The Applicants make reference to various sections of the Building Code including:

1. sections 5.6.2.2 (4) referring to junctions being designed and constructed to minimize the flow of water;
2. section A-5.6.2.1 which provides under the heading "Sealing and Drainage" that where there is a likelihood of some penetration by precipitation into a component or assembly, drainage is generally required to direct moisture to the exterior; and
3. section 9.14.2.1 (2A) which refers to the installation of a drainage layer to be installed adjacent to the exterior face surface of a foundation.

It is the Applicants' position as stated in their hearing request form at Tab 22 of Exhibit 3 that the drainage layer is only a temporary and not a long-term solution.

Further, the Applicants believe that the sediment and build up in the sump pit indicates problems with the subsoil under the garage floor being eroded and that there may be a problem with mould.

It is the position of the Program that the burden of proof rests with the Applicants and that in arriving at its decision the Tribunal must take into account section 14(2) of the Act which states:

14.(2) *Other recovery.* - In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

and argues that the repairs effective by Delpark are such a benefit.

With respect to the issue of actual water penetration, it is the Program's position that the installation of the drainage layer satisfies the warranty under section 14 of the Act as water is no longer penetrating through the basement or foundation of the home and that the drainage layer now becomes part of the building envelope with the result that if there is no penetration through the drainage layer, there is no penetration into the home.

Counsel for the Program notes that there was no complaint made with respect to mould and there is no evidence of mould, no evidence as to what is in the sump pit water and no evidence of any adverse effects upon the sump system. Further, there is no evidence of any hydrostatic pressure and no evidence that rectification of the weeping tile would correct the problem.

Counsel for the Program argues that the Applicants' fears are not of actual damage but prospective damage and that the Tribunal cannot adjudicate with respect to future conditions.

Finally, as there is no damages as required by subsection 14(1)(b) of the Act, the Applicants have no claim.

Counsel for the Delpark simply takes the position that the membrane is part of the wall and as the interior face of the membrane is not wet, there is no water penetration.

At the conclusion of the hearing, counsel for the Program advised that she had a Book of Authorities which she had not brought with her as it was anticipated that this hearing would continue for one further day. It was arranged that the Book of Authorities would be provided to both the Tribunal and the Applicants, and the Applicants would be given sufficient time to review the contents of the Book of Authorities, and if they wish to make any comments with respect thereto, the Tribunal would hear their comments. No response was received from the Applicants regarding the Book of Authorities.

DECISION AND ORDER:

The Book of Authorities provided by counsel for the Program contains Tribunal cases where claims were dismissed because the applicants failed to establish that there were damages resulting from a breach of the warranty as required under section 14(1) of the Act.

In the present situation, the Tribunal has no difficulty finding that the Applicants would have had a cause of action against the Delpark for damages resulting from the breach of warranty with respect to water penetration.

The Book of Authorities also contains cases where applicants have had their claims dismissed as a result of their failure to permit the builder the opportunity to rectify defects as envisioned by sections 14(2) and 14(3) of the Act.

The Tribunal finds that the actions of the Applicants in the present situation in refusing to have the builder complete the repairs do not fall within the type of refusal to permit rectification referred to in the various cases provided.

No evidence was introduced by the Applicants that the drainage layer as installed by Delpark did not conform with the Building Code. No evidence was adduced to show that the installation of the drainage layer was only temporary and not a long-term solution. The Applicants did not provide proof that there was erosion of the subsoil or that there was mould in the sump pit or the cantina.

In essence, the question that must be answered is whether or not the installation of the membrane as a drainage layer against the floor and interior walls of the cantina is the type of the repair that satisfies the warranty placed upon the builder under the Act and would satisfy any claim for damages that the Applicants might have against Delpark.

If the question is answered in the negative then the builder remains in breach of its warranty under the Act. However, if the question is answered in the affirmative then the Applicants' claim must be dismissed.

Throughout these proceedings, the Tribunal has been troubled by the fact that the cantina was not an add-on feature but part of the standard plan for this type of house under the Agreement and therefore should have been constructed in the same manner as the basement was constructed and it was a reasonable expectation of the Applicants that there would be no water penetration into the cantina as there would be no water penetration into the rest of the basement.

Notwithstanding the foregoing concern, the Applicants have not met the onus placed upon them to prove that the work done by Delpark does not satisfy the warranty. Therefore, the Tribunal must find that the repairs made by Delpark satisfied its obligation under the Act.

DECISION:

Accordingly, for the reasons stated above and pursuant to the authority vested in it by section 16(3) of the Act, the Tribunal directs the Program to disallow this claim with the proviso that Delpark is to reattend at the residence of the Applicants and complete the repair by caulking the top edges of the membrane.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: July 10th, 2000

GUDERSKI

ROMAN GUDERSKI and HANNAH GUDERSKA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

ROMAN GUDERSKI, representing himself and his wife
Hannah Guderska

ANDREA YORK, Counsel, representing the Ontario New Home
Warranty Program

DARREN COOPER, Agent, representing River Oaks
Developments Inc., Added Party

DATE OF
HEARING: June 29, 2000 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by the Applicants, Roman Guderski and his wife Hannah Guderska. The appeal is from a decision letter dated February 15, 2000 from the Ontario New Home Warranty Program ("the Program") denying two claims for warranty on their new home.

BACKGROUND:

On the October 2, 1996 the Applicants signed a purchase agreement with River Oaks Homes Inc. for a new house at 39 Prospector's Drive, which is on lot 58 in the 80-house Glen Angus subdivision, Markham. The net price was \$300,100.00 after various adjustments.

When the Applicants took possession of their home on the December 9, 1997, there were a number of outstanding items to be corrected by the builder. Eventually all but two were dealt with. One complaint being made by the Applicants is that two windows were not installed in the garage wall as they should have been, pursuant to the purchase agreement which shows two windows, one on each side of the entrance door. The Program takes the position there was a legitimate substitution with an improved garage roof at no expense to the Applicants.

The Applicant's other complaint is that the basement foyer did not have the parquet floor which they contend was in the contract and for which they paid extra.

No one appeared for the vendor because, in March 1999, River Oaks got out of the housing business and handed over the servicing of the houses in the subdivision to Glenbarra Management Services Inc. The Program called Darren Cooper, a civil engineer who is chairman of Glenbarra and has had experience in house building, having been involved in constructing some 20 houses.

THE ISSUES:

The first issue is whether or not the builder is entitled to substitute an improved roof line for the two windows in the garage wall below.

The second issue is whether there is in fact any contractual requirement for the builder to finish the basement foyer with parquet flooring.

FACTS FOUND AND PROVEN:

The builder made changes to the garage's peaked roof at his own expense costing about \$850.00. The same was done for all the other houses in the development by direction of the architect in order to improve the roof lines of the garages. The change involved installing a half window on one side of the peaked roofs and a dormer on the other side. The windows which were to have been in the Guderskis' garage wall were then omitted.

Dr. Guderski complains that this change means he has a lack of daylight entering the garage. The half window now in the roof does not help because he has installed an attic floor under it which prevents light coming down. So he intends to install the two windows in the garage wall anyway and said the estimates show it would cost \$500.00 for the windows and \$200.00 for the installation.

The second claim is more difficult. The Tribunal has to find whether there was a contractual requirement on the part of the builder to install the parquet flooring in the basement foyer. The situation is not free from doubt as there are a number of possibly conflicting documents.

The first document chronologically is schedule E 0055 which is an attachment to the purchase agreement of October 15, 1996. Item 4 is quite clear: *"install parquet floor throughout excluding bathrooms and lower level"*. That page in the agreement is signed by Dr. Guderski.

Dr. Guderski gave evidence that the wording was a mistake made by Ms. Strachan in the builder's office who transcribed the agreement and said she could not change the wording. It should, he said, have included the parquet flooring on the basement foyer. The only reason he gave for signing the page was that he was advised to by his lawyer even though there many other outstanding items.

To show this had been a mistake, Dr. Guderski pointed out a number of items in various documents.

On October 11, 1996 the agreement of purchase and sale was modified in an unsigned River Oaks document entitled "Upgrades and extras". The relevant upgrade reads:

"FINISH LOWER LEVEL FOYER - NO CARPET

\$800.00"

Dr. Guderski testified that the \$800.00 extra charge was for the basement parquet flooring. This makes sense as the cost of installation would be over \$500.00 before tax (the area of the foyer is 98 square feet and the quotation he got was for \$5.20/sq. ft). However, Darren Cooper testified that \$800.00 fits the cost for finishing the basement foyer walls and ceiling which was completed. He said that the word "finish" in that situation would not include the parquet flooring. Concrete, he said, is considered a finished floor.

A month later, November 11, 1996, Dr. Guderski received a fax from an organization called Colours & Concepts in response to an inquiry he said he had made to a lady in the builder's office about the status of the flooring in the basement foyer. The fax is on River Oaks letterhead. It bears no signature, no author and only has the usual fax recording of the sender at the very top of the page. The text reads,

"CLARIFICATION OF ITEM 4 ON E 0055 - PARQUET FLOORING TO BE INSTALLED IN FINISHED LOWER FOYER NC"

Darren Cooper explained that the colour chart project was done by an independent company under contract to River Oaks. Why Colour & Concepts would be sending this unsigned clarification is unexplained.

The colour chart project was done on this house 8 months later on July 6, 1997. The signed form stated:

"foyer: 0055 Parquet - natural"

This, Dr. Guderski said, shows that the parquet floor in the basement foyer was to be installed. But this conclusion is doubtful because the next line down relates to the main floor hall which is also a foyer and has parquet flooring and is part of the hall the line for which was marked "NA" although it too has parquet flooring. Moreover, two lines above the line for foyer was marked "Finished basement (where applicable) NA". This is far from clear.

Dr. Guderski also relied on a line in the pre-delivery inspection report dated December 3, 1997. The report had a second page on which was written "to be completed". The line in question reads,

"Basement foyer has no flooring (awaiting paper work)".

Darren Cooper testified that the wording "awaiting paper work" means that the requirement was undetermined by the builder.

Dr. Guderski further relied on a record in the Glenbarra computer taken from the same pre-delivery inspection report. Glenbarra made this record for the purpose of taking over the servicing of the houses built by River Oaks. The record in question refers to the December 3, 1998 date and reads,

Description
"misc.- basement foyer has no flooring"

Complete
"No"

But Darren Cooper explained that this particular item, together with a series of others noted as not complete, does not indicate an obligation to be fulfilled but rather was simply a recorded fact of something that was not done.

THE LAW:

With respect to the Applicants' claim for the two windows in the garage, the relevant provisions of the *Ontario New Home Warranties Plan Act* are:

Section 14(1)Where,

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.....

Section 14(2) In assessing damages, the Corporation shall take into account any benefit, compensation or indemnity payable to the person or owner from any source.

Regulation 892, Section 19 states:

Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

The underlying question is whether the vendor has made a substitution when extra value is put into a roof instead of installing two windows. It is really a question of the plain meaning of the word "substitution". In the Concise Oxford Dictionary "substitute" is defined as:

n., & v.t. 1. *Person or thing performing some function instead of another.*

In the Shorter Oxford Dictionary "substitution" is defined as:

2. *The putting of one person or thing in place of another.*

In Stephen Wood [1994] OCRAT 27 the Tribunal said "... functionality is relevant in considering the applicability of the warranties....that require substitutions to be of equal or better quality."

If the function was not an inherent part of the meaning of substitution, a builder could make any changes to a house as long as the changes were of equal or better value. The purchaser would be deprived of being able to make a binding choice of what was

wanted. The word used in section 19 is "substitution" not "change" and that imputes a definite function as is defined in the dictionary.

The Tribunal finds that section 14(2) of the Act and section 19 of Regulation 892 have no application to the garage.

With respect to the Applicants' claim to be entitled to parquet flooring on the basement foyer, section 14(1)(a) above applies and it becomes simply a question of whether there is a contractual requirement on the builder to install the parquet floor.

APPLICATION OF THE LAW TO THE FACTS:

When the builder made the changes to the garage roof on instructions from the architect, it was for its own benefit. While this increased the value of the garage, the change with the half round window in the attic has the day light blocked by the attic floor and does not compensate for the function of two wall windows below. Therefore, there has been no substitution in law as is contemplated in section 19 of the regulation above.

With respect to the parquet flooring in the basement foyer, the onus to establish their case rests upon the Applicants. The Tribunal has not been persuaded the builder has not fulfilled its contract in that respect.

DECISION:

Accordingly for these reasons and pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Program to disallow the Applicants' claim for a parquet floor in the basement foyer but directs the Program to install two suitable windows in the garage or in the alternative to pay the Applicants \$700.00 within 60 days of the release of the decision.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: July 10, 2000

SOPINKA

ALICIA SOPINKA

APPEAL FROM A DECISION OF THE COMPLAINTS
COMMITTEE OF THE BOARD OF FUNERAL SERVICES
UNDER THE FUNERAL DIRECTORS AND ESTABLISHMENTS
ACT

TO REFUSE A REFERRAL TO THE DISCIPLINE
COMMITTEE OF THE BOARD OF FUNERAL SERVICES

IN THE MATTERS OF GEORGE ROBERTSON, AND
SMITH'S FUNERAL SERVICE (BURLINGTON) LTD.

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

ALICIA SOPINKA, appearing on her own behalf
JULIE MACIURA, Counsel, representing Complaints Committee,
Board of Funeral Services
WILLIAM DERMODY, Counsel, representing George Robertson
and Smith's Funeral Service (Burlington) Ltd.

DATE OF
HEARING:

July 5, 2000

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) (the "Tribunal") arising out of a Decision of the Complaints Committee of the Board of Funeral Services dated January 5, 2000 under the Funeral Directors and Establishments Act "the Act" that the conduct of George Robertson and Smith's Funeral Service (Burlington) Ltd. (Smith's) does not warrant referral to the Discipline Committee of the Board of Funeral Services.

BACKGROUND:

Mr. Michael Anthony Sopinka (Sopinka Jr.) died on June 5, 1998 and Smith's Funeral Service (Burlington) Ltd. was hired by Mr. Michael Samuel Sopinka (Sopinka Sr.) to provide funeral services. The executors for Sopinka Jr. were Sopinka Sr. and Mr. Brian Sanders. Sopinka Jr. was cremated and after the funeral service his cremated remains were kept at Smith's.

On October 1, 1998 Sopinka Sr. died and his funeral was also conducted by Smith's. The remains of Sopinka Sr. were buried in a traditional funeral service, and the Applicant believes that the cremated remains of Sopinka Jr. were put into the casket of Sopinka Sr. prior to the burial. Brian Sanders the surviving executor of Sopinka Jr. had

refused to act as an executor and when Sopinka Sr. died, the estate was left without executors. The Applicant, Mrs. Alicia Sopinka (Mrs. Sopinka Jr.) had been separated from her husband for two years, and applied to the courts to become the executor of the estate of Sopinka Jr. The cremated remains of Sopinka Jr. were released by Smith's to his mother Mrs. Stella Sopinka on October 4, 1998.

THE LAW:

Section 1 of the Funeral Directors and Establishments Act (the 'Act'), states as follows:

"funeral director" means an individual who provides or directs the providing of funeral services;

"funeral services" means the care and preparation of dead human bodies and the coordination of rites and ceremonies with respect to dead human bodies, but does not include services provided by a cemetery or crematorium owner under the Cemeteries Act;

Section 14 of the Funeral Directors and Establishments Act (the 'Act'), states as follows:

(1) The Complaints Committee shall consider and investigate complaints regarding the conduct or actions of any licensee, but no action shall be taken by the Complaints Committee under subsection (2) unless,

(a) a written complaint has been filed with the Registrar and the licensee whose conduct or actions are being investigated has been notified of the complaint and given at least two weeks in which to submit in writing to the committee any explanations or representations the licensee may wish to make concerning the matter; and

(b) the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint.

(2) The Complaints Committee in accordance with the information it receives may,

(a) consider all or part of the matter;

(b) direct that all or part of the matter be referred to the Discipline Committee; and

.....

(3) The Complaints Committee shall advise the Registrar in writing of the action it proposes to take or recommend and its reasons therefore.

.....

(6) the Registrar shall send to the complainant and to the person complained against by prepaid first class mail a copy of the proposal of

the Complaints Committee and its reasons therefore, if any, together with notice that informs the person to whom it is sent that the person is entitled to a hearing by the Tribunal if the person mails or delivers to the Registrar and to the Tribunal, within fifteen days after the notice is served on the person, notice in writing requiring a hearing and the person may so require such a hearing.

.....

(8) If the complainant or the person complained against requires a hearing, the Tribunal shall appoint a time for and hold a hearing.

(9) After holding a hearing, the Tribunal may by order direct the Complaints Committee to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Complaints Committee ought to take in accordance with this Act and the regulations and, for such purposes, the Tribunal may substitute its opinion for that of the Complaints Committee.

Section 16 of the Act states as follows:

(1) The Discipline Committee shall,

(a) when so directed by the Board, Executive Committee or Complaints Committee, hear and determine allegations of professional misconduct or incompetence against a funeral director;

.....

Section 1 of the Vital Statistics Act states as follows:

"cremation" means the disposal of a dead body by incineration under the Cemeteries Act;

"funeral director" means a person who takes charge of the body of a still-born child or a deceased person for the purposes of burial, cremation or other disposition,

Section 22 of the Vital Statistics Act states as follows:

(3) upon the registration of the death, the division registrar without the payment of any fee, shall forthwith prepare and deliver to the funeral director requiring the same for the purpose of the burial, cremation or other disposition or the removal of the body of the deceased person,

(a) an acknowledgement that the death has been registered; and

(b) a burial permit for the purpose of the burial or other disposition of the body.

Duties of a funeral director, etc.

(6) Upon receipt of the statement containing the personal particulars and the medical certificate of death, the funeral directors shall complete the statement containing personal particulars, setting forth the proposed date and place of burial, cremation or other disposition or the removal of the body, and shall deliver the statement and the medical certificate to the division registrar for the purpose of the proper registration division.

ISSUE:

The legal issue in this case is whether the Complaints Committee erred in finding that the conduct of Mr. George Robertson and Smith's Funeral Service (Burlington) Ltd. did not warrant a referral of the matter to the Discipline Committee.

WITNESS FOR THE APPLICANT:

Evidence was given by Mrs. Alicia Sopinka who testified that she did not apply to become the executor of the estate of Sopinka Jr. and pointed out that at the time Mrs. Stella Sopinka received the cremated remains of Sopinka Jr. Mrs. Stella Sopinka was also not an executor of the estate. A letter dated June 22, 1999 from the lawyer for Mrs. Stella Sopinka was produced (Exhibit 3) to show that the appointment of the replacement executors had not yet been ordered by the court at the time the cremated remains were received by Mrs. Stella Sopinka.

The Applicant testified that she was not satisfied with the decision of the Complaints Committee (Exhibit 1) as there were several questions left unanswered. The Committee found that it could not make findings of credibility or make a finding of fact that the funeral was not properly conducted. In the following sentence they did state that:

" a significant concern has been raised and the licensee would likely avoid future complaints of a similar nature if the licensee had taken more caution in establishing whom the legal custodian of the cremated remains was."

The Applicant raised the question of why the Respondents allowed the cremated remains to be removed when they knew or should have known that there was a controversy in the family. She stated that they should have known that Mrs. Stella Sopinka would try to bury the ashes, and a representative of the Cemetery had told her that only one burial was registered. The witness did not believe that Mrs. Stella Sopinka would bury the ashes "behind her back". Mrs. Alicia Sopinka testified that although the Committee said Mr. Robertson was acting in good faith, she did not understand how he could prove this, and further, if he was acting in good faith he showed a lack of judgment.

In cross-examination she agreed that when Sopinka Jr. died he left a Will naming his father Sopinka Sr. as one of the executors, and that she was neither an executor nor a beneficiary. In her opinion the funeral arrangements were made by Mrs. Stella Sopinka and the witness questioned whether at that time Sopinka Sr. was in a proper state of mind. In the witness's opinion the funeral director should have known that he was dealing with two crazy people. When Sopinka Sr. died, the witness agreed that she was not an executor or beneficiary of his estate either. Her objection to the whole process

was that her children did not know the place of their father's burial and did not have the opportunity to grieve for him properly. In her opinion Sopinka Jr. deserved to have a burial properly registered, and if Mr. Robertson had not given his ashes away this would have occurred. The witness agreed that at no time was there any objection to the process by the executors for the estate of either Sopinka Jr. or Sopinka Sr. Mrs. Alicia Sopinka also testified that she did not know if Mr. Robertson had placed the cremated remains in the casket, but based on information provided to her, she believed that it was Mrs. Stella Sopinka who had placed them there. Her objection was that on behalf of her children, she thought that allowing the ashes to be put into the casket of Sopinka Sr. was a monstrous act, and showed a lack of dignity towards Sopinka Jr. In her opinion the Respondents had a duty to check the casket before it was closed to ensure that the ashes were not placed in it. She made reference to the Vital Statistics Act but was not able to refer specifically to any sections of the Act but agreed that a cremation was supposed to be registered. She agreed that Mrs. Stella Sopinka became an Administrator of the estate of Sopinka Jr. together with a lawyer acting on behalf of the Applicant. Neither Administrator objected to the issue of the cremated remains having been released to Mrs. Stella Sopinka, however the Applicant explained that she did not instruct her lawyer to make an objection as it would cost money and she preferred to do it herself.

WITNESS FOR THE RESPONDENT:

The only witness called by the Respondents was George Robertson who testified that he had worked at Smith's Funeral Service (Burlington) Ltd. for 18 years, and had been licensed for 16 years. Mr. Robertson was the person who dealt with the funerals of Sopinka Jr. and Sr. He testified that Sopinka Jr. had died on June 25, 1998 and his funeral was arranged by Sopinka Sr. A cremation was carried out on June 30, 1998. As required by the law, the death was registered, a Burial Permit was executed and taken to the Bayview Crematorium and a Coroner's Certificate permitting cremation was obtained. Once the cremation was completed a Certificate of Cremation was obtained, and the cremated remains were kept at Smith's. The witness testified that Mrs. Stella Sopinka represented herself as legally authorized to take the cremated remains, and signed the required authorization on October 4, 1998 (Exhibit 4).

Mr. Robertson testified that Sopinka Sr. died on October 1, 1998 and although Smith's provided the funeral services, the casket was purchased independently by the family. Arrangements for this funeral were made by Mrs. Stella Sopinka. The witness denied knowledge of what happened to the cremated remains and stated that he did not know what Mrs. Stella Sopinka did with them.

In cross-examination he testified that the family is entitled to place anything in the casket that they wish, and described the container for the ashes as being a rectangular object seven inches long and between three and four inches deep. At the time he released the ashes to Mrs. Stella Sopinka, he said that he did not ask for a copy of the Will and that it was not the common practice. If someone represented themselves as legally authorized to contract for the funeral they would deal with that person and similarly in this case Mrs. Stella Sopinka represented herself as being legally entitled to take the cremated remains. His evidence was that he was not aware of the family dynamics even though it was only three months after the difficulties involving the first funeral. He was unable to provide details and stated that it was too long ago to remember as there were many funerals since that time.

Mr. Robertson testified that there was no code of conduct within the profession, and there were apparently no written guidelines. His recollection was that the family closed the casket, which automatically locked, and was left alone for that to be done, so he was unaware of what was put into the casket.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that the Applicant was the estranged wife of Sopinka Jr. at the time of his death and was neither the executor nor the beneficiary of his estate. The funeral was arranged by Sopinka Sr. and a cremation was carried out in accordance with the requirements of the Vital Statistics Act. On October 1, 1998 Sopinka Sr. passed away and there were then no executors of the estate of Sopinka Jr. willing to act. Mrs. Stella Sopinka represented to Smith's Funeral Service (Burlington) Ltd. that she had the legal right to take custody of the cremated remains of Sopinka Jr. and did so on October 4, 1998. Mrs. Alicia Sopinka did not advise Smith's of her wishes concerning the ashes of Sopinka Jr. prior to the release of those ashes by Smith's to Mrs. Stella Sopinka. Mrs. Stella Sopinka later became a co-administrator of the estate of Sopinka Jr. The Applicant believes that Mrs. Stella Sopinka placed the ashes of Sopinka Jr. into his father's casket. There is no direct evidence of this, only hearsay received by the Applicant, but the Tribunal accepts that it is very likely that this occurred.

APPLICATION OF LAW TO FACTS:

The legal issues in this case are whether the Respondents were responsible for ensuring that the cremated remains of Sopinka Jr. were not turned over to his mother prior to her being appointed as Administrator of his estate, and whether they had a further duty to ensure that the cremated remains were not put in Sopinka Sr's casket.

On the issues of whether there was a duty not to turn over the cremated remains there was no evidence provided to the Tribunal of any standard within the industry other than the evidence of Mr. Robertson who testified that they would be turned over to someone who represented that they had the legal right to them. The funeral director must exercise discretion in this matter. In this case there is no dispute that Mrs. Stella Sopinka was the mother of Sopinka Jr. and signed the release form stating that she was:

" of the same and nearest degree of relationship to the deceased and/or legally authorize were charged with responsibility of such burial and/or other disposition."

No authority was given to show that an Executor or Administrator had to be appointed to obtain the release of the cremated remains. In this case the cremated remains were released to the nearest relative in the absence of a co-habiting spouse. Under the Vital Statistics Act, a cremation is defined as being a method of disposal of a dead body, and is the equivalent of a burial as a method of disposition under the definition of "funeral director". Therefore once the cremation has taken place the body is deemed to be disposed of, and there is a practical issue of who should be able to take the cremated remains. If they are properly released to an interested person, then that person may

dispose of them as they see fit. It is well known that ashes are often scattered or stored and are not required to be buried. If they were in fact put into the coffin of Sopinka Sr. this would not be an improper disposition of them for legal purposes if the person performing the act had properly taken charge of them any more than if they had been scattered. If a standard was imposed on funeral service providers that they were not to release the cremated remains or allow a person to arrange a funeral without proof that person is an executor or administrator or has the consent of all possible interested parties, it would prove to be a cumbersome and unworkable procedure. Funerals could be delayed for months while matters proceeded slowly through the courts. If Mrs. Stella Sopinka acted in bad faith in the way that she dealt with the cremated remains, that is separate from the act of the Respondents in releasing the ashes to her. The Respondents relied on the belief that a mother will act in the best interests of her deceased son, and in the best interests of her grandchildren. They were not given any notice otherwise. In due course the mother did become a Co-administrator of her son's estate. Her Co-administrator did not raise an objection to ashes being released to Stella Sopinka. If the industry had provided a protocol for dealing with this type of situation, the issue of conduct before this Tribunal might have been clearer, but in the absence of special required procedures the Tribunal finds that there was no conduct by the Respondents such that the matter should be sent to the Discipline Committee of the Board of Funeral Services.

DECISION:

Therefore, by virtue of the authority vested in it under Section 14(9) of the Funeral Directors and Establishments Act, the Tribunal finds that the conduct complained of, does not warrant a referral to the Discipline Committee of the Board of Funeral Services.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice Chair

Released: July 11th, 2000

CHRYSLER CREDIT CANADA LTD.

CHRYSLER CREDIT CANADA LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

NEIL ABBOTT, Solicitor for the Applicant

DATE OF HEARING: July 7, 2000

DECISION RELEASED: July 11, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 7, 2000, at Toronto, Ontario, to consider the Applicant’s appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Chrysler Credit Canada Ltd. (the "Applicant")
Motor Vehicle:	1998 Jeep Grand Cherokee, plate # 154 XVJ (the "vehicle")
Date of Appeal:	June 9, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3)(c) of the Act.

This matter came before this Tribunal on July 7, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

SCHEDULE "A"

IMPOUNDMENT

The Vehicle

1. The Vehicle in question is a 1998 Jeep Grand Cherokee bearing VIN# 1J4GZ78YWC309960 (the "Vehicle").
2. The Vehicle was leased to Jamie C. McGuinness ("Jamie") on October 30, 1998. Annexed hereto and marked as Exhibit "A" to this my Affidavit is a true copy of the Lease.

The Impoundment

3. The Vehicle was impounded as a result of an incident on May 27, 2000. Annexed hereto and marked as Exhibit "B" to this my Affidavit is a true copy of the Impoundment Order.

Claim of Chrysler Credit

4. The additional terms and conditions of the Lease provide that the Vehicle shall not be used for any illegal purpose and in accordance with the provisions of the Lease, upon the happening of such, a default occurred in which case, Chrysler Credit is entitled to repossess the Vehicle.
5. At all material times, Chrysler Credit remains the registered owner of the Vehicle, pursuant to the Lease. Annexed hereto and marked as Exhibit "C" is a true copy of the Vehicle Ownership Permit. Therefore, by virtue of the seizure of the Vehicle Chrysler Credit believes that it is entitled to possession of the Vehicle and intends to enforce its rights to the Vehicle.
6. Chrysler Credit is innocent of any complicity in and did not collude in any alleged or actual contravention of the Highway Traffic Act (the "Act") by Jamie that resulted in the impoundment in that:
 - (a) any illegal use of the Vehicle was expressly prohibited by the Lease; and
 - (b) Chrysler Credit had no knowledge of any intended or actual use of the Vehicle for any purpose which would contravene the Act or result in the impoundment of the Vehicle.
7. Chrysler Credit exercised all reasonable care to satisfy itself that the Vehicle would be used in contravention of the Act.
8. By virtue of the terms and conditions of the Lease which was imposed upon the Lessees as aforesaid.
9. The Lease is for a period of thirty-six (36) months and will mature on October 30, 2001. The Lease has been current and there is no default payment thereunder. At the Maturity of the Lease, Jamie is obliged to return the Vehicle to Chrysler Credit failing which, he will be responsible for a payout in addition to the damages in the sum of \$25,268.98.
10. Chrysler Credit therefore asks that the Impoundment Order be lifted, its Vehicle returned and be compensated for the costs of impounding including storage thereof.

Mr. Abbott stated that the vehicle was leased to the driver, Jamie C. McGuinness, by the Applicant on October 30th, 1998. Mr. McGuinness was subsequently suspended for

an incident on November 7th, 1998 and the vehicle was impounded on May 27th, 2000. Mr. McGuinness had entered into a 36-month contract with the Applicant which was now in default since he was found driving the vehicle while his driver's licence was under suspension. Mr. McGuinness was in violation of the terms of the leasing contract as this constituted using the vehicle in "violation of any law" as defined by the terms of the contract.

Mr. Abbott stated that the terms of the contract which stipulated that the vehicle was not to be used in violation of any law, included driving the vehicle while driver's licence is under suspension. As such, the Applicant would reposes the vehicle from the lessee, and the Applicant would then be able to dispose of it as they see fit. Mr. Abbott argued that by enforcing these terms of this contract, including imposing the sanction of repossession of the lessee's vehicle, the Applicant was exercising a reasonable measure of due diligence that should be considered appropriate under these particular set of circumstances.

Mr. Abbott stated that the Applicant's relationship with the lessee is that of an arm's length agreement. Furthermore, the Applicant functions as a financial service company, and only acts as a source of funds for the purchasing of a vehicle through a local Chrysler dealership, with the vehicle being used as security. The Applicant can only accept or deny financing based upon a potential lessee's financial or credit history. As a finance company, Mr. Abbott argued that the Applicant has no authority to deny financing for a vehicle based upon a person's driving record, and that no checks of the status of the driver's licence were ever made. Furthermore, since Mr. McGuinness became suspended very shortly after the lease agreement was made, had any inquiries into the status of his driver's licence been made at that time, they would have shown his driver's licence to have been valid and the circumstances would have not been different.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jamie C. McGuinness;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 11, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The only issue to be considered in this appeal is that of due diligence. The grounds of appeal under section 50.2 (3)(c) of the Act requires that the Applicant show the Tribunal that Chrysler Credit Canada Ltd. exercised due diligence in attempting to determine that Mr. McGuinness' driver's licence was not suspended at the time of the impoundment of the Applicant's vehicle.

The Tribunal finds that under the circumstances of the relationship that the Applicant had with the driver, that being the arms length financial agreement contract, the Applicant has indeed exercised some measure of prudence and responsibility. In as much as the contractual measures taken by the Applicant to assure that their vehicle was not being used in an illegal manner may be construed as some measure of an effort to assure that the vehicle was being used within the law, nonetheless, the Tribunal finds that they do not satisfy the specific requirements of the Act.

The evidence indicates that no attempts were made by the Applicant to determine the status of Mr. McGuinness' driver's licence as required by the Act; therefore, the Tribunal finds that no effort had been made by the Applicant to satisfy the requirements of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: July 11, 2000

CHRYSLER CREDIT CANADA LTD.

CHRYSLER CREDIT CANADA LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: SANDRA QUADRINI
Representative for the Registrar of Motor Vehicles

NEIL ABBOTT, Solicitor for the Applicant

DATE OF HEARING: July 7, 2000

DECISION RELEASED: July 11, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 7, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Chrysler Credit Canada Ltd. (the "Applicant")
Motor Vehicle: 2000 Chrysler Neon, plate # AFFH 057 (the "vehicle")
Date of Appeal: June 16, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3)(c) of the Act.

This matter came before this Tribunal on July 7, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

SCHEDULE "A"

IMPOUNDMENT

The Vehicle

1. The Vehicle in question in this appeal is a 2000 Chrysler Neon, bearing vehicle identification number 1C3ES46CXYD599278 (the "Vehicle").
2. The Vehicle was leased to Emilio V. Figueredo (the "Lessee") on August 14, 1999 pursuant to a Vehicle Lease Agreement (the "Lease"). Annexed hereto and marked as Exhibit "A" to this my Affidavit is a true copy of the Vehicle Lease Agreement.

The Impoundment

3. The Vehicle was impounded as a result of an incident on June 3, 2000. Annexed hereto and marked as Exhibit "B" to this my Affidavit is a true copy of the Impoundment Order.

Claim of Chrysler Credit

4. The additional terms and conditions of the Lease provide that the Vehicle shall not be used for any illegal purpose and in accordance with the provisions of the Lease, upon the happening of such, a default occurred in which case, Chrysler Credit is entitled to repossess the Vehicle.
5. At all material times, Chrysler Credit remains the registered owner of the Vehicle, pursuant to the Lease. Annexed hereto and marked as Exhibit "C" is a true copy of the Vehicle Ownership Permit. Therefore, by virtue of the seizure of the Vehicle Chrysler Credit believes that it is entitled to possession of the Vehicle and intends to enforce its rights to the Vehicle.
6. Chrysler Credit is innocent of any complicity in and did not collude in any alleged or actual contravention of the Highway Traffic Act (the "Act") by the Lessee that resulted in the impoundment in that:
 - (b) any illegal use of the Vehicle was expressly prohibited by the Lease; and
 - (b) Chrysler Credit had no knowledge of any intended or actual use of the Vehicle for any purpose which would contravene the Act or result in the impoundment of the Vehicle.
7. Chrysler Credit exercised all reasonable care to satisfy itself that the Vehicle would not be used in contravention of the Act.
8. The Lease is for a period of forty-eight (48) months and will mature on August 14, 2003. At the Maturity of the Lease, the Lessee is obliged to return the Vehicle to Chrysler Credit failing which, he will be responsible for a payout in addition to the damages in the sum of \$8,236.95.
9. Chrysler Credit therefore asks that the Impoundment Order be lifted, its Vehicle returned and be compensated for the costs of impounding including storage thereof.

The vehicle was leased by Mr. Figueredo, the driver, from the Applicant on August 14th, 1999. Mr. Figueredo's driver's licence was subsequently suspended for an offence that occurred on November 18th, 1999, and the vehicle was impounded on June 3rd, 2000.

Mr. Abbott stated that the default provision of the contract that Mr. Figueredo entered into with the Applicant stipulated that the vehicle was not to be used for any illegal purposes, and that no inquiries had been made, at any time into the status of Mr. Figueredo's driver's licence.

Mr. Abbott argued that under the circumstances of this case, the efforts of the Applicant to ensure that its vehicle was not to be used in any illegal way, as stipulated by the contract that the driver signed, constituted due diligence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Emilio Figueredo Vinent;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 5, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The only issue to be considered in this appeal is that of due diligence. The grounds of appeal under section 50.2 (3)(c) of the Act requires that the Applicant show the Tribunal that Chrysler Credit Canada Ltd. exercised due diligence in attempting to determine that Mr. Figueredo's driver's licence was not suspended at the time of the impoundment of the Applicant's vehicle.

The Tribunal finds that although the Applicant took measures to insure that the vehicle was not to be used in an illegal way, these measures can not be considered due diligence as specifically defined by the Act. There is no evidence before this Tribunal that the Applicant made any attempt to determine the status of Mr. Figueredo's driver's licence. A failure to make any inquiry as to the status of the driver's licence does not satisfy the requirement to exercise due diligence, as stipulated by the Act. Therefore, the Applicant has not satisfied the requirements of this ground of appeal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: July 11, 2000

LATHER

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
JOHN AND GLADYS LATHER

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

JOHN AND GLADYS LATHER

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

SPARKS BUILT HOMES LTD.

Added Party

ADJOURNMENT ORDER

WHEREAS, John and Gladys Lather (the "Applicants") appealed to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) from a written decision letter dated March 3, 2000 issued by the Ontario New Home Warranty Program to deny the Applicants' claim;

AND WHEREAS the Tribunal appointed a time and place for the pre-hearing for July 6, 2000 and the hearing for August 23-25, 2000 in the above matter;

AND WHEREAS Counsel for the Respondent requested an adjournment of the pre-hearing date and hearing date;

NOW THEREFORE the Tribunal Orders on consent of all parties that:

- 1) The pre-hearing scheduled for July 6, 2000 is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Wednesday, August 23, 2000.
- 2) The hearing scheduled for August 23-25, 2000 is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, October 11, 2000 and to continue October 12 and 13, 2000 if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 11th, 2000

HILES, CHRISTOPHER RICHARD AND 787498 ONTARIO INC. O/A LAKEVIEW
MOTOR SALES AND SERVICE

787498 ONTARIO INC. o/a LAKEVIEW MOTOR SALES AND SERVICE AND
CHRISTOPHER RICHARD HILES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: F. Bruce Fitzpatrick, Vice-Chair

APPEARANCES: Christopher Richard Hiles, Agent on behalf of 787498 Ontario Inc.
o/a Lakeview Motor Sales and Services
A. Mitchell Goldbloom, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: July 10, 2000 Kingston

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated February 23, 2000, issued by the Registrar of the *Motor Vehicle Dealers Act* (the "Act") to revoke the registrations of 787498 Ontario Inc. o/a Lakeview Motor Sales and Service ("Lakeview") and Christopher Richard Hiles ("Hiles") acting as a motor vehicle salesperson pursuant to the *Motor Vehicle Dealers Act*. By a letter dated March 7, 2000, to the Registrar of the Tribunal, Hiles on behalf of himself and Lakeview requested a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal).

THE FACTS:

Based on the evidence, the witnesses and the documentary evidence presented at the hearing, the Tribunal finds the following as fact.

The Applicant Hiles is the sole officer and director of Lakeview which has a registered motor vehicle dealer location at premises known municipally as 132 Main Street, Wellington, Ontario.

Lakeview has been registered as a dealer under the Act since July 5, 1993. Hiles was registered as a dealer from March 3, 1986 until July 5, 1993, at which point, he became a registered salesperson for Lakeview.

There is a substantial amount of money owing by Lakeview to the Province of Ontario pursuant to the *Retail Sales Tax Act*, R.S.O. 1990, c. R-31, as amended. Lakeview is a registered vendor within the meaning of the *Retail Sales Tax Act*. Hiles admits that at least \$100,000.00 is owing by Lakeview and has been owing since a field audit was conducted by the Ministry of Revenue on or about July 31, 1994. Lakeview has filed some 47 returns, all of which were in default, as the appropriate amount of tax was not remitted within the time permitted by the Act in respect of those filings. Some 8 post-dated cheques provided to the Ministry of Revenue have gone NSF.

Hiles acknowledges that bookkeeping is not one of his major attributes. He has attempted to keep proper books and records, but admits he has not done a very good job. Hiles has hired a number of bookkeepers. The most recent person is Michelle Moore. By letter dated June 6, 2000, addressed to who it may concern, she indicated that she was completing the books for Lakeview. She indicated she expected to have them done by July 1, 2000. As of July 10, 2000, Hiles indicated that the books were not completed. Hiles went to see Ms. Moore in the morning of July 10, 2000, to discuss the completion of the review of his books. He admits that he has sold motor vehicles, collected the retail sales tax and has not remitted the trust funds because he used it to "pay bills".

On December 10, 1999, a field collection officer from the Ministry of Revenue, Stan V. Gerkes ("Gerkes") an officer of some fourteen years of experience with the Ministry attended at Lakeview's dealership. The purpose of the visit was to advise Hiles that the amounts he had been paying to the Ministry (\$200.00 per week) were not sufficient to retire the debt, which the Ministry estimated at the time was in the order of \$171,000.00. Gerkes made an appointment to conduct a further review of the books and records of Lakeview.

On January 28, 2000, Gerkes again attended at the dealership. Hiles produced the books and records as requested. Gerkes noticed at least one discrepancy. For a filing for the month of September 1997, Lakeview reported sales in the amount of \$45,565.00 with \$242.00 of retail sales tax due and owing. The amount was not remitted. Notwithstanding that report, the actual amount of sales, as indicated by the records kept at the dealership was \$53,898.00, indicating that the sum of \$1,939.00 of retail sales tax had been collected and not remitted.

On January 28, 2000, Gerkes attended the Registry Office at Picton. His search of the Land Registrar for Prince Edward (No. 17) Picton revealed a Transfer/Deed of Land, instrument number 0151794, dated December 22, 1999. This document transferred 3 properties from Hiles to his spouse, Sandra Lynn Hiles. The transfer covered the following lands:

1. 132 Main Street, Wellington, Ontario (the vehicle dealership);
2. R.R. #2, Picton, Ontario (a rental property);
3. 37 West Street, Wellington, Ontario (a rental property).

The transfer indicated that there was no consideration paid. This was verified by a land transfer tax affidavit sworn by Sandra Lynn Hiles on December 22, 1999.

The Ministry of Revenue conducted a further audit on Lakeview in May of 2000. As a result of this audit, a further \$204,000.00 of tax has been assessed as against

Lakeview. Lakeview intends to appeal this assessment. As of the date of the hearing of the appeal has not expired, but Lakeview has yet to appeal.

Gerkes specifically questioned Hiles about the transfer. Hiles indicated he was “securing his family position”. Hiles had the advice of his solicitor, Mr. Williams of Picton, with respect to the transfers, who recommended the transfers.

Since the incorporation of Lakeview, after which time Hiles acted only as a motor vehicle dealer salesman at Lakeview, Hiles nevertheless has had 126 vehicles registered to his name, which were subsequently sold. Presently there are fourteen vehicles registered in Hiles’ name.

Hiles has not kept a garage register listing those vehicles which have come into the possession of the dealership and have been sold by Lakeview.

Hiles has made some efforts to pay the outstanding retail sales tax and has offered to pay some \$200.00 per week against the outstanding debt, which, according to the Ministry, now exceeds some \$300,000.00. As at the date of the hearing, Hiles on behalf of Lakeview was paying \$200.00 per week. This amount was not agreed to by the Ministry, which wanted a far more substantial repayment schedule.

ISSUE:

The issue in this proceeding is whether the Registrar has sufficient grounds to revoke the registration of Lakeview as a motor vehicle dealer under the *Motor Vehicle Dealer Act* and Hiles’ registration as a motor vehicle dealer salesperson under the *Motor Vehicle Dealers Act*.

THE LAW:

Section 6 of the *Motor Vehicle Dealers Act* provides:

.....

6(2) Subject to Section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 5 of the Act disentitles an Applicant to registration where:

5(1)

.....

(c) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of the business; or

- (d) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

APPLICATION OF THE LAW TO FACTS:

In a proceeding under Section 7(4) of the Act, the Registrar has the burden of proving the reasonableness of his grounds for proposing to revoke the Applicants' registrations under the Act. The Registrar proposes to revoke the registrations of Lakeview and Hiles on the grounds that Lakeview and Hiles cannot reasonably be expected to be financially responsible and the past conduct of Lakeview and Hiles forms reasonable grounds for the belief that Lakeview and Hiles will not carry on business in accordance with the law. Hiles' personal integrity and honesty were put in issue by evidence raised by the representative of the Registrar, Amanda LeeDempsey. Proper and due notice of this position was given to Lakeview and Hiles. Ms. LeeDempsey is the manager of inspections for the Ontario Motor Vehicle Industry Council.

1. Can Lakeview and Hiles reasonably be expected to be financially responsible in the conduct of business?

Hiles testifying on his own behalf and behalf of Lakeview explained that the failure to remit retail sales tax is as a result of his failure to keep proper records and as a result of his difficulties in conducting business. Hiles indicated that he had used the retail sales tax to "pay bills" in the hopes that things would get better in the next months. Apparently things did not get better over a 4-year period. The "use" of trust funds in this way is a completely unsatisfactory and irresponsible approach to the conduct of business. The Tribunal is greatly concerned that the transfer of land on December 22, 1999, may have been motivated solely by the desire to place these assets out of the reach of creditors, namely the Ministry of Finance. However, the Tribunal makes no finding as to whether or not this transfer was a fraudulent conveyance or a conveyance to avoid creditors. Hiles did explain that he had done it on advice of counsel, however, the Tribunal takes the view that this, in and of itself, is not a satisfactory answer to the concerns raised by the Ministry. The specific quality of this transaction will no doubt be dealt with in another forum.

The Tribunal notes that Hiles was, at least up until December 21, 1999, the owner of two rental properties. While he testified that he is under some considerable difficulty in his business, he certainly was of the means to own rental properties and generate income from those endeavours. Apparently the properties are now listed for sale. Further, Hiles indicated in cross examination that he is planning to move to Alberta once the properties sell and his elderly mother (who is apparently in a "home", although Hiles did not elaborate as to the level of care that she is provided) is all that is keeping Hiles and his family in Ontario.

Whether the amounts outstanding to the Ministry for retail sales tax are as Hiles suggested or as the Ministry of Finance suggests, they are certainly of a magnitude that one cannot reasonably expect that \$200.00 a week would be satisfactory to pay off the debts in any reasonable period of time.

The Tribunal finds that given the amounts owing and the length of time for which the amounts have been owing, Hiles and Lakeview cannot be reasonably expected to be financial responsible in the conduct of their business on an ongoing basis.

2. Will Lakeview and Hiles be able to carry on business in accordance with law?

The Tribunal must look at the past conduct of Lakeview and Hiles in totality in determining the reasonableness of the Registry's grounds. In this case, the Tribunal considers Hiles' answer to why he has not remitted the appropriate amount of retail sales tax to be completely unsatisfactory. Hiles knew that monies were properly due and owing and yet chose to not remit the funds and use them for his own purposes. It is simply unacceptable business practice in any circumstance to allow this to continue. Also, the transfer in December 1999, coming some 12 days following an initial field visit by the representative of the Ministry is troubling and raises some concerns about the degree to which Hiles, notwithstanding his protestation to the contrary, is genuinely interested in making an arrangement which would see him pay off his debt and pay retail sales tax on an ongoing basis. In this case, the Tribunal considers Hiles' answers, together with the evidence put forward by the Registrar concerning the number of vehicles which are apparently in Hiles' name (as opposed to Lakeview, which is the only registered dealership at issue here), to be more than sufficient for the Registrar to have reasonable grounds to believe that the Applicants will not carry on their business in accordance with law, nor can be reasonably expected for them to be financially responsible in the conduct of their business.

The discrepancies in reporting lead the Tribunal to further conclude that Hiles and Lakeview are not capable of conducting the business in accordance with law.

DECISION:

Pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal hereby directs to the Registrar to carry out his proposal to revoke the registrations of 787498 Ontario Inc. o/a Lakeview Motor Sales and Service and Christopher Richard Hiles.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick
Vice-Chair

Released: July 13, 2000

LAURIN

CHRIS LAURIN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR
VEHICLE ISSUED BY THE REGISTRAR OF MOTOR
VEHICLES**

TRIBUNAL: NIVES MONTANO, Presiding Member

APPEARANCES: No one appearing for the Applicant

K.M. BIEL, Agent, representing the Registrar of Motor Vehicles

DATE OF HEARING: July 13, 2000
By Telephone-conference Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended, Chris Laurin (the "Applicant"), appealed a decision of the Registrar of Motor Vehicles (the "Registrar") set out in the Order to Impound dated June 9, 2000;

WHEREAS the Tribunal set a hearing by telephone-conference for July 13, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., which did not proceed;

AND WHEREAS the Notice of Hearing, dated June 29, 2000, was delivered by facsimile [(519) 743-8325] to the Applicant on June 29, 2000 the receipt of which was acknowledged by the Applicant;

AND WHEREAS the Applicant was not present to receive the teleconference call at this telephone number when communication was attempted on two separate occasions between 9:45 a.m. and 10:15 a.m. on June 29, 2000;

AND WHEREAS Kyle M. Biel, representing the Registrar of Motor Vehicles was present at the hearing on July 13, 2000;

AND WHEREAS ON READING the Applicant's Notice of Appeal, Owner's Position, Ministry of Transportation's submissions as well as Exhibits 1 and 2, no one appearing for the Applicant although properly served as appears from proof of service filed, this Tribunal finds that due to delay, non-attendance and failure to proceed on the part of the Applicant, the Applicant has abandoned these proceedings;

THIS TRIBUNAL ORDERS that the appeal by the Applicant is dismissed and pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, the Tribunal confirms the Registrar's Order to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano
Member

Released: *July 13, 2000*

BRUSSOLO

IVANA BRUSSOLO

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

IVANA BRUSSOLO, Applicant
unrepresented

DATE OF HEARING: July 11, 2000

DECISION RELEASED: July 13, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 11, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Ivana Brussolo (the “Applicant”)
Motor Vehicle: 1999 Chevrolet Malibu, plate # AHWE 461 (the “vehicle”)
Date of Appeal: June 22, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on July 11, 2000 and proceeded as oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered in to evidence as exhibits with the consent of both parties.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I work in Toronto and have to commute by train now
Scheduling has been difficult with the children

Ms. Brussolo testified that her husband, Mr. Norman Fryer, who was the driver of the impounded vehicle, had lost his driver's licence as a result of an incident in December of 1999. Mr. Fryer had initially had a 90-day ADLS suspension, and following which his licence was reinstated pending his court appearance. Ms. Brussolo further stated that her husband told her that he had received a fine and was ordered to perform some community service by the court, however she was unaware that his licence had been suspended for a further year. Ms. Brussolo testified that she had assumed that Mr. Fryer's driver's licence was valid, though she had not actually asked him specifically if it was, nor had she seen his actual driver's licence card.

Ms. Brussolo stated that her vehicle is used to transport her or her husband to work in Toronto where they must commute to from their residence in Cobourg. Since the loss of the vehicle, they have had to rely upon VIA Rail commuter train service which has proven to be much more costly than driving to work. Furthermore, Ms. Brussolo testified that although they have had to miss the occasional day of work in order to stay with their children, she has another vehicle for local transportation needs and household errands.

Mr. Fryer testified that his wife did not know of his suspension, and that he assumed that she may have seen his licence in the mail after it was reinstated following his 90 day ADLS suspension. He further testified that the added difficulties of commuting to work and re-scheduling the days that they work so that one parent is there to attend to their children has placed a great deal of stress upon their family.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Norman Fryer;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 8, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;

- (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

1. Due Diligence

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension as per section 50.2(3)(c) of the Act?

The evidence before the Tribunal was that the Applicant had made an assumption that her husband's driver's licence was valid at the time of the impoundment. This assumption appears based upon the Applicant not being told otherwise by her husband, and not the result of any specific inquiry on the part of the Applicant.

Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature. There were in fact no specific attempts to determine Mr. Fryer's licence status at the time of the impoundment, and it would appear from the Applicant's testimony that no such attempts were ever made.

However, the legislation under section 50.2(3)(c) is clear and unambiguous. It is the driver's licence of the driver of the vehicle that must be looked into to attempt to determine that it was not under suspension, and this must be done by the owner of the vehicle. This the Applicant failed to do.

The Tribunal therefore can find no evidence that the Applicant exercised due diligence as per subsection 50.2(3)(c).

2. Exceptional Hardship

The Applicant has also appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself.

The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as per section 22(4) of the Regulation. Furthermore, no attempt was made by the Applicant to demonstrate to the Tribunal that no other alternatives to the impounded vehicle existed. In fact, the Applicant's testimony was that she has made use of alternatives to the impounded vehicle, including VIA Rail service, and the use of a second older vehicle for her local transportation needs.

Though inconvenienced, the Applicant has not suffered any significant loss of employment as a result of the impoundment. She has managed to make arrangements to take vacation time as necessary to accommodate the days she has had to miss work in order to care for her children. Furthermore, the Applicant has not presented the Tribunal with any evidence that would indicate that this loss of the vehicle would be immediate significant and lasting as stipulated in section 22(3)(b) of the Regulation.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *July 13, 2000*

STEVENS

SAMUEL AND DRAGICA STEVENS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

JAMES C. MORTON, Counsel, representing the Applicants
ANDREW LEWIS, Counsel, representing the Ontario New Home
Warranty Program,
LYNN MITCHELL, Counsel, representing Gilgrove Developments
Inc., Added Party

DATE OF
HEARING:

July 13, 2000

Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990 Chapter 0.31, as amended (the "Act"), the Applicants, Samuel and Dragica Stevens appealed to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) a decision letter dated November 25, 1999 issued by the Ontario New Home Warranty Program to deny the claims of the Applicants;

WHEREAS on March 31, 2000, an Order was made by the Tribunal *peremptory* against the Applicants adjourning the hearing of June 12-16, 2000 on consent to be heard on July 13, 2000, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS Applicants counsel was present and in attendance when the Order of the adjournment was made on the March 31, 2000;

AND WHEREAS a copy of the Order of this Tribunal was duly served on Applicants counsel by facsimile with confirmation;

AND WHEREAS at the commencement of the hearing on July 13, 2000, Counsel for the Applicants requested that the hearing be adjourned, as the Applicants were on vacation and not present at the hearing;

AND WHEREAS the application for adjournment was refused by the Tribunal and counsel for the Applicants had no evidence to call on behalf of his clients;

UPON MOTION, made by the Program for an Order dismissing such appeal, heard by the Tribunal on July 13, 2000 at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, M4V 1K6, no evidence being tendered by the Applicants, and;

ON HEARING submissions of counsel for the Program and counsel for the Applicants and reviewing documents filed as Exhibits by the Program, this Tribunal finds that the Applicants have not established their claims as required under the Act;

NOW THEREFORE this Tribunal Orders that the appeal by the Applicants is dismissed and pursuant to the authority vested in the Tribunal under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicants.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: July 13th, 2000

PERELGUT

PREHEARING

MICHAEL D. PERELGUT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

MICHAEL D. PERELGUT, representing himself
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
LAWRENCE F. WALLACH, Counsel, representing Hentob
Construction Ltd., Added Party

DATE OF

PREHEARING: July 13, 2000

Toronto

ORDER

Following attendances on July 13, 2000 at a pre-hearing before the Licence Appeal Tribunal of Michael D. Perelgut, representing himself (the "Applicant") and Netanus Rutherford, Counsel, for the Ontario New Home Warranty Program (the "Program"), and Lawrence F. Wallach, Counsel, for Hentob Construction Ltd., (the "Added Party");

The Tribunal makes the following Order:

- 1) The pre-hearing of this matter is adjourned on consent of all parties to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:00 a.m., on Thursday, October 5, 2000.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: July 13, 2000

ROSEN

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by Melvin
Rosen to appeal the decision of the Registrar
of Motor Vehicles pursuant to Section 55.1 of
the Highway Traffic Act;

AND IN THE MATTER of

MELVIN ROSEN

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a hearing in the above matter was scheduled to be held on Friday, July 21, 2000 at the Tribunal;

AND WHEREAS a letter was filed, dated July 13, 2000, by the Applicant requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard at **9:30 a.m. on Wednesday, July 26, 2000** at the **Licence Appeal Tribunal, 1 St. Clair Avenue W., 12th Floor, Toronto, Ontario,**

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: *July 14, 2000*

0069/ADLS/00/012

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE
SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: K. M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF HEARING: July 4, 2000 Toronto

DECISION

A hearing was held on July 4, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C., Presiding Member

RELEASED: July 5, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE
SUSPENSION

TRIBUNAL: Jeffrey M. Lee D.C.
Presiding Member

APPEARANCES: Kyle Biel,
Representative for the Registrar of Motor Vehicles

Applicant
Agent for the Applicant

DATE OF
HEARING: July 4, 2000

DECISION
RELEASED: July 5, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 4th, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on July 5, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated June 5, 2000 and was received by the Tribunal on June 7, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“I was unable to provide the required breath sample because of a medical reason.”

Preliminary Matters

There were no preliminary matters. The documents tendered for consideration were entered into evidence with the consent of both parties. The matter proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Suspension Reminder Notice dated May 15, 2000
- b) Exhibit # 2 Notice of Appeal dated June 5, 2000
- c) Exhibit # 3 Letter from Applicant dated June 7, 2000

By the Respondent:

- a) Exhibit # 4 MTO Submissions, 14 pages, plus certified copies of the Applicant's drivers record, Notice to Registrar, Vehicle Record as of Occurrence date.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

50.1 (1) “A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood

was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15.(1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver’s licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant was sworn and took the stand. The Applicant testified that he had left a restaurant at Markham Road and Eglinton Avenue at about 9 p.m. He stated that he had one bottle of Heineken beer. He left the restaurant and was subsequently stopped at Milner Avenue and Progress Avenue. He was stopped by OPP Constable Officer # 1 at a R.I.D.E. spot check. The Applicant further stated that he was asked to step out of his car and get into the cruiser. He was asked for his driver's licence which he produced. He then testified that the officer started a barrage of words. He felt as though he was being treated as a criminal. He was asked to blow into the machine. According to the Applicant, the officer was using profane language such as "blow... blow, your F...ing 99 year of man can blow." The Applicant then stated that he tried to blow five or six times but his throat was dry. He asked if he could have water but got no response. He said he tried to plead his case. The officer then called a tow truck to remove his vehicle. He testified that he has diabetes and high blood pressure and he was stressed out because of the situation.

The Applicant was cross examined by the Ministry's Representative, Mr. Kyle Biel. Mr. Biel noted that in Exhibit # 3, the Applicant stated that "it was the first time that I had ever got into a police car. She immediately started talking to me in a rash and discriminatory way. I was really scared and frightened." Upon questioning, the Applicant recanted and stated that initially the officer was calm and explained to him the situation and what she was requesting from him. In fact, the Applicant confirmed that the Officer in fact had first read the demand for a sample of his breath to be provided into an approved roadside screening device. He also confirmed that the Officer in fact had demonstrated the use of the device and what was required to provide a suitable sample for testing. The Applicant testified that he tried the best he could and tried a total of four times with the first mouth piece and two to three times with the second mouth piece. He then re-stated that he was afraid and scared and did not argue with the officer any further. He was released on a promise to appear. He stated that he went home after being released.

The Applicant was excused from the stand.

The representative for the respondent called OPP Constable Officer # 1, badge number 9282, Downsview Detachment to the stand.

Constable Officer # 1 was sworn and gave the following testimony. She stated that she has been with the OPP since April 1997 and has been with the R.I.D.E. program for the past two years.

On the evening of May 10, 2000 she set up a R.I.D.E. spot check at Milner Avenue and Progress Avenue. At 11:13 p.m., she pulled over a Black Toyota with Ontario tag (#). Constable Officer # 1 stated that when she talked to the driver, she detected a strong odour of an alcoholic beverage. She questioned the driver about his alcohol consumption that evening and was told by the driver that "yes, a few drinks" had been

taken that evening. The time being around 7:30 to 8:00 p.m. According to Constable Officer # 1, the driver's eyes were red.

Constable Officer # 1 stated that at this time, she had formed a reasonable suspicion that the driver had alcohol in his body. She asked the driver to accompany her back to her cruiser. The driver sat in the front passenger seat. At that time, Constable Officer # 1 read the demand for a breath sample. At 11:16 p.m., Constable Officer # 1 demonstrated the use of the device, 7410 GLC which had been calibrated on May 3, 2000 by P.C. Officer # 2. Constable Officer # 1 further explained to the driver that if he blew 000 to .049, it would be considered a pass and he would be free to go. If he blew .050 to .099, he would be issued a 12-hour suspension and if he blew over .10 it would be considered a fail and he would be arrested. According to Constable Officer # 1, the driver had no problems understanding the directions and at 11:17pm the driver attempted his first blow. Over the next 10 minutes. There were a total of 14 attempts to provide as well as several demonstrations of how to blow into the machine as well as caution given to the driver about the consequences of not providing a proper breath sample.

At 11:27 p.m. after the fourteenth attempt, the driver was charged with failure to provide a sample.

According to Constable Officer # 1, the driver stated that he had diabetes and maybe this is why he could not blow.

Constable Officer # 1 did not observe any respiratory distress. The driver did not request access to medication or ask to seek medical attention.

The Applicant had no questions for the officer and the officer was excused from the stand.

The Tribunal accepts the evidence presented by Constable Officer # 1. The Tribunal recognizes that Constable Officer # 1 is not a trained medical person, but is a trained observer and the Tribunal accepts her evidence that at no time did the Applicant exhibit any form of respiratory distress or indicate to her that he had a medical condition which would not allow him to provide a sample of his breath. The Tribunal also accepts the testimony of the Applicant that he in fact does suffer from diabetes, hypertension and dyslipidemia. This is borne out in the Applicant's medical information submitted on his behalf by his family physician.

However, in an appeal of this nature, the onus is upon the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he has a medical condition which precluded him from providing a breath or blood sample.

The "report" of Physician # 1, the Applicant's medical practitioner, fails to meet the specific requirements of section 15(1) of Regulation 574 of the *Highway Traffic Act*. Physician # 1 indicated that he saw the Applicant on June 6, 2000 for the purpose of providing him with the "report". The medical information on this "report" clearly stated that "Pt. is not appealing on a medical condition." The physician also indicates that the Applicant's present medical conditions, namely hypertension, diabetes and dyslipidemia is controlled by medication and that the patient is stable.

The Tribunal accepts this document from Physician # 1 as clear evidence that the Applicant does not have a medical condition which would have precluded the Applicant from providing a proper breath sample. Physician # 1 continues and indicates that "he alleges significant harassment by the police officer and was so stressed that he could not follow the instructions given and could not blow the test." Evidence to the contrary was presented. The Applicant stated that he clearly understood the instructions of the officer and finally "gave up trying to plead his case with the officer".

APPLICATION OF THE LAW TO FACTS:

After reviewing the foregoing facts, it is obvious that the Applicant did not relate any medical condition to Regulation 574 and sections 50(1)(2)(b) of the Act.

The evidence is clear that the Applicant failed to provide a suitable sample for no established medical reason. The evidence submitted suggests that action of the Applicant was such as to lead this Tribunal to believe the he had no intention of providing a proper breath sample.

In the testimony of Constable Officer # 1, the Applicant repeated the same pattern, blowing into the device for two seconds and then stopping and then continuing. This, inspire of repeated demonstrations and instructions on how to provide a proper sample.

The Tribunal can only conclude from the evidence presented that the actions of the Applicant were actions to prevent a suitable sample from being retrieved and not the action of someone having difficulty providing a sample because of a medical condition.

The Applicant has not discharged the onus under section 50.1 of the HTA to establish a valid medical reason for his failure to provide and his refusal to comply with the demand made under section 254 of the *Criminal Code (Canada)* to provide a sample of breath or blood.

DECISION:

Upon the application by the Applicant, to appeal the suspension order dated May 10, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee D.C., Presiding Member

RELEASED: July 10, 2000

0114/MED/00/012

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: July 6, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal - received June 5, 2000
- b) Exhibit #3 MTO letter to the Applicant, stamped by "A A" July 2, 2000
- received July 6, 2000
- c) Exhibit #4 Letter from The Renascent Centre, dated October 11, 1999
- received July 6, 2000

By the Respondent:

- a) Exhibit #2 Ministry of Transportation submissions – tabs 1 – 12

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a final written summation with respect to this matter, as well as certified copies of documents on file.

FACTS:

The Applicant is appealing the suspension of his driver's licence effective "99 10 26" (Exhibit # 1).

Exhibit # 2 Tab 1, Ministry of Transportation driving record for the Applicant since 1977, shows no infractions.

The Applicant came to the attention of the Ministry as a result of an unsolicited letter dated August 30, 1999, from Physician # 1, of the Ajax/Pickering Centenary Health Centre. Physician # 1 informs the Ministry that the Applicant *"...has been seen the second time this month for alcoholism ...has a previous history of alcohol abuse ...admitted because of impending DT's ...may have had a seizure ...and did in fact drive to the hospital..."*. (Exhibit # 2 Tab 2)

Physician # 2, from the Bellwood Health Centre, writes the Ministry, on December 8, 1999, that the Applicant *"...does not believe alcohol was a problem until 2 years ago when he was drinking five days a week while at a party he ...experienced an episode of chest pain ...his friends took him to the hospital ...One of the doctors at the hospital told him he was intoxicated and that a report was being sent to the Ministry ...his driver's licence was suspended ...attended a 21 day program at the Renascent Treatment Centre ...began attending AA has remained abstinent since September 13/99..."* (Exhibit # 2 Tab 4)

Canadian Laboratories form, dated "07 DEC 99," indicates *"...GGT level at 53; MCV 91.7"*. (Exhibit # 2 Tab 5)

MINISTRY OF TRANSPORTATION ASSESSMENT FORM, dated November 4, 1999, completed by a physician in substance abuse reports as follows:

1. "YES" is checked under "Personal Health History" for "Addictions" and "Hospitalizations within last 12 months".
2. According to the "PHYSICAL ASSESSMENT AND LABORATORY EVALUATION," *"...Blood Pressure - NORMAL 100/70; LIVER - not palpable; NEUROLOGICAL normal/reflexes; MCV NORMAL 92.3 "*.
3. Under TREATMENT, the physician notes that the Applicant attended the *"...Renascent Treatment Centre - Sept 20/99 to Oct 11.99 ...Attending 3 AA meetings (minimum per wk since Sept 13/99"*

4. "ABSTINENCE" is the "RECOMMEND GOAL FOR ALCOHOL CONSUMPTION". (Exhibit # 2 Tab 6)

A MEDICAL ADVISORY COMMITTEE CASE STUDY, dated January 28, 2000, upheld the suspension. (Exhibit # 2 Tab 7)

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS, dated "*January 31/00*," completed by J.W., details the Applicant's history as explained by the Applicant. The Applicant states that he "*...does not drink and drive...*" (Exhibit # 2 Tab 11)

A Letter from R.N., dated June 21, 2000, suggests that the Applicant "*...attended 21 day programme ...has not been involved in any form of aftercare ...continues to drink heavily...*" (Exhibit # 2 Tab 12)

At the hearing, the Respondent relied on the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 12, and on "*three ...sources...*" Physician's Guide to Driver Examination; National Safety Code - Medical Standards for Drivers; Ministry of Transportation Medical Advisory Committee. A copy of page 437 of Edition 28 - Dorland's Illustrated Medical Dictionary was attached to the Ministry's written summations.

The Respondent contends that the Applicant offers no new evidence that he is still attending any sort of rehabilitation programme.

In closing, the Respondent emphasized Section 14 of Regulation 340/94 under the *Highway Traffic Act* as the basis for the Ministry's suspension of the Applicant's driver's licence.

The Applicant stated under oath that he recognizes he has had a problem with alcohol in the past but is currently abstinent. The Applicant has attended a Treatment Centre and is presently attending AA.

AA does not provide members with letters of attendance. However, the Applicant was able to obtain a stamp, on July 2, 2000, on a letter from the Ministry, dated April 27, 2000. Said letter was entered on consent as Exhibit #3.

The Applicant submitted a letter from the Renascent Centre, dated October 11, 1999, confirming that the Applicant "*...completed our short term residential program ...admitted ...on September 20, 1999 ...was transferred to our follow up program on, October 11, 1999.*" This letter was entered also on consent as Exhibit # 4.

The Applicant affirmed his adherence to the requirements of the law and stated that he does not drink and drive.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar to “...suspend or cancel” a driver's licence for “any...sufficient reason...”. The Applicant came to the attention of the Registrar as a result of an unsolicited letter received from Physician # 1 informing the Ministry that the Applicant “...has been seen the second time this month for alcoholism ...has a previous history of alcohol abuse ...admitted because of impending DT's ...may have had a seizure ...and did in fact drive to the hospital...”. (Exhibit # 2 Tab 2)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation.

The Respondent reviewed the policies contained in the Physician's Guide to Driver's Examination and the National Safety Code which were considered by the Ministry of Transportation Medical Advisory Committee. The Tribunal notes that these policies are to be used as guidelines and are not legislation.

In closing, the Respondent referred to Section 14 of Regulation 340/94 as grounds for suspension. The applicable Section 14 (b) of Regulation 340/94 under the HTA states:

"An applicant for or a holder of a driver's license must not,

b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

There are clearly two parts to this clause:

- be addicted to the use of alcohol or drug
- extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

The regulation might explicitly states that the addiction must be to the extent likely to significantly interfere with the ability to drive a motor vehicle.

The Applicant concedes that his consumption of alcohol may have been excessive, yet there have been no drinking and driving incidents in the past. The Tribunal notes that the Applicant's record is in fact spotless. Exhibit # 2 Tab 1)

The only alleged infraction against the Applicant's driving record is made by Physician # 1 who states in his unsolicited report that the Applicant "did in fact drive to the hospital...". (Exhibit # 2 Tab 2) There is no evidence to substantiate this accusation. Physician # 1 was not present to give testimony. The Applicant testified under oath that he was driven to the hospital by "a friend". The Tribunal is, thus, compelled to accept the evidence of the Applicant.

The Tribunal finds that the Respondent has not proven that the Applicant is currently suffering from an alcohol addiction which is likely to significantly interfere with his ability to drive a motor vehicle as described by Regulation 340/94 section 14 (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated October 26, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend her/his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Roy Melvin, M.D.,
Member

RELEASED: July 12, 2000

WATT

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NOEL THOMAS WATT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: May 16th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NOEL THOMAS WATT

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 24, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Thursday, October 5th, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 18th, 2000

MANN

BARBARA MANN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

BARBARA MANN, Applicant
unrepresented

DATE OF HEARING: July 14, 2000

DECISION RELEASED: July 18, 2000 Barrie

REASONS FOR DECISION

A hearing was held on July 14, 2000 at Barrie, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”) made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Barber Mann (the "Applicant")
Motor Vehicle: 1994 Mitsubishi Galant (the "vehicle")
Date of Appeal: June 27, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on July 14, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a statement by PC Chris Alton of the Barrie City Police, and statements by Barbara Mann and Roy Nelson that were given to Constable Alton.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

My position as the owner of the car is that the motor vehicle was stolen at the time in respect of which the order was made. Wilson Hurley said he would fix on car on June 10, 00 in the afternoon. He was given no permission to drive the car. He stole my car while I was at work and was arrested by Constable Neil Towns of the Barrie Police at 1:47 a.m. June 11, 00. His incident report will support the grounds of Mr. Hurley's driving unauthorized and drunk in my car. This is report # 336-3016 which will further support my appeal case.
Thank-you.

Ms. Mann testified that she had driven to a friend's house with Mr. Wison Hurley (the driver at the time of the impoundment), and that when she went to leave this friend's house to drive to work, her vehicle could not be driven as it had some sort of transmission trouble. Mr. Hurley offered to repair it while Ms. Mann went to work. Ms. Mann gave the keys to Mr. Hurley and stated that he was not to drive the vehicle as she was aware that Mr. Hurley's licence was then under suspension.

Ms. Mann further testified that when she returned to where she had left the vehicle, it was missing. She later discovered that her pet dog and credit card had also been taken. She contacted Barrie City Police where she learned that her vehicle had been impounded. Ms. Mann later gave a statement to Constable Alton, who decided not to charge Mr. Hurley with the theft of the vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Wilson Hurley;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 21, 2002.

Constable Neil Towns of the Barrie City Police testified that he observed Mr. Hurley driving the Applicant's vehicle in an erratic manner, and subsequently stopped and impounded the vehicle. He further stated that a charge of theft against Mr. Hurley was not laid because the Applicant had given the key to her vehicle to Mr. Hurley, and that Mr. Hurley had permission to have care and control of the vehicle.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black’s Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transportation of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S., Colo, 338F.2d 787,788.* It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.*

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The evidence before the Tribunal is that the Applicant had given the keys to Mr. Hurley under the condition that the intended purpose for him having the keys was to repair the vehicle. The Tribunal finds that by giving her vehicle keys to the Applicant had in fact transferred possession of the vehicle to Mr. Hurley. The Tribunal finds that even though Mr. Hurley had not been given permission to drive the vehicle, he had been given possession of it by the Applicant, and therefore no finding of stolen, as defined above, can be made.

As a condition of this possession Mr. Hurley was to repair the vehicle, but not to drive it. However as the evidence showed, Mr. Hurley chose to break the condition imposed upon him by the Applicant and took her vehicle for a drive. On its own, the act of breaking the Applicant’s imposed condition of the vehicle’s use by Mr. Hurley, is insufficient for the Tribunal to consider that the vehicle was stolen by Mr. Hurley.

Furthermore, the Tribunal did not find any facts that would indicate that Mr. Hurley intended to deprive the Applicant of her vehicle in any permanent form. In this case, the Tribunal finds that there is insufficient evidence to indicate that the actions of Mr. Hurley, driving the vehicle and using it contrary to the conditions that he was given possession of it under, constitute theft of the vehicle.

Therefore, the Tribunal can find no evidence that Mr. Hurley acted '*with the intent to deprive the owner of the benefit of ownership (or possession) permanently*' as defined by Black's Law Dictionary, and thus no finding under section 50.2(3)(a) of the Act can be made.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: July 18, 2000

TRI-STAR CONSTRUCTION MANAGEMENT LTD.

TRI-STAR CONSTRUCTION MANAGEMENT LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: No one appearing for the Applicant
LUCY McSWEENEY, Counsel, representing the Registrar, Ontario
New Home Warranty Program

DATE OF
HEARING: July 18, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This matter was commenced by a Notice of Proposal dated March 2, 2000 from the Registrar, Ontario New Home Warranty Program. Tri-Star Construction Management Ltd. (the "Applicant") submitted a dispute to the Proposal by its letter of March 14, 2000. The Applicant submitted a hearing request form dated April 6, 2000 to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal). Both the letter and hearing request form stated that the address of the Applicant was 6021 Yonge Street, suite 820, Toronto, Ontario M2M 3W2, telephone 905-660-7750 and fax 905-660-3766. There was no consent to a pre hearing, and the Tribunal scheduled a hearing to commence July 18, 2000 and continue on July 19, 2000 if necessary. The Notice of Hearing was sent to the Applicant by fax. A voice mail message was left for the Applicant via John Cornacchia, Operations Manager, on July 14, 2000 reminding him of the hearing date. No one appeared for the Applicant at 9:30 a.m. on July 18, 2000. The hearing was adjourned for thirty minutes in case the Applicant was delayed. When the hearing commenced at 10:10 a.m. no one appeared for the Applicant. The Tribunal proceeded to hear the evidence of the Program in the absence of the Applicant.

ISSUE:

Should the Tribunal direct the Registrar to carry out the Registrar's Proposal to refuse to renew the registration of Tri-Star Construction Management Ltd?

EVIDENCE:

Opening Statement:

Counsel for the Program:

Counsel stated that the Program wished to refuse to renew the registration of the Applicant, which is a corporation. The Applicant has failed to provide the requested documentation to permit the Program to do an assessment of the financial ability of the Applicant to continue as a builder under the Program. This is a threshold issue. The Applicant has failed to comply with several requests from the Program for financial information.

Counsel for the Program referred to sections 7(c)(i), 8(2), 9(1) and 9(4) of the Ontario New Home Warranties Plan Act and Regulation 894, section 1, subsections 5 and 6.

Testimony of Adil Darr:

Mr. Darr is a senior underwriting analyst with the Program. He has held that position for eight months. Prior to that time, he worked for KPMG, an international financial services firm. Mr. Darr is a chartered accountant. He has a bachelor of commerce degree from the University of Toronto.

Mr. Darr's duties include the registration of new applicants and the renewal of registrants. He performs a financial analysis to determine if the builders are financially viable and the risks, if any, to the Program.

Mr. Darr identified a number of documents provided by the Program, including the Notice of Proposal, the Applicant's articles of incorporation and the Vendor/builder agreement which outlines the responsibilities of the builder. The Applicant had initially registered with the Program in 1994 and had been registered since then until 1999. The last renewal application was received by the Program in June, 1999. This renewal application had preprinted information on it provided by the Program and a date of renewal of June 9, 1999. This application form would have been sent to the Applicant some 45 days prior to that date.

Mr. Darr checked the renewal application to see if there were any changes in the business organization and what were the number of units proposed to be built. These affect his analysis of the risk assessment for the Program. The Applicant was proposing to build two houses, one of which was valued at \$800,000.00. The Applicant submitted the renewal fee of \$321.00 and a notarized net worth statement of the President of the company, Donald Hendriks. No supporting documents were attached to this net worth statement. The 1998 Financial Statement of the Applicant was not attached.

Mr. Darr testified that the Program will often require a personal guarantee from the principals of a company. Accordingly, the Program requires the completion of the personal net worth statement plus supporting documents.

Mr. Darr testified that Ms. Connic Carreiro, underwriting coordinator, had in writing dated July 23, 1999 requested the 1998 Financial Statement, the tax bill/assessment/transfer of deed and documentation for the cash and RRSPs listed on

the net worth statement. When that information was not provided, Ms. Carreiro sent a second letter of September 22, 1999 requesting that documentation. As well, Ms Carreiro left two voice messages for Mr. Cornacchia, Operations Manager, requesting that information on November 1, 1999 and February 3, 2000. The requested information was not provided, and the Registrar issued the Notice of Proposal on March 2, 2000.

Mr. Darr stated that the Applicant disputed the Notice of Proposal by a letter of March 14, 2000. That letter did not have as attachments the requested documentation. Mr. Darr agreed that the company had been registered with the Program for five years and there were no claims against the builder during that time.

Mr. Darr testified that Counsel for the Program, Ms. Rutherford, by her letter to the Applicant of April 13, 2000 requested the 1998 Financial Statement and the supporting documents for the net worth statement of Donald Hendriks. At the date of the hearing, Mr. Darr had not been provided with these documents.

Mr. Darr testified that if the registration was refused, the builder could not legally build or sell homes in Ontario. The builder does have the opportunity at a later date to reapply for registration with the Program. That process takes approximately one month. Mr. Darr stated that there were no serious concerns as to the performance of the builder. The issue is that he cannot assess the financial situation of the builder if the documentation is not provided.

Mr. Darr testified that to his knowledge the Applicant has not changed his address. It is the responsibility of the builder to inform the Program of any changes in address or telephone numbers.

Closing Statement:

By Counsel for the Program:

Counsel stated that the Ontario New Home Warranties Plan Act is a consumer protection legislation. The Program needs to satisfy itself as to the financial position of the builder in order to ensure that the public is protected.

The documents requested by the Program are reasonable ones according to Counsel. Without these documents the Program cannot do its risk assessment. Despite repeated requests by the Program, the Applicant has failed to provide the required information.

LEGISLATION:

The relevant legislation is the Ontario New Home Warranties Plan Act.

Section 7 (1) provides that an applicant is entitled to registration by the Registrar except where,

.....

(c) the applicant is a corporation and,

- (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings,

Section 8(2) provides that subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 9(4) provides that where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Section 10 provides that a further application for registration may be made upon new or other evidence or where it is clear that material circumstances have changed.

Regulation 894 under the Act sets out Terms and Conditions of registration of builders and vendors, including:

1. The following are conditions of every registration under the Plan:

.....

5. The registrant shall from time to time, at the registrant's expense, furnish the Registrar with such documents relating to the Plan as the Registrar may reasonably require.
6. The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.

.....

10. The registrant shall, within fifteen days after the event, notify the Registrar in writing,

- i. of any change in address of the registrant for correspondence relating to the Plan.

.....

ANALYSIS:

The Program is requesting the revocation of the registration of Tri-Star Construction Management Ltd. This is a serious request as the Applicant has been registered with the Program since 1994. There is no history adduced of any deficiencies in the performance of this builder. Up to the renewal application of June, 1999 this builder would appear to have complied with its responsibilities to the Program under the Act

and its Regulations and under the Vendor/Builder agreement signed by its President, Donald Hendriks, on June 15, 1994.

The Vendor/builder agreement contains a number of covenants by the Applicant to the Program. In particular on page 3 of the agreement under section 4.4 Vendor's Covenants, item (e) it states: "The Vendor at his own expense shall supply to the Corporation upon request whether for the purpose of initial registration or renewal, documentation in the form of guarantees, surety bonds, letters of credit, statements of personal net worth, bank statements and other such documentation and records as the Corporation may reasonably require". The wording of this covenant reflects the conditions of registration under the Plan found in Regulation 894, in particular conditions number 5 and 6. The Legislature in its wisdom under Regulation 894 has attached stringent conditions to registration of a builder under the Ontario New Home Warranty Plan. The wording used in Regulation 894 contains the word "shall". As well in conditions number 5 and 6 there is the phrase "as the Registrar may reasonably request".

In the present case the Tribunal finds that the Registrar acted in a reasonable manner in its request to the Applicant. The Registrar requested the 1998 Financial Statement of the Applicant. That is a reasonable request. The Registrar requested documents to support the statements made by Donald Hendriks in his personal net worth statement. That is a reasonable request. The Registrar was not acting in an arbitrary fashion when he requested such documents. The financial information to be found in these documents are necessary for the Program to assess the financial ability of this builder to continue within the Plan.

The Applicant is a small builder. Initially in 1994 the Program made it a condition that written permission was necessary for this builder to construct more than 2 homes of any class or to construct any condominium units. Then in 1998 the Program assessed that this builder had to provide a security of \$5000.00 per freehold unit. The Program was maintaining supervision over the financial affairs of this builder. In light of the purposes of the Act and the expressed statements of this builder to construct two units with a combined value of over one million dollars it is not unreasonable for the Program to request the 1998 Financial Statement and the supporting documents for the net worth statement. It is more puzzling that the Applicant has failed to comply with this reasonable request.

ORDER:

Accordingly, under the authority of section 9 (4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to carry out the Proposal to refuse to renew the registration of Tri-Star Construction Management Ltd.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: July 19, 2000

PREHEARING

GULSHAN AND SUKHDEV MEHTA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

DAVID A. STEIN, Counsel, representing the Applicants
NETANUS RUTHERFORD, Counsel, representing
the Ontario New Home Warranty Program
TONY GUGLIETTI, Agent, representing the Added Party,
Town Wood Homes Limited

DATE OF
PREHEARING: July 19, 2000 Toronto

ORDER

FOLLOWING attendances on July 19, 2000, at the prehearing before this Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of David A. Stein, Counsel on behalf of Gulshan and Sukhdev Mehta (the "Applicants") and Netanus Rutherford, Counsel, on behalf of the Ontario New Home Warranty Program (the "Program"), and Tony Guglietti, Agent, on behalf of Town Wood Homes Limited (the "Added Party");

THERE were no issues resolved and no agreements concluded at the prehearing on Wednesday, July 19, 2000, and the hearing will proceed to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Monday, November 20, 2000, and to continue if necessary on November 21, 22, 23 and 24, 2000, at 9:30 a.m.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice- Chair

Released: July 19th, 2000

ROBERT B. MCILVENNA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

ROBERT MCILVENNA, Applicant
unrepresented

DATE OF HEARING: July 20, 2000

DECISION RELEASED: July 24, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 20, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Robert McIlvenna (the “Applicant”)
Motor Vehicle:	1994 Buick Lasabre, plate # ADSZ 701 (the “vehicle”)
Date of Appeal:	June 30, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act (***Exhibit 1***).

This matter came before this Tribunal on July 20, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (***Exhibit #1***) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"OWNER'S POSITION:

I, Robert McIlvenna, as owner of the aforementioned automobile would like to appeal the forty-five day impoundment of my vehicle under the following conditions:

- 1) That due diligence was made in attempting to determine the driver's licence of the driver was indeed valid at the time.
- 2) That the order will result in exceptional hardship.

1) On Thursday, June 22 my wife, who was operating the vehicle as her means of getting to work, was asked by my son, Ryan (whose licence is suspended), if he and a friend, Barry Dolan, could go with her to work and use the car for the day and pick her up after work. My Wife asked Ryan if Barry's licence was okay. His response was that Barry had been driving all along and had shown him a licence that appeared to be valid. My wife had no reason to doubt her son and loaned the boys the car for the day. After Mr. Dolan was stopped by the police for making an illegal left turn he still insisted that he had a valid licence and told Ryan that his licence was suspended through mail for failing to pay fines. We later found out through the police department that it was a complete lie and we had been conned into believing that his licence was valid. I do believe my wife and son used reasonable discretion and due diligence in allowing Mr. Dolan to drive our vehicle under the circumstances.

2) Losing the use of this car for forty-five days will cause an exceptional amount of hardship to my family for the following reasons:

a) My family lives in a rural setting 20 to 30 km. Away from our places of work. We all go in different directions and at different times. My son is currently seeking employment and due to his suspension we must find additional time to try to get him to some of his interviews and to distribute resumes. There are many times when we are an hour apart in our job sites. In addition to my regular day job I make additional funds through officiating community sports on a regular basis and I have a small in home business with which I need a vehicle to meet clients and make deliveries.

My daughter has just started a new job, 25 km away, that starts at 7am. This will be a full time job that will give her enough funds to attend University in the fall. She will require a vehicle on a daily basis. There is no public transportation within 3 km. of our house and it only operates twice daily.

b) The loss of this vehicle will indeed create a financial loss to all members of my family. As mentioned above the distance from work would cause an increase in travel costs. This will affect me in my community service and my small business opportunities. It will affect my daughter in her financial preparation for University, and it will affect my wife in her opportunity to embark on a new business venture that she was considering. It will also impact on my son's chances for employment due to limiting his opportunities.

Also as indicated in the letter from Mr. Michael Moore, of the Sudbury Regional Credit Union, my families financial situation at this time is very precarious. That is why I have taken on other means of providing income the loss of the vehicle compounded with the \$600 in impound fees will seriously impact on my financial situation.

c) As mentioned in (b) there is a potential loss for loss of employment opportunity for all members of my family and we are already handicapped by having to provide transportation for my son. It is very common for us to have our vehicles in use all at the same time going in different directions.

d) My wife is currently, besides working, taking three university courses which has her travelling to Laurentian University campus on a regular basis. This drive is 35 km. one way and takes 40 minutes across the City of Sudbury. My wife often uses the Buick as it is the most economical vehicle that we have and are currently trying to make ends meet.

Overall, as you can see, we are a very active family that depends very heavily on the use of our vehicles. Already in only a few days I have been unable to make a couple of business appointments and this could impact on my family's situation if it is allowed to continue much longer.

Thank you for your consideration in this matter.

Submitted by: Robert McIlvenna"

The Applicant is married with two children, a son who is 23 years old and a daughter who is 20 years old. They reside in a community called Val Caron which is approximately 25 kilometres from Sudbury, Ontario. Both the Applicant and his wife are employed as teachers in Sudbury but are currently not working during the summer months.

At the present time, the Applicant is landscaping approximately 28 acres of his property to establish a raspberry farm, a new business venture, for his wife for when she retires in five years. He also officiates as an umpire in Sudbury and the surrounding area anywhere from one to three times per week.

As well, the Applicant carries on a home-base business wherein he consults on athletic injuries as well as sells equipment relating to the sports industry. He also distributes flyers for his home-base business every night at ball parks, soccer fields and at tournaments even during the winter months.

Mrs. McIlvenna is taking three correspondence courses at Laurentian University.

Ryan, the Applicant's son, has recently found employment about one kilometre from home.

The Applicant's daughter is employed with Teletech in Sudbury as of the beginning of July, 2000. Her hours of work are from 3:00 p.m. to 9:00 p.m. each day. She is driven to work each day by one of her parents. She is planning on attending a university in Alberta in September.

The Applicant testified that he no longer owns the 1990 Nissan. His son, Ryan, sold the vehicle to a friend in November of 1999. Ryan then spent six months in jail and on his release tried to collect the vehicle plates for his father. Ryan was advised that the vehicle was in a body shop in Toronto and the plates were in its trunk. The Applicant then went to the Ministry of Transportation to swear an affidavit with regard to the foregoing.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant (***Exhibits 5 & 6***) were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Barry Dolan;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 7, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Board in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
 - (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal – Due Diligence

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Mr. Dolan's driver's licence at the time in respect of which the order was made was not then under suspension as required by section 50.2(3)(c) of the Act.

The Applicant has conceded that he is the owner of the vehicle that has been impounded. At the time of the impoundment, the vehicle was being driven by Mr. Barry Dolan whose driver's licence was then under suspension due to a conviction under the *Criminal Code of Canada* for driving with more than 80 mg of alcohol in his blood.

The evidence before the Tribunal, in the Applicant's own testimony, was that the Applicant at no point in time saw or asked Mr. Dolan if he possessed a valid driver's licence. He testified that his son, Ryan, was shown what appeared to be a valid driver's card by Mr. Dolan. As a side note, the two friends had only known each other for about one week and since the impoundment, Mr. Dolan has not been seen. Mrs. McIlvenna relied on the verbal assurance from her son that the driver's licence of Barry Dolan was in good standing.

In any event, the test is whether or not the Applicant, Robert McIlvenna, exercised due diligence. The inquiries or observations of Mrs. McIlvenna are not those of Mr. McIlvenna. On the facts here, it was not the responsibility of Mrs. McIlvenna or their son, Ryan, to act for the Applicant to perform due diligence respecting the driver of his vehicle.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal – Exceptional Hardship

The Applicant has also requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardships as described by section 22(2). In order for his claims to be considered under section 22(2), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Applicant has testified that there are two other alternative vehicles owned by him, a pick-up and a van, separate and apart from the Buick that has been impounded (**Exhibits 5 & 6**), but he wishes to use them as little as possible due to high fuel costs.

The Applicant has testified that there is public transit about two kilometres from his home which travels to Sudbury at approximately 8:00 a.m. and 1:00 p.m. and returns from Sudbury to Val Caron at approximately 5:00 p.m. and 9:00 p.m. The Applicant did

not feel that it would not be a “viable” or “valid criteria” by which his daughter could get to and from work in Sudbury.

The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting.

Mrs. McIlvenna does not need the vehicle for her correspondence courses on a daily basis, only when she requires to obtain some books from the library, consult with her professors and to write any exams.

The need to assist Ryan in finding employment no longer is a factor in this case since he’s recently found a job about one kilometre from home.

But as aforementioned in section 22(2) above, these are not criteria in which the Tribunal may consider.

Evidence was heard that the Applicant may have incurred some financial hardship as a result of the loss of the vehicle and he may pursue compensation from the suspended driver, Mr. Dolan, as is stated in section 55.1(21) of the *Highway Traffic Act*:

“The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order”.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable option has been considered as contemplated by section 22(4) of the Regulation.

The Tribunal accordingly finds the Applicant has not established that he has or will suffer exceptional hardship as defined by Ontario Regulation 632/98, subsection 22.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant’s motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: July 24, 2000

WHITTON

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JOHN DAVID WHITTON

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 11th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOHN DAVID WHITTON

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 7, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Monday, October 30th, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 25th, 2000

WHITTON

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JOHN DAVID WHITTON

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 11th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOHN DAVID WHITTON

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

AMENDED ADJOURNMENT ORDER

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 7, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Middlesex County Building, North Room, 399 Ridout Street, London, Ontario, at 9:30 a.m., on Monday, October 30th, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 25th, 2000

VIS-VEERMAN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
TRUUS VIS-VEERMAN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

TRUSS VIS-VEERMAN

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

LAKESIDE CONDOMINIUMS SOUTHAMPTON INC.

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on July 25-26, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Tuesday, August 29, 2000, and to continue August 30, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 26th, 2000

McINDOE

MARIAN McINDOE

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL INDUSTRY
COMPENSATION FUND CORPORATION UNDER
THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

MARIAN McINDOE, appearing on her own behalf
FATIMA HUSAIN, Counsel, representing the Board of Directors of
the Ontario Travel Industry Compensation Fund Corporation

DATES OF

HEARING: July 19, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) (the "Tribunal") from a written decision dated March 13, 2000 of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the "Fund") to deny the Applicant's claim for reimbursement in the amount of \$3,414.54.

Marian McIndoe (the "Applicant") bases her claim on the provisions of Section 50(1) of Regulation 806/93 (the "Regulation") made under the *Travel Industry Act* (the "Act").

THE EVIDENCE:

Evidence was both oral and documentary. Oral testimony was given by the Applicant and by Lori Furlan on behalf of the Fund. Besides the evidence, the parties at the hearing filed an agreed statement of fact with the Tribunal.

The agreed statement of fact reads as follows:

MARIAN MCINDOE-AGREED STATEMENT OF FACT

1. Shalom-K Tours Ltd., a travel agent then registered in Ontario, offered group tours of Israel, departing on January 4, 1999.
2. On October 21, 1998, Ms. Marian McIndoe (the "claimant") purchased travel services, along with cancellation insurance, from Toronto to Israel from January 4, 1999, to January 19,

1999, along with a Jordan-Egypt extension, for two passengers, herself and her aunt, Ms. Mary Kuchta.

3. The claimant paid \$1,999.00 for each passenger for the travel service package. She also paid \$1,240.00 each for an extension to Egypt and Jordan. In addition, she paid \$20.00 each for an Israeli departure tax, \$144.00 each for insurance, and \$23.04 in tax on the insurance coverage.
4. The total amount paid for travel services only for Ms. Marian McIndoe was \$3,239.
5. In November, 1998, the claimant was notified verbally of a change in the departure date of her group to January 3, 1999.
6. On January 3, 1999, the claimant was transported by bus from London and attended at the Toronto airport along with other passengers in the group, but the flight was apparently cancelled due to weather conditions (snowstorm). The passengers were requested to return on January 4. Accommodations for the night were provided by the travel agent.
7. On January 4, 1999, the claimant again went to the airport, where she waited, but the passengers could not be accommodated on the flight and were again transported to a hotel and asked to return on January 5, 1999.
8. On January 5, 1999, the claimant was advised that the group could not depart as scheduled and the departure would be postponed to January 14, 1999. The claimant advised the travel agent that she could not depart on January 14, 1999.
9. A seat lottery was arranged for departure on January 5, 1999, for a flight to Israel via Montreal. Passengers who received seats through this lottery (a group of 20 passengers) were advised they should be able to fly to Montreal on January 5, 1999, and connect with a flight to Israel from Montreal. In Israel the group would connect with the other scheduled tour groups already in Israel.
10. Passengers who did not receive a seat in the lottery and could not travel on the January 14 date were promised a full refund by the travel agent, Shalom-K Tours Ltd.
11. The claimant won a seat in the lottery and was provided with a boarding pass for the Montreal flight.
12. The flight to Montreal was delayed due to mechanical problems with the aircraft. Air Canada recalled the boarding passes.
13. The claimant was advised that she should take the delayed flight, along with the 20 other group members, to Montreal, and from there a flight would be arranged to Israel.
14. The claimant was unable to confirm information about the Jordan-Egypt extension purchased, or about accommodations to be provided in Montreal. The claimant advised Air Canada she would not be travelling and left the airport. Ms. McIndoe's luggage was not removed but remained on the flight and eventually arrived in Israel.
15. The remaining passengers in the group departed on January 6, 1999, and subsequently arrived in Israel.
16. The claimant states she was promised a full refund and sent documentation to Shalom-K Tours Ltd. on January 9, 1999, further to this promise.
17. In April of 1999, Ms. Mary Kuchta was given a travel credit by the travel agent, and therefore travelled to Israel in lieu of the January tour.
18. On May 21, 1999, the claimant made a formal complaint to The Travel Industry Council of Ontario (TICO).
19. The claimant did not receive a reimbursement from the travel agent.
20. On September 24, 1999, Shalom-K Tours Ltd. voluntarily terminated its registration.

21. By letter dated November 10, 1999, Claimant was advised that Shalom-K Tours Ltd. had closed its offices. The claimant was further advised that she may submit a claim against the Fund; however, section 50 of Ontario Regulation 806/93 provides that customers are not entitled to reimbursement from the Fund where the travel services were available but not received due to the customer's action or failure to act.
22. On December 6, 1999, TICO received a letter from the claimant's solicitor requesting a claim form.
23. On December 24, 1999, the claimant submitted a claim form for the amount of \$3414.54, which amount included taxes and cancellation insurance.
24. On December 30, 1999, TICO advised that the claim did not appear to be eligible, but may be presented to the board of directors for review.
25. By letter dated January 13, 2000, the claimant advised she wished her claim to be presented to the board of directors for review.
26. By letter dated March 13, 2000, the claimant the board had denied her claim.

(Exhibit 3)

When the Applicant gave oral testimony before the Tribunal she amplified the agreed statement of fact as follows:

When she arrived by bus in Toronto on January 3, 1999 together with her aged aunt and other members of her church, no flights were leaving Toronto airport and all members were accommodated at a hotel in Toronto on the night of January 3, 1999. On January 4, 1999 flights were departing from Toronto airport and another group from London, Ontario arrived at the airport and were put on their flight to Israel which flight then departed as scheduled. Several of the Applicant's group were chosen on January 4, 1999 to join the group of January 4 travellers and left with the January 4 group on that day. The Applicant and her aunt were not chosen to join the January 4 group and remained at the airport until midnight when they were returned to their hotel for the night.

On January 5, 1999 while still at the hotel, the Applicant and her group assembled and were addressed by a representative of Shalom-K Tours Ltd. At that meeting, the representative told the group that their tour was cancelled and that they would be rebooked to leave Toronto on January 14, 1999. When asked by the representative whether there was anyone who could not leave on January 14, 1999, the Applicant and certain others of the group advised the representative that they could not leave on January 14, 1999 as their vacation had been structured to commence on January 3, 1999 and they could not, on such short notice, restructure their vacations. Applicant stated that she is a nurse and that her superior had informed her, when she telephoned her on January 5, that the Applicant would not be permitted to restructure her vacation and to leave on January 14, 2000. After speaking with her superior and upon returning to the group that was assembled in the hotel, the Applicant noticed that her name, together with some 20 others, had been entered on a blackboard indicating that she and her aunt had won seats in a lottery conducted in her absence. The representative of Shalom-K Tours advised her "he thought he could get a flight that evening to Montreal and Israel" for the lottery winners. Those who were not successful in the lottery returned to London.

At about 6:00 p.m., Applicant and other lottery winners were transported to the airport from their hotel. The flight to Montreal was to leave that evening at 8:45 p.m. to connect in Montreal with a flight to Israel, leaving at about 11:00 p.m. that evening. Applicant's luggage was checked, and she and others were given boarding passes for the Montreal leg of the flight. Shortly after 9:00 p.m. that evening while waiting in the departure lounge, an announcement was made that their Montreal flight was delayed and shortly thereafter a further announcement was made that the flight to Montreal was cancelled due to mechanical problems with the aircraft. All passengers' boarding passes were then collected from the aircraft's passengers, and they were left sitting in the departure area. They were told that they could not connect in Montreal with that night's flight from Montreal to Israel.

By 11:00 p.m. that night the group were still sitting in the departure area. The representative of Shalom-K Tours was present. He had not presented the group with alternative travel arrangements. The representative had given no answers to the Applicant's and other group members' concerns. They had unsuccessfully sought answers on:

- what was going to happen regarding the days lost on the 9 day tour of Israel which had a detailed itinerary of each day's doing.
- what was happening with the guide who was to accompany them to Israel and in Israel as this guide had already left with those persons who were travelling via London and Europe.
- would the extension trip of 7 days to Egypt and Jordan still take place.
- where would they stay in Montreal when they eventually arrived in Montreal that night.
- would there be someone in Montreal to meet them, assist them and take care of them.
- would those persons taking the 7 day tour to Egypt and Jordan meet up with other members of the tour who had already left for Israel via London and Europe.

The Applicant stated she was physically and emotionally spent. She had the additional worry of her aged aunt who was travelling with her and to whom she felt a responsibility. She was not an experienced traveller and was unsettled by the repeated delays and the lack of information. She was left feeling abandoned, insecure and fearful of travelling to a foreign land under the circumstances. Although other members in the group were from the same church as the Applicant, she only knew one other member, one Rosemary Soga.

At 11:15 p.m. she advised the representative of the airline for the Montreal leg of the trip, as well as the representative of Shalom-K Tours that she and her aunt would not be proceeding with the tour and were returning to London which she, her aunt and others did. The remainder of the group of 20 left for Montreal the next day, January 6, 1999 and arrived in Israel on January 7, 1999.

The above evidence was not contested by the Compensation Fund and accordingly the agreed statement of fact and the facts in the above stated evidence are found by this Tribunal to be facts found proven.

ISSUE:

Does the claim made by the Applicant fall within the terms of regulation 806/93 to the Act?

THE LAW:

The relevant portions of regulation 806/93 of the *Travel Industry Act* that are applicable to these proceedings are:

Section 50(1), which reads as follows:

Section 50(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (a) the customer made payment for the travel services directly to or through a registered travel agent;
- (b) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- (c) the customer has not been reimbursed by,
 - (i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (ii) any other person who has received the customer's money, or
 - (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

Section 50(3), which reads as follows:

Section 50(3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

.....

- 4. For a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act.

.....

APPLICATION OF LAW TO FACTS:

Does the claim made by the Applicant fall within the terms of regulation 806/93 made under the Act?

The Tribunal is of the opinion that the Applicant's claim does fall within Section 50(1) of the above regulations as:

- (a) The Applicant made payment for the travel services directly to Shalom-K Tours a registered travel agent. (s. 50(1)(a))

- (b) The Applicant has made a demand for payment from the registered travel agent. (s.50(1)(b))
- (c) The Applicant has not been reimbursed by,
- (i) the registrant (Shalom-K Tours) because the registrant is unable to pay by reason of bankruptcy or insolvency. (s.50(1)(c)(i))
 - (ii) any other person who has received the Applicant's money. (s. 50(1)(c)(ii))
or
 - (iii) any other person who may be legally obliged to reimburse or compensate the Applicant, including a person obliged under a contract of insurance. (s. 50(1)(c)(iii))

The Tribunal is also of the opinion that the Applicant's claim does fall within Section 50(3)4. of the regulation 806/93 as:

- The Applicant paid for travel services that were not available to her and were not received by her, the failure to receive such travel services being due not to the Applicant's action or failure to act.
- The Applicant contracted with Shalom-K Tours for travel services. The travel services consisted of return air transportation to Israel, Egypt and Jordan as well as a nine day escorted tour of Israel according to a set itinerary and a seven day escorted tour of Egypt and Jordan according to a set itinerary. Accommodations were included throughout.
- The tour was to depart Toronto on January 3, 1999 and arrive in Israel January 4, 1999. The tour did not depart Toronto until January 6, 1999 and arrived in Israel January 7, 1999.
- The travel agent did not make the travel services that the Applicant contracted for available to the Applicant.
- The Applicant contracted with Shalom-K Tours for a tour of Israel that was to be nine days in duration but due to the delay was reduced to only six days in duration.
- Shalom-K Tours breached the contract, not the Applicant. It was not the Applicant's failure to act nor was it her action that resulted in the travel services she contracted for not being available to her or received by her.

The Applicant claims \$3,414.54 from the Compensation Fund being the amount paid by her to Shalom-K Tours. Her claim for reimbursement is limited in terms of section 50(2) of the Act to the amount paid by her to Shalom-K Tours for travel services that were not provided. The amount of such travel services is \$3,239.00.

DECISION:

Accordingly, pursuant to the authority vested in it by section 62(6)(a) of Regulation 806/93 under the *Travel Industry Act*, this Tribunal allows the Applicant's claim in the sum of \$3,239.00 and directs the Corporation to pay such amount out of the Ontario Travel Industry Compensation Fund.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: July 27, 2000

SOGA

ROSEMARY SOGA

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL INDUSTRY
COMPENSATION FUND CORPORATION UNDER
THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ROSEMARY SOGA, appearing on her own behalf
FATIMA HUSAIN, Counsel, representing the Board of Directors of
the Ontario Travel Industry Compensation Fund Corporation

DATES OF

HEARING: July 19, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision dated April 7, 2000 of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the "Fund") to deny the Applicant's claim for reimbursement in the amount of \$1,239.17.

Rosemary Soga (the "Applicant") bases her claim on the provisions of Section 50(1) of Regulation 806/93 (the "Regulation") made under the *Travel Industry Act* (the "Act").

THE EVIDENCE:

Evidence was both oral and documentary. Oral testimony was given by the Applicant and by Lori Furlan on behalf of the Fund. Besides the evidence, the parties at the hearing filed an agreed statement of fact with the Tribunal.

The agreed statement of fact reads as follows:

ROSEMARY SOGA-AGREED STATEMENT OF FACT

1. Shalom-K Tours Ltd., a travel agent then registered in Ontario, offered group tours of Israel, departing on January 4, 1999.
2. Ms. Rosemary Soga (the "claimant") had intended to travel with a group tour to Israel, scheduled to depart on January 4, 1999.

3. In November of 1998, the claimant was notified verbally of a change in the departure date of her group to January 3, 1999.
4. On December 10, 1998, the claimant purchased an extension to Jordan and Egypt, and paid \$795.00 U.S.F. for these services.
5. On January 3, 1999, the claimant attended at the Toronto airport, but the flight was cancelled due to weather conditions (snowstorm). The passengers were requested to return on January 4. Accommodations for the night were provided by the travel agent.
6. On January 4, 1999, the claimant again went to the airport, where she waited, but the passengers could not be accommodated on the flight and were again transported to a hotel and asked to return on January 5, 1999.
7. On January 5, 1999, the claimant was advised that the group could not depart as scheduled and the departure would be postponed to January 14, 1999. The claimant advised the travel agent that she could not depart on that date.
8. A seat lottery was arranged for departure on January 5, 1999, for a flight to Israel via Montreal. Passengers who received seats through this lottery (a group of 20 passengers) were advised they should be able to fly to Montreal on January 5, 1999, and connect with a flight to Israel from Montreal. In Israel the group would connect with the other scheduled tour groups already in Israel.
9. Passengers who did not receive a seat in the lottery and could not travel on the January 14, 1999, date were promised a full refund by the travel agent, Shalom-K Tours Ltd.
10. The claimant won a seat in the lottery and was provided with a boarding pass for the Montreal flight.
11. The flight to Montreal was delayed due to mechanical problems with the plane. Air Canada recalled the boarding passes.
12. The claimant was advised that she should take the delayed flight, along with the 20 other group members, to Montreal, and from there a flight would be arranged to Israel.
13. The claimant was unable to confirm information about the Jordan-Egypt extension purchased, or about accommodations to be provided in Montreal. The claimant advised Air Canada she would not be travelling and left the airport. Ms. Soga's luggage was not removed but remained on the flight and eventually arrived in Israel.
14. Passengers in the group who remained at the airport departed the next day, January 6, 1999, and subsequently arrived in Israel.
15. On May 21, 1999, the claimant made a formal complaint to The Travel Industry Council of Ontario (TICO).
16. The claimant did not receive any reimbursement from the travel agent.
17. On September 24, 1999, Shalom-K Tours Ltd. voluntarily terminated its registration.
18. By letter dated November 10, 1999, Claimant was advised that Shalom-K Tours Ltd. had closed its offices. The claimant was further advised that she may submit a claim against the Fund; however, section 50 of Ontario Regulation 806/93 provides that customers are not entitled to reimbursement from the Fund where the travel services were available but not received due to the customer's action or failure to act.
19. On December 6, 1999, TICO received a letter from the claimant's solicitor requesting a claim form.
20. On December 24, 1999, the claimant submitted a claim form for the amount of \$795.00 U.S.F.

21. On December 30, 1999, TICO advised that the claim did not appear to be eligible, but may be presented to the board of directors for review.
22. By letter dated January 30, 2000, the claimant advised she wished her claim to be presented to the board of directors for review.
23. By letter dated April 7, 2000, the claimant the board had denied her claim.

(Exhibit 4)

When the Applicant gave oral testimony before the Tribunal she amplified the agreed statement of fact as follows:

When she arrived by bus in Toronto on January 3, 1999 together with other members of her church, no flights were leaving Toronto airport and all members were accommodated at a hotel in Toronto on the night of January 3, 1999. On January 4, 1999 flights were departing from Toronto airport and another group from London, Ontario arrived at the airport and were put on their flight to Israel which flight then departed as scheduled. Several of the Applicant's group were chosen on January 4, 1999 to join the group of January 4 travellers and left with the January 4 group on that day. The Applicant was not chosen to join the January 4 group and remained at the airport until midnight when she was returned to her hotel for the night.

On January 5, 1999 while still at the hotel, the Applicant and her group assembled and were addressed by a representative of Shalom-K Tours Ltd. At that meeting, the representative told the group that their tour was cancelled and that they would be rebooked to leave Toronto on January 14, 1999. When asked by the representative whether there was anyone who could not leave on January 14, 1999, the Applicant and certain others of the group advised the representative that they could not leave on January 14, 1999 as their vacation had been structured to commence on January 3, 1999 and they could not, on such short notice, restructure their vacations.

Applicant stated that she is a nurse and that her superior had informed her, when she telephoned her on January 5, that the Applicant would not be permitted to restructure her vacation and to leave on January 14, 2000. After speaking with her superior and upon returning to the group that was assembled in the hotel, the Applicant noticed that her name, together with some 20 others, had been entered on a blackboard indicating that she had won a seat in a lottery conducted in her absence. The representative of Shalom-K Tours advised her "he thought he could get a flight that evening to Montreal and Israel" for the lottery winners. Those who were not successful in the lottery returned to London.

At about 6:00 p.m., Applicant and other lottery winners were transported to the airport from their hotel. The flight to Montreal was to leave that evening at 8:45 p.m. to connect in Montreal with a flight to Israel, leaving at about 11:00 p.m. that evening. Applicant's luggage was checked, and she and others were given boarding passes for the Montreal leg of the flight. Shortly after 9:00 p.m. that evening while waiting in the departure lounge, an announcement was made that their Montreal flight was delayed and shortly thereafter a further announcement was made that the flight to Montreal was cancelled due to mechanical problems with the aircraft. All passengers' boarding passes were then collected from the aircraft's passengers, and they were left sitting in the departure area. They were told that they could not connect in Montreal with that night's flight from Montreal to Israel.

By 11:00 p.m. that night, the group were still sitting in the departure area. The representative of Shalom-K Tours was present. He had not presented the group with alternative travel arrangements. The representative had given no answers to the group members' concerns. They had unsuccessfully sought answers on:

- what was going to happen regarding the days lost on the 9 day tour of Israel which had a detailed itinerary of each day's doing.
- what was happening with the guide who was to accompany them to Israel and in Israel as this guide had already left with those persons who were travelling via London and Europe.
- would the extension trip of 7 days to Egypt and Jordan still take place.
- where would they stay in Montreal when they eventually arrived in Montreal that night.
- would there be someone in Montreal to meet them, assist them and take care of them.
- would those persons taking the 7 day tour to Egypt and Jordan meet up with other members of the tour who had already left for Israel via London and Europe.

The Applicant stated she was physically and emotionally spent. She was not an experienced traveller and was unsettled by the repeated delays and the lack of information. She was left feeling abandoned, insecure and fearful of travelling to a foreign land under the circumstances. Although other members in the group were from the same church as the Applicant, she only knew one other member.

At 11:15 p.m. she advised the representative of the airline for the Montreal leg of the trip, as well as the representative of Shalom-K Tours that she would not be proceeding with the tour and was returning to London which she, and others, did. The remainder of the group of 20 left for Montreal the next day, January 6, 1999 and arrived in Israel on January 7, 1999.

Under cross-examination, by counsel representing the Compensation Fund, the Applicant stated that her claim against the Fund is for \$795.00 U.S. (\$1,239.17 Canadian) which represented the amount she paid to Shalom-K Tours in respect of the seven day escorted tour through Egypt and Jordan. She also stated that "I had an arrangement with another passenger to pay \$1,000.00" and that she paid Shalom-K Tours for the Egypt and Jordan extension of the trip on December 10, 1998. The \$1,000.00 was paid to a Father Pinto of the Church and this payment enable the Applicant to be part of the Church group's travel arrangements from Toronto to Israel as well as the nine day tour of Israel.

The above evidence was not contested by the Compensation Fund, and the agreed statement of fact and the facts in the above stated evidence are found by this Tribunal to be facts found proven.

ISSUE:

Does the claim for \$1,239.17 made by the Applicant fall within the terms of regulation 806/93 to the Act?

THE LAW:

The relevant portions of regulation 806/93 of the *Travel Industry Act* that are applicable to these proceedings are:

Section 50(1), which reads as follows:

Section 50(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (d) the customer made payment for the travel services directly to or through a registered travel agent;
- (e) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- (f) the customer has not been reimbursed by,
 - (iv) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - (v) any other person who has received the customer's money, or
 - (vi) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

Section 50(3), which reads as follows:

Section 50(3) A customer is not entitled to be reimbursed for the following or in the following circumstances:

.....

- 4. For a payment, including a non-refundable payment, for travel services that were available but not received if the failure to receive the travel services is due to the customer's or the traveller's action or failure to act.

.....

APPLICATION OF LAW TO FACTS:

Does the claim made by the Applicant for payment of \$1,239.17 representing the amount the Applicant paid for in respect of the Egypt and Jordan seven day tour fall within the terms of regulation 806/93 made under the Act?

The Tribunal is of the opinion that the Applicant's claim does fall within Section 50(1) of the above regulations as:

- (d) The Applicant made payment of \$795.00 U.S. (\$1,239.17 Canadian) for the travel services regarding the Egypt and Jordan portion of the tour directly to Shalom-K Tours, a registered travel agent.
- (e) Insofar as the other portion of the tour namely, the return air transportation to Israel and the nine day escorted Israel tour, the Applicant as a member of the Church paid Father Pinto of the Church \$1,000.00 in respect of such air transportation and the Israel portion of the tour. Father Pinto was the Applicant's duly authorized agent to

contract with the registered travel agent, Shalom-K Tours. This agency was recognized by Shalom-K Tours by its issuance directly to the Applicant of her ticket. (s. 50(1)(a))

(f) The Applicant has made a demand for payment from the registered travel agent. (s.50(1)(b))

(g) The Applicant has not been reimbursed by,

(iv) the registrant (Shalom-K Tours) because the registrant is unable to pay by reason of bankruptcy or insolvency. (s.50(1)(c)(i))

(v) any other person who has received the Applicant's money. (s. 50(1)(c)(ii))
or

(vi) any other person who may be legally obliged to reimburse or compensate the Applicant, including a person obliged under a contract of insurance. (s. 50(1)(c)(iii))

The Tribunal is also of the opinion that the Applicant's claim does not fall within Section 50(3)4. of the regulation 806/93 as:

- The Applicant paid \$1,239.17 directly to Shalom-K Tours for travel services regarding a tour of Egypt and Jordan that were not available to her and was not received by her. The failure to receive such travel services was not due to the Applicant's action or failure to act.
- The Applicant through her duly authorized agent, Father Pinto, contracted with Shalom-K Tours for travel services, which was in respect of the return air transportation to Israel and the Egypt and Jordan extension tour. Shalom-K Tours issued an air ticket to the Applicant, in her name as passenger, for travel on January 3, 1999 from Toronto to Montreal and from Montreal to Israel on the same date with a return air ticket to Toronto from Israel on January 19, 1999. These travel services, which the Applicant paid for through her agent, were not available to her and were not received by her. The failure to receive such travel services was not due to the Applicant's action or failure to act.
- The tour was to depart from Toronto on January 3, 1999 and arrive in Israel January 4, 1999. The tour did not depart Toronto until January 6, 1999 and arrived in Israel January 7, 1999.
- The travel agent did not make the travel services that the Applicant contracted for, available to the Applicant.
- The Applicant contracted with Shalom-K Tours for a tour of Israel that was to be nine days in duration but due to the delay such tour was reduced to six days in duration.
- Shalom-K Tours breached the contract, not the Applicant. It was not the Applicant's failure to act, nor was it her action, that resulted in the travel services she contracted for not being available to her or received by her.

The Applicant claims \$1,239.17 from the Compensation Fund being the amount paid by her to Shalom-K Tours. Her claim for reimbursement is limited to such amount, as she makes no claim for any other amount paid by her.

DECISION:

Accordingly, pursuant to the authority vested in it by section 62(6)(a) of Regulation 806/93 under the *Travel Industry Act*, this Tribunal allows the Applicant's claim in the sum of \$1,239.17 and directs the Corporation to pay such amount out of the Ontario Travel Industry Compensation Fund.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: July 27, 2000

1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS

1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: NO ONE appearing for 1296347 Ontario Ltd. o/a Bargain Travel
Holidays
FATIMA HUSAIN, Counsel, representing the Registrar,
Travel Industry Act

DATE OF
HEARING: July 27, 2000 Toronto

ORDER

WHEREAS on July 18, 2000 this matter was adjourned, on a peremptory basis against the Applicant, to continue July 27, 2000;

AND WHEREAS, when this matter was to proceed before the Tribunal on July 27, 2000, the Applicant's agent was not present but, had by way of correspondence, requested a further adjournment so as to enable him to continue to represent the Applicant;

TAKE NOTICE, the Tribunal adjourns the hearing *peremptorily against the Applicant*, to continue at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, August 2, 2000.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: July 27, 2000

ABDUL-HUSSEIN, YOUSSEF AKIL o/a EXPRESS FUELS and
AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
YOUSSEF AKIL ABDUL-HUSSEIN O/A EXPRESS FUELS AND
AUTO SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 30th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

YOUSSEF AKIL ABDUL-HUSSEIN O/A EXPRESS FUELS
AND AUTO SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Youssef Akil Abdul-Hussein o/a Express Fuels and Auto Sales, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 12th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

FROM: Youssef Akil Abdul-Hussein
O/A Express Fuels and Auto Sales
4880 Bank Street
Gloucester, ON K1X 1G7

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Youssef Akil Abdul-Hussein o/a Express Fuels and Auto Sales (hereafter the "Dealer") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Dealer acknowledges and understands that he will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by Section 16 of Regulation 801. The Dealer further agrees to store books and records at the location approved by the Registrar.
4. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify his registered name and the address of the location approved by the Registrar.
5. The Dealer agrees not to invite the public to deal at a place other than his approved location.
6. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in employment location in the form required by the Registrar.

7. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a Dealer under the Motor Vehicle Dealers Act.
8. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
9. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
10. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
11. The Dealer agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells to his customers. The Dealer agrees that he is under a positive obligation to ensure that all salespeople also disclose all material facts about vehicles sold to consumers. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
12. The Dealer acknowledges and understands that his registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
13. The Dealer will comply with all aspects of the Retail Sales Act with regards to filing, and ensuring all tax collections are accurately reported and remitted to the Minister of Finance when due.
14. The Dealer will pay all amounts owing to the Minister of Finance in respect of all future audit assessments when due.
15. The Dealer acknowledges that Mohamad Ahmad Tirani will in no way, either directly or indirectly be involved with the business.
16. The Dealer acknowledges that Mohamad Ahmad Tirani is not permitted on the Dealer's registered premise of 4880 Bank Street Gloucester ON.
17. The Dealer agrees he will not be involved with the buying and selling of motor vehicles without the benefit of registration.
18. The Dealer hereby acknowledges that in the event of a breach of any of the terms and conditions set out herein, the Registrar is directed to, and shall revoke the registration of the Dealer.
19. The Dealer understands that his registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.

20. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.

21. The Dealer acknowledges that the Registrar may take legal action, including Provincial Offences prosecution arising from actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

22. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the terms, and conditions set out herein.

23. The Dealer hereby withdraws the appeal to the Licence Appeal Tribunal.

24. The Dealer acknowledges that he has read, understand and will comply with the above terms and conditions of Registration.

25. The Dealer acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out herein.

Signed in the City of Gloucester, this day of June 2000.

(Signature) Youssef Akil Abdul-Hussein

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

POUNDER

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ROBERT ANTHONY POUNDER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 15th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ROBERT ANTHONY POUNDER

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by Robert Anthony Pounder, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 11th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Robert Pounder
760 Bruledale Ave Esat
Hamilton, Ontario, 18P 1R9

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Robert Pounder hereafter the ("Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) I agree, if I am charged in the future, under any law, to immediately notify the Registrar, MVDA, in writing of the charges or convictions against me. Upon any future convictions, the Applicant's registration will be automatically revoked.
- 2) I agree, if I am charged in the future, under any law, to immediately notify my employer of the charges or convictions against me.
- 3) I agree not to transfer my registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 4) I acknowledge that my registration will not prevent the Registrar from taking administrative action, including a proposal to revoke my registration, arising from matters that may have occurred or may occur in the future related to my financial circumstances and honesty and integrity.
- 5) I acknowledge that my registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 6) I acknowledge that the disclosure provided by me to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of my disclosure in entering into these terms and conditions.
- 7) I agree to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. I further acknowledge that enrolment in the course entitles me to a sixty (60) day conditional

registration period that allows for my successful completion of the course (including passing the exam).

8) The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.

9) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.

10) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership

11) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.

12) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.

13) The Applicant acknowledges that, if, the Registrar has evidence that the Applicant has failed to comply with any of the requirements noted above, the Applicant's registration as a motor vehicle salesperson will be revoked and the Applicant will immediately return all registration certificates to the Registrar.

14) I hereby withdraw my appeal to the Licence Appeal Tribunal.

15) I acknowledge that I have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

Witness
Pounder

(Signature) Salesperson, Robert

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

SEAGER

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
TODD KENNETH ROSS SEAGER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 30th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TODD KENNETH ROSS SEAGER

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Todd Kenneth Ross Seager, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 14th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Todd Kenneth Ross Seager
2120 Rathburn Road
Unit 65
Mississauga ON L4W 2S8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Todd Kenneth Ross Seager (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, in writing, of the charges laid against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant agrees that any further convictions will result in the automatic revocation of his registration.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer. Should he wish to transfer his Registration, he shall submit a new application for registration to the Registrar.
5. The Applicant agrees not to be the final signatory on any vehicle purchase agreements.
6. The Applicant agrees not to be an officer, director, manager or owner of a motor vehicle dealer.
7. The Applicant agrees that his disclosure to the Registrar is accurate. Should the Registrar discover that the circumstances surrounding the convictions differ materially from the Applicant's disclosure, the Applicant's registration will automatically be revoked.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

10. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
11. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
12. The Applicant agrees to give a copy of this order to his employer.
13. The Applicant acknowledges that his registration as a motor vehicle salesperson will be revoked if the Applicant breaches any of the terms and conditions set out herein or if salesperson provides false information on any application or document provided to the Registrar.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this of July 2000.

(Signature) Todd Kenneth Ross Seager

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

MELNYK

MOTOR VEHICLE DEALERS ACT

Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF

KYLE MELNYK

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: February 8th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KYLE MELNYK

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Kyle Melnyk, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 20th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Kyle Melnyk
9 Bonheur Court
Apartment 816
Brantford, Ontario, N3P1Z5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Kyle Melnyk hereafter the ("Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) I agree, if I am charged in the future, under any law, to immediately notify the Registrar, MVDA, in writing of the charges or convictions against me. Upon any future convictions pursuant to the Motor Vehicle Dealers Act, the Business Practices Act or the Criminal Code of Canada, the Applicant's registration will be automatically revoked.
- 2) I agree, if I am charged in the future, under any law, to immediately notify my employer of the charges or convictions against me.
- 3) I agree not to transfer my registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 4) I acknowledge that my registration will not prevent the Registrar from taking administrative action, including a proposal to revoke my registration, arising from matters that may have occurred or may occur in the future related to my financial circumstances and honesty and integrity.
- 5) I acknowledge that my registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 6) I acknowledge that the disclosure provided by me to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of my disclosure in entering into these terms and conditions.
- 7) I agree to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. I further acknowledge that enrolment in the course entitles me to a sixty (60) day conditional registration period that allows for my successful completion of the course (including passing the exam).
- 8) The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.

9) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.

10) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership

11) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.

12) The Applicant agrees to provide, as soon as possible, copies of any and all judgments rendered against the Applicant as well as good and sufficient evidence that said judgments have been paid or that satisfactory payment arrangements have been reached with the Applicant's creditors.

13) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.

14) The Applicant acknowledges that, if, the Registrar has evidence that the Applicant has failed to comply with any of the requirements noted above, the Applicant's registration as a motor vehicle salesperson will be revoked and the Applicant will immediately return all registration certificates to the Registrar.

15) I hereby withdraw my appeal to the Licence Appeal Tribunal.

16) I acknowledge that I have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

Witness _____ (Signature) Salesperson, Kyle Melnyk

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

SHAQIQ, MOHAMMAD AMIN o/a EAST & WEST USED CAR SALES

MOHAMMAD AMIN SHAQIQ O/A EAST & WEST USED CAR SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice Chair

APPEARANCES:

JORGE BARROILHET, Agent representing the Applicant
AVIVA R. HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

July 5, 2000

Toronto

CONSENT ORDER

WHEREAS the Registrar, *Motor Vehicle Dealers Act* brought a motion before the Tribunal on July 5, 2000;

AND WHEREAS the motion was for an Order that the Applicant file particulars to his Notice of Appeal to the Registrar's Proposal to Revoke the Applicant's registration as a Dealer under the Motor Vehicle Dealers Act (the "Act");

AND WHEREAS the Registrar and the Applicant were represented at the hearing of the motion by Jorge Barroilhet, Agent for Mohammad Amin Shaqiq o/a East & West Used Car Sales (the "Applicant") and Aviva R. Harari, Counsel for Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

AND WHEREAS at the commencement of the motion hearing, the Tribunal was advised that the Applicant's agent and the Registrar's counsel had resolved the issues involved in the motion and wished to record, by consent, the terms under which the motion proceedings had been resolved;

AND WHEREAS the Applicant's agent and the Registrar's counsel have consented to the issuance of a Consent Order of the Tribunal without the hearing of the motion pursuant to Section 4.1 of the Statutory Powers Procedure Act R.S.O. 1990, Chapter S. 22;

HAVING reviewed the written particulars prepared by the Applicant's agent and accepted by the Registrar's counsel as meeting the full requirements of the Registrar in

sofar as motion proceedings are concerned and which particulars are filed and attached hereto as Schedule "A";

NOW THEREFORE, upon consent of the parties, this Tribunal Orders that the motion proceedings in this matter are disposed of without a hearing on the basis of the particulars now furnished by the Applicant and set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: July 6, 2000

RE: Particulars

SCHDEULE "A"

- 1) This cars were bought in dealer auction.
- 2) Odometers were not in working conditions
- 3) Were replaced to working conditions
- 4) Bill of sale proof this work completed.
- 5) At appeal, document to substantiate the grounds will be presented which won't derogate in anyway from disclosure requirements.
- 6) Did not have the opportunity to provide document at the lot.
- 7) Client did not know exactly true process to defend his self.

" _____ "

EASTMAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
STEPHEN CRAIG EASTMAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: April 3rd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

STEPHEN CRAIG EASTMAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Stephen Craig Eastman, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: July 19th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

FROM: Steve Eastman
66 Champlain Drive
Cornwall, Ontario, K6H 6P2

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Steve Eastman hereafter the ("Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) I agree, if I am charged in the future, under any law, to immediately notify the Registrar, in writing of the charges or convictions against me. Upon any future convictions, the Applicant's registration will be automatically revoked.
- 2) I agree, if I am charged in the future, under any law, to immediately notify my employer of the charges or convictions against me.
- 3) I agree not to transfer my registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 4) I acknowledge that my registration will not prevent the Registrar from taking administrative action, including a proposal to revoke my registration, arising from matters that may have occurred or may occur in the future related to my financial circumstances and honesty and integrity.
- 5) I acknowledge that my registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 6) I acknowledge that the disclosure provided by me to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of my disclosure in entering into these terms and conditions.
- 7) The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.
- 8) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.
- 9) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership
- 10) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- 11) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.

12) The Applicant acknowledges that, if, the Registrar has evidence that the Applicant has failed to comply with any of the requirements noted above, the Applicant's registration as a motor vehicle salesperson will be revoked and the Applicant will immediately return all registration certificates to the Registrar.

13) I hereby withdraw my appeal to the Licence Appeal Tribunal.

14) I acknowledge that I have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 2000.

Witness

(Signature) Salesperson, Steven Eastman

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

ABBEY TRAVEL SERVICE LTD.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
ABBEY TRAVEL SERVICE LTD.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 12th, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ABBEY TRAVEL SERVICE LTD.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

PURSUANT to the provisions of the *Travel Industry Act* R.S.O. 1990, Chapter T. 19 (the "Act"), Abbey Travel Service Ltd. (the "Applicant") appealed a proposal of the Registrar under the Act dated November 12, 1999 in terms of which the Registrar proposed to revoke the registration of the Applicant as a travel agent;

AND WHEREAS, following attendances on July 10, 2000, at the hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of Mary Nagy, Agent for the Applicant, Abbey Travel Service Ltd. (the "Applicant") and Fatima Husain, Counsel for the Registrar, *Travel Industry Act* (the "Registrar"), the parties came to an agreement to settle on consent with terms and conditions;

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair

Released: July 10th, 2000

B E T W E E N:

ABBHEY TRAVEL SERVICE LTD.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Abbey Travel Service Ltd. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and registered as a travel agent (Registration No. 01250995/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration as a travel agent on June 23, 1982.
2. On November 30, 1995, the Registrant signed an acknowledgement of Terms and Conditions of Registration, in which it agreed, among other things, to maintain trust accounting, maintain the required minimum working capital, and file financial statements within 3 months of its fiscal year end.
3. The past conduct of Abbey Travel Service Ltd. reveals numerous instances of non-compliance. As well as previous working capital deficiencies, Abbey Travel Service Ltd. has, in the past, persistently filed its financial statements late:
 - On November 8, 1994, the Registrant filed the financial statements for the fiscal year ended June 30, 1994. The statements had been due by September 30, 1994.
 - On November 17, 1995, the Registrant filed the financial statements for the fiscal year ended June 30, 1995. The statements had been due by September 30, 1995.
 - On December 9, 1996, the Registrant filed the financial statements for the fiscal year ended June 30, 1996. The statements had been due by September 30, 1996.
 - On June 19, 1998, the Registrant filed the financial statements for the fiscal year ended June 30, 1997. The statements had been due by September 30, 1997.
 - On November 12, 1999, the Registrant filed the financial statements for the fiscal year ended June 30, 1998. The statements had been due by September 30, 1998.

4. By letter dated June 7, 1999, the Registrant was requested to file the financial statements for the fiscal year ended June 30, 1999, on or before September 30, 1999. On October 5, 1999, the Registrant was again requested to file the requisite financial statements.
5. By letter dated October 27, 1999, the Registrar requested the Registrant to file the financial statements for the fiscal year ended June 30, 1999, on or before November 10, 1999. The statements had been due by September 30, 1999.
6. On November 12, 1999, the Registrar issued a Notice of Proposal to Revoke Registration to the Registrant for failure to file its financial statements for the fiscal year ended June 30, 1999.
7. By letter dated December 7, 1999, the Registrant appealed the Proposal to Revoke Registration issued on November 12, 1999, and stated that it would file its financial statements by January 31, 2000.
8. On February 23, 2000, the Registrant filed its financial statements for the fiscal year ended June 30, 1999. The statements had been due by September 30, 1999.
9. By letter dated February 29, 2000, the Registrant was advised that it had a working capital shortfall in the amount of \$5,995.00, and was requested to address this shortfall on or before March 15, 2000.
10. On May 23, 2000, the Registrant addressed the working capital shortfall in full.
11. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under s. 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated November 12, 1999, with respect to Abbey Travel Service Ltd.;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation") and which it has acknowledged in its Terms and Conditions of Registration;
 - b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - c) The Registrant shall maintain proper trust accounting pursuant to and in accordance with section 36 of the Regulation;
 - d) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 28th day of each month for the preceding month, beginning on **August 28th, 2000**, for the month of July, 2000, for so long as the Registrar shall so require;
 - e) If the above-noted trust account reconciliations as filed according to (ii)(f) are incomplete and/or reveal a customer deposit deficiency, the Registrant will have **five (5) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - f) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30th, 2000, on or before **August 14th, 2000**;
 - g) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending June 30th, 2000, on or before **September 30th, 2000**;
 - h) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- i) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31st, 2000, on or before **February 14th, 2001**;
- j) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30th, 2001, on or before **August 14th, 2001**;
- k) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending June 30th, 2001, on or before **September 30th, 2001**;
- l) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- m) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31st, 2001, on or before **February 14th, 2002**;
- n) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30th, 2002, on or before **August 14th, 2002**;
- o) The Registrant shall file the financial statements as required by the Regulation for the fiscal year ending June 30th, 2002, no later than **September 30th, 2002**;
- p) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **30** days from the date of notice of the deficiency to fully and completely address any deficiency and produce proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- q) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31st, 2002, on or before **February 14th, 2003**;
- r) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
- s) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
- t) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of

such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.

- (iii) Should the Registrant fail to comply with any of the above conditions **(ii) (d) to (q)** inclusive, the Registrar **shall revoke** the Registrant's registration on five (5) days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of July, 2000.

Abbey Travel Service Ltd.

Registrar, *Travel Industry Act*

Ms. Mary Nagy
Abbey Travel Service Ltd.
I have authority to bind the corporation

Michael Pepper, Registrar
Travel Industry Act

UNIVERSAL TOURS AND TRAVEL INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
UNIVERSAL TOURS AND TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: December 17, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

UNIVERSAL TOURS AND TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) by Universal Tours and Travel Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair

Released: July 10th, 2000

B E T W E E N:

UNIVERSAL TOURS & TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Universal Tours & Travel Inc. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and registered as a travel agent (Registration No. 04633863/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration as a travel agent on September 18, 1998. Prior to being approved for registration, the Registrant signed an acknowledgement of Terms and Conditions of Registration on September 10, 1998.
2. On December 17, 1999, the Registrar issued a Notice of Proposal to Revoke Registration for failure to file financial statements for the fiscal year ended July 31, 1999.
3. On May 29, 2000, the Registrar issued a Notice of Further and Other Particulars which set out further information which had come to the attention of the Registrar and which related to the fitness for registration of Universal Travel & Tours Ltd. including failure to file Form 1 for the period ended January 31, 2000.
4. On June 29, 2000, the Registrant filed its financial statements for the fiscal year ended July 31, 1999. The statements had been due by October 31, 1999.
5. To date, the Registrant has not filed its Form 1 filing for the period ended January 31, 2000. The filing had been due by March 16, 2000.
6. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Commercial Registration Appeal Tribunal under s. 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated December 17, 1999, with respect to Universal Tours & Travel Inc.;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation") and which it has acknowledged in its Terms and Conditions of Registration;
 - b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - c) The Registrant shall maintain the renewable and irrevocable Letter of Credit in the amount of \$10,000.00 (Canadian) with the beneficial interest in favour of the Travel Industry Council of Ontario for so long as the Registrar shall so require;
 - d) The Registrant shall maintain proper trust accounting pursuant to and in accordance with section 36 of the Regulation;
 - e) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 28th day of each month for the preceding month, beginning on **August 28th, 2000**, for the month of July, 2000, for so long as the Registrar shall so require;
 - f) If the above-noted trust account reconciliations as filed according to (ii)(f) are incomplete and/or reveal a customer deposit deficiency, the Registrant will have **five (5) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - g) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended January 31st, 2000, on or before **July 31st, 2000**;
 - h) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended July 31st, 2000, on or before **September 14th, 2000**;
 - i) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending July 31st, 2000, on or before **October 31st, 2000**;

- j) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- k) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended January 31st, 2001, on or before **March 17th, 2001**;
- l) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended July 31st, 2001, on or before **September 14th, 2001**;
- m) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending July 31st, 2001, on or before **October 31st, 2001**;
- n) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- o) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended January 31st, 2002, on or before **March 17th, 2002**;
- p) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended July 31st, 2002, on or before **September 14th, 2002**;
- q) The Registrant shall file the financial statements as required by the Regulation for the fiscal year ending July 31st, 2002, no later than **October 31st, 2002**;
- r) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **30** days from the date of notice of the deficiency to fully and completely address any deficiency and produce proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- s) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;

- t) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - u) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions **(ii) (e) to (r)** inclusive, the Registrar **shall revoke** the Registrant's registration on five **(5)** days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of July, 2000.

Universal Tours & Travel Inc.

Registrar, *Travel Industry Act*

Mr. Bajinder Pal Singh, President
Universal Tours & Travel Inc.
I have authority to bind the corporation

Michael Pepper, Registrar
Travel Industry Act

0105/MED/00/011

Appeal under Section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M. D., Presiding Member
ROY MELVIN, Member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

Applicant

Solicitor for Applicant

DATE OF HEARING: July 07, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

a) Exhibit # 1 Notice of Appeal - received June 9, 2000

By the Respondent:

b) Exhibit # 2 Ministry of Transportation submissions – tabs 1 – 10
- received June 22, 2000.

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a file summary with respect to this matter, as well as certified copies of documents on file.

FACTS:

The Applicant is appealing the suspension of his driver's licence effective '99 12 10" (Exhibit # 1).

The Applicant came to the attention of the Ministry as a result of an unsolicited Medical Report from Physician # 1. Physician # 1 reports that the Applicant "...fell asleep at the wheel investigation to follow ...alcohol problem but abstinent x 2 mth..." (Exhibit # 2 Tab 1)

In a hand written note, dated "Jan 25/00," Physician # 1 explains that "... At the time of his accident he was not under the influence ...had had a GI bleed ...and I believe the reason for his accident was his anemia and therefore fatigue ...he is an alcoholic but I have never been concerned about drinking and driving otherwise I would have recommended a suspension a long time ago." (Exhibit # 2 Tab 3 A)

MINISTRY OF TRANSPORTATION ASSESSMENT FORM, dated January 10, 2000, completed by Physician # 1, the Applicant's physician since 1986, reports as follows:

1. "YES" is checked under "Personal Health History" for "Addictions" and "Hospitalizations within last 12 months".
2. Under Medical Consequences Related to Alcohol Use, "Liver Disease" is indicated
3. According to the "PHYSICAL ASSESSMENT AND LABORATORY EVALUATION," "...Blood Pressure - NORMAL 130-140/60- 70; LIVER - see form; GGT 48; MCV NORMAL 89".
4. Under the heading 'DSM-IV CRITERIA FOR ALCOHOL DEPENDENCE, " number "7 - Continued drinking despite knowledge of alcohol related physical or psychological problems," was circled.
5. The "RECOMMEND GOAL FOR ALCOHOL CONSUMPTION - REDUCED DRINKING" (Exhibit # 2 Tab 6)

MEDICAL ADVISORY COMMITTEE CASE STUDY, dated February 4, 2000, upheld suspension. (Exhibit # 2 Tab 4)

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS, dated "March 3 2000," completed by Harry Ansara, details the Applicant's history as explained by the Applicant. The Applicant states that "...when the owner of his apartment building didn't see him for two days, the paramedics were called ...taken to Queensway Hospital ...transferred to Toronto Western Hospital leaving the hospital after two days..." (Exhibit # 2 Tab 6)

In a second hand written note, dated "March 12/00", Physician # 1, asserts that "...had upper GI bleed ...caused him to be extremely anemic ...the Ministry has decided that his alcohol problem has affected his driving, which is not the case ...I was told by the Ministry that he has drinking and driving offences. This is not true. I am appalled at the response I have gotten from the Ministry when asked as a physician to consult with another physician about his case ...No one has returned my calls..." (Exhibit # 2 Tab 6 a)

MEDICAL ADVISORY COMMITTEE CASE STUDY, dated April 20, 2000, upheld suspension, on the grounds that the Applicant is "...Still Drinking; No Formal Treatment or Relapse Programs; Liver Disease..." (Exhibit # 2 Tab 7)

Exhibit # 2 Tab 10, Ministry of Transportation driving record for the Applicant since 1977, shows no infractions.

The Respondent, at the hearing, relied on the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 10.

Through detailed tab by tab cross-examination by the Applicant's solicitor the Respondent maintains that the grounds for suspension were based on Physician # 1's comments regarding the Applicant's history of alcoholism.

The Respondent admitted to having no conclusive evidence that the Applicant has ever driven under the influence. The Ministry's conclusion that the Applicant is addicted from alcohol were derived from association, i.e. the Applicant's falling asleep at the wheel was due to GI bleeding which in turn was a result of excessive alcohol consumption.

The Respondent agreed that the information of the Applicant's "...past drinking and driving..." is erroneous.

In closing, the Respondent emphasized Section 14 of Regulation 340/94 under the *Highway Traffic Act* as the basis for the Ministry's suspension of the Applicant's driver's licence.

The Applicant's solicitor called Physician # 1 as a witness on behalf of the Applicant. Physician # 1 attested that, to the best of her knowledge, and she has known the Applicant for approximately fourteen years, the Applicant has never had any of the social difficulties generally associated with alcohol abuse, i.e. family or work related incidents.

Physician # 1 confirms that she has had conversations with the Applicant regarding the effects of alcohol on the body. Nonetheless, Physician # 1 does not believe the Applicant is a classic example of alcohol dependency given the fact that on several occasion he has been able "...stop and start ...stop and start..."

The incident of falling asleep at the wheel, was according to Physician # 1's evidence, a case of fatigue due to the GI bleed possibly caused by Advil, not necessarily alcohol.

In his closing remarks, the Applicant's Solicitor summarized the evidence before the Tribunal.

Based on Physician # 1's comments, the Applicant's Solicitor questioned the Medical Advisory Committee's decision of February the 4, 2000. The Applicant's Solicitor noted that the Medical Advisory Committee briefly mentions the original cause of the incident, i.e. the GI bleeding, but focuses on the issue of alcoholism.

The Applicant's Solicitor similarly dismissed the second Medical Advisory Committee's decision of April 20, 2000 and indicates that although the "*Medical Condition*" stated is "*Anemic (GI/Bleed/Alcohol)*" the emphasis is placed on a perceived alcohol addiction rather than on Physician # 1's diagnosis.

The Applicant's Solicitor commented on the criteria of Section 14, of Regulation 340/94, and pointed out that the Applicant adhered to the requirements of the law as he does not drink and drive.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

(g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar to “...*suspend or cancel*” a driver’s licence for “*any...sufficient reason...*” The Applicant came to the attention of the Registrar as a result of an unsolicited Medical Report from Physician # 1, who reports that the Applicant “...*fell asleep at the wheel investigation to follow ... alcohol problem but abstinent x 2 mth...*” (Exhibit # 2 Tab 1).

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, at the time of the suspension.

Nonetheless, as early as January 25, the Ministry had evidence from Physician # 1 that “...*At the time of the his accident he was not under the influence ...the reason for his accident was his anemia and therefore fatigue ...never been concerned about drinking and driving...*” (Exhibit # 2 Tab 3 A)

On March 12, Physician # 1 again takes the time to correct the Ministry’s inaccurate assumption by assuring “...*the Ministry has decided that his alcohol problem has affected his driving, which is not the case...*” (Exhibit # 2 Tab 6 a)

Based on the Medical Advisory Committee’s decision, the Ministry opted to continue the suspension.

Both parties to the action, referred to Section 14 of Regulation 340/94 as grounds for suspension, each with a different interpretation.

The applicable Section 14 (b) of Regulation 340/94 under the HTA states:

“*An applicant for or a holder of a driver’s license must not,*

b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.”

First, this Tribunal finds that there is absolutely no evidence to substantiate the Ministry’s determination that the Applicant is addicted to alcohol. The Tribunal notes Physician # 1’s presence at this hearing to testify on behalf of the Applicant. Physician # 1 clearly expressed, that unlike other patients at her clinic, she has always found the Applicant to be absolutely candid with her as far as his drinking habits were concerned. Physician # 1 testified that Applicant was able to “...*start and stop ...start and stop...*”. This is not the symptom of an individual addicted to alcohol.

Second, this Tribunal concurs with the Applicant Solicitor's interpretation that the key words in Section 14 (b) of Regulation 340/94 are "*...to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely*".

There is no evidence whatsoever, to suggest that the Applicant's consumption of alcohol has in any way affected the Applicant's ability to drive. The Tribunal notes that the Applicant's record is in fact spotless. Exhibit # 2 Tab 1)

The Tribunal finds that the Respondent has not proven that the Applicant is currently suffering from an alcohol addiction which is likely to significantly interfere with his ability to drive a motor vehicle as described by Regulation 340/94 section 14 (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated December 10, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Roy Melvin, M.D.,
Member

RELEASED: July 12, 2000

PERFECT AUTO SALE

1384706 ONTARIO INC. O/A PERFECT AUTO SALE AND
GEORGE FIDDAOUI AND FRANK MENHEM FAOUAL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLES DEALERS ACT*

TO REFUSE REGISTRATION OF 1384706 ONTARIO
INC. O/A PERFECT AUTO SALE AND FRANK
MENHEM FAOUAL

TO REVOKE THE REGISTRATION OF GEORGE FIDDAOUI

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES:

No one appearing for the Applicants
AVIVA R. HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: July 24, 2000

Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal), arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar, and the "Act" respectively). The combined effect of the original Notice dated March 16, 2000, and the Notice of Further or Other Particulars dated July 4, 2000 was to refuse the registration of 1384706 Ontario Inc. o/a Perfect Auto Sale and Frank Menhem Faoual and the Notice of Proposal to revoke the registration of George Fiddaoui under the Act.

The Applicants were duly notified by Notice of Hearing dated May 2, 2000, which was faxed to all parties in this matter. The hearing was scheduled to proceed at 9:30 a.m. on July 24, 2000 in Ottawa. But the Applicants did not appear in person or by agent. At 9:30 a.m. the hearing was adjourned until 10:00 a.m. to allow the Applicants time to arrive or make contact by telephone if they wished to participate. At 10:00 a.m., there being no communication from the Applicants, the hearing was carried on in their absence.

FACTS:

The Registrar under the Act proposed to refuse the registration 1384706 Ontario Inc. o/a Perfect Auto Sale as a motor vehicle dealer and Frank Menhem Faoual as a salesperson and to revoke the registration of George Fiddaoui. The reasons relied upon by the Registrar for the Proposal are set out below.

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The Salespersons' past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentitlement to registration under the Act. Therefore, the Registrar is unwilling to register 1384706 Ontario Inc. o/a Perfect Auto Sale as a motor vehicle dealer and Frank Faoual as a salesperson under the Motor Vehicle Dealers Act. And further, the Registrar is no longer willing to continue the registration of George Fiddaoui.

The Proposal of the Registrar with the three amendments from the Notice of Further and Other Particulars reads as follows:

PARTICULARS

- 1) 1384706 Ontario Inc. o/a Perfect Auto Sale, hereinafter the Dealer applied for registration as a motor vehicle dealership on or about February 10, 2000.
- 2) Frank Menham Faoual (hereinafter Faoual) applied for registration on or about February 10, 2000. Faoual is an officer and director of the dealer.
- 3) George Fiddaoui (hereinafter Fiddaoui) was first registered as a motor vehicle salesperson on or about May 28, 1996.
- 4) On the application to become a Registered Salesperson, question 10 asks: "Have you ever been found guilty or convicted of an offence under any law or are there any charges pending? Fiddaoui answered "yes". Fiddaoui disclosed charges from 1982 until 1991. He stated that in 1991, he was charged with assault.
- 5) After running a routine criminal history check, it came to the Registrar's attention that Fiddaoui had the following convictions that include, but are not limited to:

Assault	November 4, 1993
Mischief to private property	November 4, 1993
Possession of an unregistered restricted weapon	February 5, 1988
Cause a disturbance	February 5, 1988
Point a firearm	February 5, 1988
Possession of narcotic	November 15, 1990
Assault with a weapon	November 19, 1990
Possession of prohibited weapon	June 24, 1991
Assault	March 26, 1992
Assault causing bodily harm	November 13, 1992
- 6) On all previous applications submitted to the Registrar, Fiddaoui provided false information by not disclosing his prior convictions.
- 7) On or about March 8, 2000, representatives of the Registrar attended 617-619 Street. Laurent Blvd Ottawa, Ontario, the Dealers proposed registered premise, and found that the Dealer was operating without benefit of registration.

THE ISSUE:

The legal issue in this case is whether the past conduct of the individual Applicants are such that the Registrar had reasonable grounds to believe that the Applicants would not carry on business in accordance with law and with honesty and integrity. And with respect to the Corporation it is whether the past conduct of its directors affords reasonable grounds for belief that its business will not be carried on with law and with honesty and integrity.

THE LAW:

Under Section 5(1) of the *Motor Vehicle Dealers Act* an Applicant is entitled to registration by Registrar, except where:

Section 5(1)

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with integrity and honesty; or

.....

Section 6(1) of the Act states as follows:

Section 6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

Section 7(4) and 7(5) set out the powers of the Tribunal at a hearing:

Section 7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Section 7(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

EVIDENCE:

The evidence in the seven exhibits tendered by the Registrar confirms the particulars given in the Registrar's reasons. It also confirms that Faoual and Fidaoui were the sole directors of the company which was negotiating to sell a vehicle without being registered as required under the Act.

The Applicant Fidaoui has a serious criminal record, the significance of which is magnified by the lack of full disclosure.

There was no evidence given by the Applicants as they did not appear at any time during the hearing.

APPLICATION OF LAW TO FACTS:

The onus of proof is on the Registrar to justify the proposal being renewed. In the absence of any contradictory evidence, the evidence submitted suffices.

The leading case of *Brenner and the Registrar of Motor Vehicle Dealers and Salesmen* 19 CRAT SCO Decisions and Orders (1971-1989) sets out the test to be applied by the Tribunal as follows:

The effect of Section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

On this evidence, the Tribunal cannot find that the Registrar was in error in coming to his conclusion with respect to his proposal to refuse the registration of 1384706 Ontario Inc. o/a Perfect Auto Sale and Frank Menhem Faoual and to revoke the registration of George Fiddaoui under the Act.

Counsel for the Registrar made a motion for costs to be awarded against the three applicants in the amount of \$2,500 to \$3,000 jointly and severally. This was supported by evidence of the costs for attendance of the Registrar's legal counsel and a witness from Toronto and for one witness from Ottawa scheduled for two days.

Counsel relied on the wording in section 8 of the Licence Appeal Tribunal Act, which reads as follows:

Section 8,

If, on the application of a party to a hearing before the Tribunal *with notice to the other parties* (emphasis added), the Tribunal is satisfied that the application for the hearing is frivolous or vexatious, the Tribunal may refuse to grant the hearing or may terminate the hearing at any time and make an order for costs as it considers appropriate in the circumstances.

The Tribunal finds that these costs would be well deserved, however there has to be notice given to the other parties. Since that was done in this case, the motion was denied.

DECISION:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated March 16, 2000, to refuse the registration of 1384706 Ontario Inc. o/a Perfect Auto Sale and Frank Menhem Faoual and to revoke the registration of George Fiddaoui.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: August 2, 2000

MAHADEO

STEVEN MAHADEO

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE ONTARIO MOTOR VEHICLE
DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

STEVEN MAHADEO, appearing on his own behalf
MITCHELL GOLDBLOOM, Counsel representing the Ontario Motor
Vehicle Dealers Compensation Fund

DATE OF
HEARING:

August 1, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario Motor Vehicle Dealers Compensation Fund (the "Fund"), dated May 11, 2000, wherein the claim for compensation of Steven Mahadeo (the "Applicant") was denied.

The claim of the Applicant is for the sum of \$6,150.00 being the amount of a default judgement obtained by the Applicant in the Whitby Small Claims court against B & J Auto Sales and Leasing. The default judgement has not been satisfied by B & J Sales and Leasing.

MOTION BY THE FUND:

At the commencement of the hearing, Counsel for the Fund brought a motion that the Tribunal was without jurisdiction to hear this appeal for the following reasons:

1. The Applicant's claim against the Fund identifies the basis of his claim as being a default judgment, dated July 26, 1999, for \$6,150.00 granted in favour of the Applicant against B & J Sales and Leasing.
2. Subsequent to the default judgement being granted by court, B & J Sales and Leasing brought a motion to that court for rescission of that default judgement.

3. Pursuant to the Applicant's motion for rescission of the default judgement, the court heard evidence and rendered a decision. The decision of the court, issued on July 17, 2000, was:

Judgement for the Plaintiff against the Defendant in the sum of \$3,000.00; counterclaim dismissed; no costs; no pre-judgment interest.

4. The July 17, 2000 decision was not a final judgement and would not become a final judgement until the expiration of the time for an appeal. The time for the filing of an appeal has not expired.
5. The proprietor of B & J Sales and Leasing who was present under subpoena when the Fund's motion was heard, advised the Tribunal that an appeal was about to be filed to the court's judgement of July 17, 2000. The Applicant also advised the Tribunal that he intended to appeal the judgement as to quantum.
6. Until the judgement of the court becomes final by reason of the expiration of the time for appeal, the Applicant's claim is premature, and the Tribunal is without jurisdiction to hear this matter.
7. The time for an appeal of the court's July 17, 2000 judgement has not expired and the Tribunal was therefore without jurisdiction to hear the Applicant's appeal.

FACTS FOUND PROVEN:

The Tribunal found the following to be proven facts:

1. On July 26, 1999, the Applicant was granted default judgement against B & J Sales and Leasing in an amount of \$6,150.00 which judgement has not been satisfied by the B & J Sales and Leasing.
2. On July 17, 2000, the default judgement for \$6,150.00 against B & J Sales and Leasing was rescinded by order of court.
3. On July 17, 2000, the court that rescinded the default judgement, granted judgement in favour of the Applicant against B & J Sales and Leasing for the sum of \$3,000.00

THE ISSUE:

The legal issue raised by the motion brought by the fund is:

Has this Tribunal the jurisdiction to hear the Applicant's appeal under section 12(3)1. of Regulation 801 to the Act?

THE LAW:

MOTOR VEHICLE DEALERS ACT

Section 1. "Motor vehicle dealer" means a person who carries on business of buying

a or selling motor vehicles, whether for the person's own account or the account of any other person, or who holds himself, herself or itself out as carrying on the business of buying or selling motor vehicles

Section 24. The Lieutenant Governor in Council may make regulations,

.....

- (o) providing for the establishment, maintenance and administration of the Motor Vehicle Dealers Compensation Fund including prescribing provisions relating to investing and paying out of money from the Fund;

.....

- (p) providing for payment out of the Fund of claims and procedures to be followed in respect thereto;

.....

REGULATION 801 TO THE MOTOR VEHICLE DEALERS ACT

.....

Section 12(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgement in respect of the claim and the judgement has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgement and statement of claim, for payment of the unsatisfied portion of the judgement and costs as assessed.

.....

APPLICATION OF LAW TO FACTS:

The Applicant when filing his notice of claim against the Fund, dated October 27, 1999, stated that his claim was based upon an unsatisfied default judgement for \$6,150.00 against a motor vehicle dealer, namely B & J Sales and Leasing.

The Applicant, accordingly, filed his claim in terms of section 12(3)1. of regulation 801. B & J Sales and Leasing successfully challenged the default judgement in a motion brought before court and upon the court setting aside the default judgement for \$6,150.00 there was no longer a judgement upon which the Applicant could found his claim.

However, when setting aside the default judgement, the court granted a new judgement for \$3000.00 in favour of the Applicant. This judgment was granted on July 17, 2000 and the time within which an appeal may be filed to that judgement has not, at this stage, expired. Accordingly, the July 17, 2000 judgement is not a final judgement as is required by section 12(3)1. of regulation 801. Until that judgement becomes a final judgement, this Tribunal does not have jurisdiction to hear the Applicant's appeal.

The Tribunal records that Counsel for the Fund indicated to the Tribunal that the Fund would consent to the Applicant amending the basis of his claim so as to bring his claim within the terms of section 12(3)4. of regulation 801. The Applicant, however, did not respond to this aspect, and it was not dealt with further.

DECISION:

By virtue of what is stated above, the Tribunal finds it does not presently have jurisdiction to hear this appeal and accordingly this hearing is concluded.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: August 2, 2000

KLEIST

EDWARD and KATHLEEN KLEIST

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELMER MERKLEY
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

EDWARD AND KATHLEEN KLEIST, Applicants
unrepresented

DATE OF HEARING: July 28, 2000

DECISION RELEASED: August 3, 2000 London

REASONS FOR DECISION

A hearing was held on July 28, 2000, at London, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Edward and Kathleen Kleist (the "Applicant")
Motor Vehicle: 1987 Chev CRS, plate # ADEF 528 (the "vehicle")
Date of Appeal: July 10, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on July 28, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"I Edward Kleist would like to apply for this appeal for I didn't give Mr. Haines permission to drive this car. So on the ground this would be considered stolen he was charge with auto theft of this car on July 2, 2000 when impounded."

The Applicant testified that his car was parked in his yard prior to him retiring around 7 p.m. on July 1, 2000. Sometime during the night, Bradley Haines, his border for the past eight months, took the Applicant's vehicle without consent or permission. The Ontario Provincial Police, Constable Ted Smith, advised him by telephone around 2:30 a.m. on July 2, 2000, that his vehicle was being impounded and the driver had been arrested and charged with providing false identification under the Highway Traffic Act and for "driving while disqualified."

In his testimony, the Applicant conceded that this was not the first time that Mr. Haines had taken his vehicle without prior consent or permission. However, in previous incidents, the vehicle was only used to joyride around the Applicant's one hundred-acre farm. The Applicant testified that he was aware that Mr. Haines' driver's licence was under suspension for the offence of "driving while disqualified," and he had cautioned Mr. Haines on one occasion about driving the vehicle on private property without consent or permission.

No measures were taken to deny access to the keys before this recent incident. The keys were normally kept on top of the fridge in plain view to all the occupants of the household. In his testimony, the Applicant stated that his vehicle could be started and driven without the benefit of keys due to a faulty steering wheel switch. It is his intention to repair the defective switch once the vehicle is released from impound.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Bradley Haines;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 17, 2002.

Police Constable Ted Smith, of the Ontario Provincial Police, testified that he stopped the Applicant's vehicle while on routine patrol near Gadshill, Ontario. The driver, Mr. Bradley Haines, identified himself as Mr. Edward Kleist and produced a business card and a Petro Canada points card both displaying the name Edward Kleist. Regardless, Constable Smith pursued the matter further since the vehicle was being operated without the benefit of a key in the ignition.

With Mr. Haines' arrest and more intense questioning, he admitted to taking the vehicle without the owner's consent or permission and produced the keys that were normally kept on top of the fridge. Mr. Haines stated that he and his friend were on their way to London, Ontario and that he did not intend to deprive Mr. Kleist of his vehicle. Numerous charges i.e., "obstruction of a Police Officer" as well as "driving while disqualified" and "taken without consent" were processed. The charges are currently before the Court.

On the basis of the evidence given at this hearing, the Tribunal finds the following to be the fundamental facts found proven:

1. The Applicant is the owner of the motor vehicle that was the subject of the impoundment order.
2. At the time of the impoundment order, the Applicant's motor vehicle was driven by Bradley Haines.
3. At the time of the impoundment of the Applicant's motor vehicle, Bradley Haines' driver's licence was under suspension for "driving while disqualified."
4. Neither Constable Ted Smith or the Applicant believes that Bradley Haines had any intent to deprive the owner of the benefit of ownership (or possession) permanently.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The “owner” for the purposes of the section is defined in subsection 50.2(11) as:

“Owner” means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar’s order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver’s licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of “stolen” is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black’s Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter

forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. United States v. Turley, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The burden of proof is on the Applicant to establish whether the vehicle was in fact stolen.

The Tribunal has found that the driver took the Applicant's vehicle without the Applicants prior knowledge or consent. However, there is no evidence before the Tribunal that the actions on the part of the driver constituted theft of the vehicle. While the Applicant had cautioned Mr. Haines about joyriding around the family farm without consent or permission, the keys continued to be left on top of the fridge and the motor vehicle ignition switch remained in disrepair. The evidence does not indicate that either Mr. Haines or Mr. Kleist felt that Mr. Haines intended to steal the Kleist vehicle, which is the basis of the Kleists' appeal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: August 3, 2000

IRVIN HOMES LTD.

IRVIN HOMES LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair presiding
IRVING ANDRE, Vice-Chair

APPEARANCES: EDWARD IRVIN, Agent representing the Applicant
ANDREW LEWIS, Counsel representing the Registrar, Ontario
New Home Warranty Program

DATE OF
HEARING: July 20, 2000 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) arising out of a Notice of Proposal issued by the Registrar of the Ontario New Home Warranty Program (the "Registrar, and the "Act", respectively). The Notice of Proposal dated February 10, 2000 proposed to refuse to renew the registration of Irvin Homes Ltd. (the "Applicant") under the Act.

BACKGROUND:

The registrant in this matter is a builder that has been registered with the Ontario New Home Warranty Program (the "Program") since 1988 at which time a guarantee was executed by Mr. Edward Irvin who has been the principal and sole officer of the Irvin Homes Ltd. since the company was first registered. At the time of the initial registration, a Vendor/Builder Agreement was also executed by Mr. Irvin as the President of Irvin homes Ltd.

It is agreed by all parties that Irvin Homes has a record of excellence as a builder, and has no history of claims as a registrant with the Program.

In May 1999 the application for the renewal of registration was made by Irvin Homes, and the required financial statements of the company and a personal statement of net worth were provided by Mr. Edward Irvin. After examination of this information, the Registrar determined that the financial position of the Company and the net worth of Mr. Irvin were not sufficient, and a guarantee was required from Mr. Irvin's wife, Mrs. Margaret Irvin. The registrant did not provide a copy of this guarantee.

The Registrar under the Act proposed to refuse to renew the registration of Irvin Homes Ltd. The grounds relied upon by the Registrar for the Proposal are set out below:

1. Pursuant to the provisions of section 8 (2) of the Act, the Registrar, having regard to the registrant's financial position, finds that the registrant cannot reasonably be expected to be financially responsible in the conduct of its undertakings as required by the provisions of section 7(1)(c)(i) of the Act, TO WIT;
 - (a) The registrant's financial statement shows a deficit and the registrant thereby has failed to provide sufficient evidence of financial ability as required by the Registrar. Further Edward Irvin the sole principal officer, director and guarantor of the registrant declared assets on his personal net worth statement that can not be taken into account as they are registered in the name of Margaret Irvin who is not presently a principal, officer, director, or guarantor of the registrant. The registrant has failed to provide an executed guarantee in duplicate from Margaret Irvin as requested from the registrant by letter dated September 8, 1999, and the registrant has thereby failed to provide sufficient evidence of financial ability as required by the Registrar.
2. Pursuant to the provisions of section 8(2) of the Act, the registrant is in breach of a term or condition of registration, TO WIT;
3.
 - (a) The registrant has failed to comply with subsections 5 and 6 of Regulation 894 requiring the registrant to furnish such documentation as the registrar may require and request and which was requested in accordance with the letter of September 8, 1999.

THE LAW:

Section 7(1)(c)(i) of the Ontario New Home Warranties Plan Act (the "Act"), states as follows:

7(1) An applicant is entitled to registration by the Registrar except where,

(c) the applicant is a corporation and,

- (i) having regard to it's financial position, it cannot reasonably be expected to be financially responsible in the conduct of its undertakings, or
- (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its undertakings will not be carried on in accordance with law and with integrity and honesty; or

.....

Section 8(2) of the Act states as follows:

.....

Section 8(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 7, if the registrant were an applicant, or where the registrant has a record of breaches of warranties or of failure or

unwillingness to complete performance of contracts or is in breach of a term or condition of the registration.

Section 9 of Regulation 892 to the Act states as follows:

Section 9(1) Each applicant desiring registration under the Plan shall complete, execute, and deliver to the Registrar such form or forms of application as the Registrar may require from time to time.

.....

Section 9(3) The applicant shall furnish to the Registrar;

.....

3. Financial statements of the applicant and such other information relating to the applicant's financial affairs as the Registrar may require.

.....

5. Such additional documentation related to the application as the Registrar may reasonably require.

Section 5 of Regulation 894, to the Act states as follows:

Section 5. The registrant shall from time to time, at the registrant's expense, furnish the Registrar with such documents relating to the plan as the Registrar may reasonably require.

Section 6 of Regulation 894, to the Act states as follows;

Section 6. The registrant shall furnish the Registrar with such information relating to the registrant's financial affairs and position as the Registrar may reasonably request.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was appeal by the Registrar of Motor Vehicle Dealers and Salesman from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the registrar to grant a conditional registration to the respondent. The applicant had a very serious criminal record which he had disclosed in his application spot had not disclosed three further convictions which were considered by the Registrar to be minor offences. The applicant heard evidence from a potential employer and a criminal lawyer who testified that the applicant was rehabilitated himself. The court found that the Tribunal had not applied the proper test and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and

with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it thought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Ontario (Registrar of Real Estate and Business Brokers) v Vogelsberg (Ont. Divi. Ct.) (1994) O.J. No. 266

In this case the respondent had interfered with a trust account, and although no one suffered a loss, the court found at page 3 that the proper question for the Tribunal was whether:

"the respondent has carried on activities in contravention of the Act and regulations, and whether his past conduct afforded reasonable grounds for the belief that he would not carry on business in accordance with law, integrity, and honesty".

The Tribunal failed to make a finding of whether the activities contravened the statute, and failed to determine whether the past conduct afforded the grounds to believe that business would not be carried on in accordance with law, integrity, and honesty. The Court found that that the Tribunal must make both determinations. Although no one suffered a financial loss as a result of the conduct, it did not take away from the fact that interfering with the trust account was a wrongful act. As in the Brenner case, the Court held at page 3 that:

"unless the Tribunal found that his conduct does not afford such reasonable grounds, the Tribunal should not order the Registrar to refrain from carrying out his proposal."

Ontario (Registrar of Real Estate and Business Brokers) v Faccenda (1994) O.J. No. 954 (Ontario Court of Justice-General Division- Divisional Court)

In this case the Commercial Registration Appeal Tribunal refused to direct the Registrar to carry out his proposal, and concluded that the Registrar was in error, but did not set out what error was made or what test was applied. It appeared that the Tribunal did not make a qualitative assessment of the respondent's conduct based on the evidence before it, and did not apply the standards of integrity, honesty, and law as provided for in the statute. The Court found that the Tribunal should only have refused to direct that the Registrar carry out the proposal if it found the Registrar was in error in his belief.

Re: Skinner and Laprise General Contractors Limited (1999) O.C.R.A.T.D. No. 99

In this matter the Registrar had refused to renew the registration of the Applicant as a builder on the basis that having regard to the Applicant's financial position, it could not reasonably be expected to be financially responsible in the conduct of its undertakings. In the case, attempts were made to reach an appropriate solution but without success. The Applicant was a well respected builder of the highest quality that had received awards for excellence. At the time of the application, the company was in serious financial difficulty and was suffering increasing losses. A risk assessment was carried

out under the terms of Builder Bulletin 28 and a security amount was determined on the basis of the number of units produced. The builder had a poor credit rating, with only a 4 point financial score based on the risk assessment criteria. A security arrangement was made, but at the next renewal the risk assessment showed that the financial score was zero, and the Registrar proposed to refuse to renew the registration. Although the owner of the company was making every effort to keep the company from going bankrupt, he was not able to make appropriate plans for what would happen if he was unable to continue funding the company. The Tribunal found that in a regulated industry, certain requirements must be met for the continued registration of the company for the mutual advantage of both the industry and the consumer. In this way, the consumer is guaranteed some protection against business failures which cause negative consequences for consumers, and the companies that continue to work in the industry benefit from the enhanced public credibility resulting from effective regulation of the industry. The Tribunal ordered that the Registrar carry out the proposal.

Star Development Inc. (1998) O.C.R.A.T.D. No.135

In this matter, the applicant was applying for initial registration but, in the opinion of the Registrar, did not provide sufficient information for the assessment. The issue was whether the Registrar could require personal guarantees. In its first year of operation, the company had a net loss. The Tribunal found at page 4 that:

"the Act is consumer protection legislation and it gives builder warranties. Due to subrogation, the Program must honor the financial obligations if the builder is unable or unwilling to do so."

The Tribunal found that the Applicant was advised in the Vendor/ Builder Agreement that guarantees could be required, and the Program has specific statutory authority to request guarantees, statements of personal net worth, or other documentation it reasonably requires. In this case, although the owner of the company agreed to provide a guarantee, it was not sufficient to protect the public interest and the interest of the Program as a subrogated party.

V.M.A. Construction Limited v Ontario New Home Warranties Program (February 9, 1982)

In this case, the Registrar had concerns due to the financial situation of the Applicant. The Tribunal found that given the financial position of the applicant, it was reasonable to require a personal guarantee from the principal shareholder of the Applicant. The Tribunal directed the Registrar to carry out the proposal to refuse to renew the registration unless within 30 days of the date of the order the applicant provided personal guarantees of the principal shareholders along with the required statements of their net worth.

Garnet Lane Developments Ltd. (1997) O.C.R.A.T. No. 132

In this matter, the Registrar proposed to refuse to renew the registration of two companies based on financial grounds and on the past conduct of an officer. There was a history of claims with the Program, and it was found to be reasonable that the Registrar would have serious concerns about the Applicant carrying out its undertakings. In the circumstances, the Tribunal followed the decision of Brenner found that the Registrar was not in error in his decision and directed the Registrar to carry out the proposal.

Lauramat Homes Inc. (1999) O.C.R.A.T. No, 102.

In this matter, the Registrar proposed to refuse registration of the Applicant as it had failed to provide the latest available financial statement requested and had thereby failed to provide evidence of financial ability as required by the Registrar. There was also past conduct by the principal of the company as he had failed to discharge a judgment against him in favour of the Ontario New Home Warranty Program in the amount of \$20,000.00 plus post judgment interest. Information provided by the Applicant was found to be vague, insufficient and unreliable. In these circumstances together with the past conduct of the principal of the company, the Tribunal found that the company could not reasonably be expected to be financially responsible, and based on the past conduct, there were reasonable grounds to believe that the company's undertakings would not be carried out in accordance with law, integrity, and honesty.

ISSUES:

The issues in this case are whether the Applicant has provided sufficient evidence of financial ability to show that it can reasonably be expected to be financially responsible in the conduct of its undertakings, and whether it is reasonable, pursuant to Section 5 of Regulation 894 under the Act, for the Registrar to require the Applicant to provide the guarantee as requested by the Registrar.

WITNESS FOR THE REGISTRAR:

Testimony was given by Mr. Adil Dahr who is a senior underwriting analyst employed by the Program for eight months. He is a Chartered Accountant, and prior to his employment by the Program, worked for three years with K.P.M.G. Financial Services Co.

In the later part of 1999, Mr. Dahr reviewed the financial documentation submitted by the Applicant, and the Personal Net Worth Statement submitted by Mr. Edward Irvin to assess the financial viability of the Company. He testified that Mr. Irvin had signed a personal guarantee in 1988 (Exhibit 3, Tab 1) to indemnify the Program from the loss which they suffered by reason of failure of the Applicant to perform its obligations under the Ontario New Home Warranty Program, and had signed a Vendor/ Builder Agreement. (Exhibit 3, Tab 4) in which he agreed in paragraph 4.4(e) to provide, upon request for purposes of renewal, any financial information, guarantee, statement of personal net worth or other documents that the Program may reasonably require.

Mr. Dahr explained that the purpose of the financial assessment and provision of the guarantee was to ensure that there was equity to cover any future claims in the event that the Applicant was unable to meet its financial obligations due to a bankruptcy or other situation of inadequate resources. If the guarantor does not have sufficient assets to cover the loss, then the Program would pay a claim and have no opportunity for reimbursement. To ensure that the guarantee is sufficient, the Program requires a Net Worth Statement from the individual, and verifies the ownership and value of the assets shown. In this case, the Applicant had applied for a renewal and provided financial statements showing that Irvin Homes had liabilities of over \$300,000.00, had lost money for the past two years, had an accumulated deficit of \$219,63.17, and had a significant bank overdraft which would be expensive to service. In the witness's opinion, the

company was in very weak financial condition. When the personal Net Worth Statement of Mr. Irvin was examined, it was found that the home was in the name of Mr. Irvin's wife, and there were insufficient personal assets to cover the liabilities of Irvin Homes under his personal guarantee. A letter was sent to the Applicant on September 8, 1999 (Exhibit 3, Tab 18) requiring that the enclosed guarantee form be signed by Mrs. Margaret Irvin to include her assets in the risk assessment calculations as per Bulletin No. 28.

The witness explained that Builder Bulletin 28 (Exhibit 4) sets out assessment criteria to be used as guidelines for risk assessment and because of the financial situation of Irvin Homes and Mr. Edward Irvin, the company was in the high risk category with a point total of zero. On that basis, the company was unable to be registered without a sufficient guarantee. To calculate the point score, the witness calculated the total number of housing units controlled before the proceeding, and took 50% of the units which were not closed, and 50% of those within the first-year warranty period. He then considered the equity situation of Mr. Irvin and Irvin Homes Limited, and he determined that the point score was zero. Although there is discretion, he testified that when there is a point total below 10, this outweighs the other factors and registration will be refused even though the Applicant had an excellent service record, and apparently no claims. In his estimation, the Applicant would not been able to show sufficient financial responsibility in the absence of a sufficient further guarantee.

In cross-examination, the witness was asked how much money would be needed for registration, and he was unable to name a figure or a method to calculate it. He testified that there was no magic number, and any decision would be based on the consideration of a number of factors. It would depend on the number of homes constructed or expected to be constructed, the consideration of competence and the interview. Even though only 50 percent of the score related to financial issues, he repeated that a minimum score of 10 must be met, or the financial considerations outweigh other factors and registration will be refused. If the score is above 10, but is low, the assessor can use judgment and may still grant registration. In this case, the financial score was zero, and there was a refusal of the registration. Mr. Dahr testified that even though he had only been with the Program since October 1999, he was permitted to make the decision. It was suggested to the witness that the Program was trying to reduce the number of builders, and he denied hearing any such rumor. The witness also denied that he knew that it was a common practice to protect assets by putting them into the name of a spouse. He testified that he did not know that the maximum deposit that could be claimed by a person was \$20,000.00. The witness confirmed that a credit check had been done on Irvin Homes, and agreed that it showed nothing negative. Although there was a small enrollment fee owing, the witness agreed that it was simply an adjustment based on the increase in the sale price of a home and did not reflect negatively on the Applicant. On the issue of the builder's reputation, the witness agreed that his information showed that there was no history of complaints, and the Applicant had received a Certificate of Excellence from The Ontario New Home Warranty Program in 1999. The witness also had no knowledge of the extent of the financial resources of the Program when it was suggested that there was an enormous fund that was being somehow drained off.

WITNESS FOR THE APPLICANT:

Mr. Edward Irvin gave evidence on behalf of the Applicant. He testified that he refused to allow his wife to be a guarantor, and was acting on a matter of principal. He

considered the Registrar's decision to be unfair, and wished to take a stand on behalf of himself and other builders.

When the company was first registered, he had less money than he did now, and has now proven that he knows what he is doing. He stated that at the time he provided the registration information it was not his year end for the company and this had an effect on the information.

During the previous two years there had been two situations which had hurt the company financially and had caused the present financial problems. The first problem was that the company had been involved in a subdivision development plan with three other partners. One partner ran off with the wife of another partner. This led to a general deterioration of the arrangement, and Mr. Irvin had to remove Irvin Homes from the partnership resulting in a financial loss. Under cross-examination, he stated that if he had not been able to get out of this situation, it would have been the end of his company. Even though the Bank of Montreal had issued a \$300,000.00 line of credit, and made \$1,500,000.00 in mortgages available, he was not able to work his way through the situation, and had to take a serious loss through no fault of his own. The second problem was that Mr. Irvin was unable to work for a considerable period of the previous year due to a serious health problem. As a result of this inability to build and sell homes, the company suffered financial losses as shown on the financial statements.

Mr. Irvin testified that he had obtained a mortgage approval for his home (Exhibit 6) and was also trying to sell the home for \$609,000.00. He was unhappy about the company's deficit, and was trying to work his way out of it. In addition, the Royal Bank had extended a \$50,000.00 line of credit to him to help finance Irvin Homes. Under cross-examination, he agreed that his wife had signed as a guarantor for this line of credit and had agreed to apply for the mortgage on the home which was in her name.

The witness testified that while he was unable to construct homes, he had upgraded his qualifications by taking courses in the United States. He produced a series of articles and certificates showing the extent of his achievements as a builder, and the general recognition of Irvin Homes as an excellent builder. In addition to this, he testified that he works on various committees of builders and for the Ontario New Home Warranty Program.

In cross-examination, he agreed that he had signed the original guarantee and the Vendor Builder Agreement. When questioned about his Net Worth Statement, he testified that he had assets that were not on the statement but was not specific. When asked if the major asset was his home, he stated that it was not and said that the house was in his wife's name to protect it from lawsuits against Irvin Homes or him personally. He explained that business people put assets in their spouses' names to protect the assets from lawsuits and that the goal of his accountant was to render his personal worth as close to zero as possible to protect his assets. Effectively, he was seeking to be judgement proof. He explained that there is a general security agreement with the bank, guaranteed by his wife, and that she does not understand why she has to sign another guarantee. The witness testified that the bank would hold the mortgage, and there would be no risk to the Program as the trades would be covered by the holdbacks. When asked how this arrangement with the bank would protect a home buyer with claims for deficiencies after closing, or in case of bankruptcy, he stated that he would take care of repairs, and that his record for customer service was excellent. During cross-examination, he said that a bond should be put in place rather than a guarantee,

and raised the question of what type of bond the Program would require. He also stated that it is his wife and not he, who is refusing to provide a guarantee.

Mr. Irvin raised the issue that Mr. Brian Campbell, a lawyer, would be angry if Mr. Irvin's wife signed the guarantee, and that he was taking a stand against it on principle, on behalf of other builders. He also mentioned how builders who are not registered with the Program are building individual homes and selling them as their private residence or acting as the customer's subcontractor. Mr. Irvin expressed his wish to be registered with the Program, and did not want to be put in the situation of having to resort to one of these methods of building.

FACTS FOUND PROVEN:

The Tribunal finds that the Applicant is a builder of exceptional quality that is recognized within the building industry for its competence and virtually perfect record of customer satisfaction. In addition, Mr. Edward Irvin the principle of the company has taken steps to upgrade his skills, and gives the Program the benefit of his expertise through his work on committees and within the industry.

In the preceding years, the company suffered financial setbacks unrelated to the skill, diligence or integrity of Mr. Irvin. Due to his involvement in one building project which put the company heavily in debt, and his inability to work for a period of time due to health problems, the company now finds itself with a serious debt problem. A personal guarantee was provided by Mr. Irvin as required in the original Vendor/ Builder Agreement, however this guarantee is now of little use as Mr. Irvin has sought to ensure that he has few assets in his name to protect himself in case of litigation.

For business reasons, the home is in his wife's name, and his personal assets which are subject to the guarantee are insufficient to cover the debts of the company. Although in his evidence he claimed that he did have assets, and implied that there were assets beyond those shown in the information provided, the Tribunal has no proof of this. If Mr. Irvin has assets which he has chosen not to disclose, and has filed an incomplete or misleading Statement of Net Worth, the Tribunal cannot go behind the documents provided.

It is clear to the Tribunal that Mr. Irvin intends to make every possible effort to improve the financial situation of his company, and has a history of hard work and honesty. The Tribunal cannot find as a fact that Mr. Irvin will be able or not be able to turn around the financial fortunes of his company in the future as this will involve many factors beyond his control. Recently, Irvin Homes has suffered financial setbacks due to a failed project, and his health problem, despite Mr. Irvin's best efforts and hard work. The Tribunal has no concern over Mr. Irvin's intention to continue to serve his customers with the highest standard of personal service while his company is operating and he is financially able to do so. Arrangements made for financing give some protection up until the time of closing of transactions. Although the arrangements made with the bank also give some measure of protection for the payment of subcontractors and the return of deposits, it does not deal with the issue of warranty claims by purchasers. If Irvin Homes does not have assets to cover the claims, and Mr. Edward Irvin has protected himself from lawsuits by moving the bulk of his assets to his wife's name, the Program would have no recourse against him, and any claims would be paid out of the compensation fund.

APPLICATION OF LAW TO FACTS:

The first issue is whether the Applicant has provided sufficient financial information to show that it can reasonably be expected to be financially responsible in the conduct of its undertakings. Based on the financial information provided by the Applicant, the Tribunal finds that the assets of Irvin Homes combined with those of Mr. Edward Irvin are not sufficient to discharge the liabilities of the company. In order to protect his assets from creditors, Mr. Irvin has put his home into his wife's name, and sought to reduce his personal exposure in the event of a lawsuit. To enhance the financial viability of the company, Mr. Irvin has made arrangements for a mortgage on his home, is trying to sell the home, and has arranged a line of credit for the company from a bank. Based on the financial information before the Tribunal, it appears that efforts are being made by Mr. Irvin that would give some protection for deposits by purchasers and money owed to the subcontractors. When he was asked about how warranty claims would be dealt with, Mr. Irvin responded that he would carry out the repairs, and did not appear to be aware that the Program is responsible for warranty claims of up to \$100,000.00 for single-family homes pursuant to the limits of liability established under section 6 (3) of Regulation 892, under the Ontario New Home Warranties Plan Act.

The second issue is whether it is reasonable pursuant to section 5 of Regulation 894 for the Registrar to require the Applicant to provide the guarantee as requested, and if so has the Applicant failed to comply with subsections 5 of Regulation 894. The Tribunal finds that the Ontario New Home Warranties Plan Act is consumer protection legislation enacted to protect the public in the event that new home builders fail to perform their contracts either through an unwillingness or financial inability to do so. This provides new home buyers with protection against finding themselves with a valid warranty claim against a company which has gone bankrupt despite the efforts of the owner, or has been operated as a judgment proof "shell" corporation with little or no assets to satisfy any claims against it. The Registrar has chosen to require a guarantee from builders. The Registrar has chosen not to devise a system whereby a bond in a predetermined amount would be posted to cover all potential claims for each unit or project. The Registrar does not wish to simply depend on the integrity of a builder or on the hope that a builder will never go bankrupt or transfer away assets. This Tribunal finds that it is not unreasonable for the Program to request a guarantee together with supporting financial documentation as proof of the financial viability of the builder in making the determination of whether the Applicant can be reasonably expected to be financially responsible in the conduct of its undertakings.

Based on these findings of fact and their application to the law, this Tribunal finds that the Applicant has failed to provide documentation reasonably required by the Registrar. The decision of the Registrar to refuse to renew the registration in the absence of a sufficient guarantee was not in error. In the circumstances of this particular case, however, the Tribunal finds that Irvin Homes Ltd. is entitled to registration subject to providing a sufficient guarantee as required by the Registrar.

DECISION:

Therefore, by virtue of the authority vested in it under section 9(4) of the Ontario New Home Warranties Plan Act, the Tribunal directs the Registrar to refrain from carrying out his proposal dated February 10, 2000 to refuse to grant the Applicants registration and directs the Registrar to issue the renewal of the Applicant's registration subject to the following term and condition:

1. The Applicant shall provide the Registrar with a guarantee and supporting documentation satisfactory to the Registrar within 40 days of the issuance of this order, failing which the Tribunal directs the Registrar to carry out his proposal.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair, presiding

Irving Andre
Vice-Chair

Released: August 3, 2000

KOLLAR

EVE T. KOLLAR

APPEAL FROM A DECISION OF THE COMPLAINTS
COMMITTEE OF THE BOARD OF FUNERAL SERVICES
UNDER THE *FUNERAL DIRECTORS AND ESTABLISHMENTS*
ACT

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:
by teleconference

EVE T. KOLLAR, was not represented nor was she present or
in attendance

NORMAN G. STONER, Counsel, representing Geoffrey P.
Lougheed, Funeral Director, Lougheed Funeral Home

BERNARD C. LeBLANC, Counsel, representing the Registrar,
Board of Funeral Services

DATE OF
HEARING: August 3, 2000

by teleconference

ORDER

WHEREAS, the Complaints Committee of the Board of Funeral Services issued its decision dated November 3, 1999 in regard to a complaint by Eve T. Kollar ("Kollar") against Geoffrey P. Lougheed, Funeral Director ("Lougheed");

AND WHEREAS, Kollar appealed the decision of the Complaints Committee to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal);

AND WHEREAS, the hearing of Kollar's appeal was set down for hearing before the Tribunal, by teleconference, for 1:00 p.m., on August 3, 2000;

AND WHEREAS, Norman G. Stoner, Counsel for Lougheed and Bernard C. LeBlanc, Counsel for the Registrar, were present by teleconference at the hearing on August 3, 2000;

AND WHEREAS, shortly prior to the hearing on August 3, 2000, the Tribunal was advised by Kollar that she would not partake in the hearing of the appeal and that the Tribunal could proceed with the hearing in her absence;

AND WHEREAS, Kollar did not attend the hearing nor was she represented at the hearing;

AND WHEREAS, Counsel for Loughheed moved for an order dismissing Kollar's appeal and confirming the Complaints Committee's decision;

NOW THEREFORE this Tribunal orders that the appeal of Kollar to the decision of the Complaints Committee of the Board of Funeral Services is hereby dismissed and the decision of that Committee is confirmed.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: August 4, 2000

STEVENS

SAMUEL AND DRAGICA STEVENS

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

JAMES C. MORTON, Counsel, representing the Applicants
ANDREW LEWIS, Counsel, representing the Ontario New Home
Warranty Program,
LYNN MITCHELL, Counsel, representing Gilgrove Developments
Inc., Added Party

DATE OF
HEARING:

July 13, 2000

Toronto

AMENDED ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990 Chapter 0.31, as amended (the "Act"), the Applicants, Samuel and Dragica Stevens appealed to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) a decision letter dated November 25, 1999 issued by the Ontario New Home Warranty Program to deny the claims of the Applicants;

WHEREAS on June 15, 2000, an Order was made by the Tribunal upon consent of the parties adjourning the hearing of June 12-16, 2000, *peremptory against the Applicants* to be heard on July 13, 2000, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS a copy of the Order of this Tribunal was duly served on Applicants counsel by facsimile with confirmation;

AND WHEREAS at the commencement of the hearing on July 13, 2000, Counsel for the Applicants requested that the hearing be adjourned, as the Applicants were on vacation and not present at the hearing;

AND WHEREAS the application for adjournment was refused by the Tribunal and counsel for the Applicants had no evidence to call on behalf of his clients;

UPON MOTION, made by the Program for an Order dismissing such appeal, heard by the Tribunal on July 13, 2000 at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, M4V 1K6, no evidence being tendered by the Applicants, and;

ON HEARING submissions of counsel for the Program and counsel for the Applicants and reviewing documents filed as Exhibits by the Program, this Tribunal finds that the Applicants have not established their claims as required under the Act;

NOW THEREFORE this Tribunal Orders that the appeal by the Applicants is dismissed and pursuant to the authority vested in the Tribunal under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow the claims of the Applicants.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: August 4, 2000

1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS

1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ROY F. SMITH, Agent, representing 1296347 Ontario Ltd. o/a
Bargain Travel Holidays
FATIMA HUSAIN, Counsel, representing the Registrar,
Travel Industry Act

DATES OF HEARING: July 7, July 18,
July 27, and August 2, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

1296347 Ontario Ltd. o/a Bargain Travel Holidays (the "Applicant") appeals the written Notice of Proposal issued by the Registrar under the *Travel Industry Act* (the "Act") to revoke the registration of the Applicant as a travel agent.

The Proposal dated May 2, 2000 was issued in terms of section 6(1) of the *Travel Industry Act*, which reads as follows:

Section 6(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration or to refuse to name a branch office in a registration, he or she shall serve notice of his or her proposal, together with written reasons therefor, on the applicant or registrant.

The Registrar bases his proposal to revoke on section 4(1) of the Act, which reads as follows:

Section 4(1) An applicant is entitled to registration or renewal of registration as a travel agent or travel wholesaler by the Registrar except where,

.....

- c) the applicant is a corporation and,
 - i) is incorporated without share capital, or
 - ii) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - iii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honest; or

d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

The Registrar takes the position that the Applicant's registration should be revoked as, having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business and the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty. The Registrar also takes the position that the Applicant is carrying on activities that are in contravention of the Act or the Regulations.

Subsequent to the Notice of Proposal to revoke being served on the Applicant the Applicant served notice in terms of section 6(2) of the Act that it appeals the Registrar's Notice of Proposal to the Licence Appeal Tribunal (the "Tribunal").

By Notice dated June 21, 2000 the Registrar served on the Applicant an Order temporarily suspending the Applicants' registration in terms of section 7 of the Act and in the aforementioned Notice, the Registrar furnished the Applicant with further or other particulars relating to his Proposal.

At the commencement of the hearing on July 7, 2000, Counsel for the Registrar requested the Tribunal, in terms of section 7 of the Act, extend the temporary suspension of the Applicant's registration until the hearing is concluded. The agent for the Applicant consented to the extension of the temporary suspension of the Applicant's registration until the conclusion of the hearing, and the Tribunal accordingly so ordered.

Counsel for the Registrar also made a motion that certain documents, or part thereof, which would be tendered in evidence during the hearing, be ordered not to be accessible to the public. The basis for the motion was that certain documents or part thereof, contain intimate confidential and personal information of a financial nature relating to certain consumers who have complaints against the Applicant. Counsel also contended that such information should not be disclosed in the interests of the consumers with complaints against the Applicant. The agent for the Applicant consented to the exclusion of access of such documentation from the public. Counsel for the Registrar undertook to identify in a written list, which she would submit to the Tribunal for its approval and acceptance, all such documents.

A separate order is being issued by the Tribunal in respect of the above motion.

THE EVIDENCE:

The evidence in this matter was both oral and documentary. The following persons appeared before the Tribunal and testified as follows on behalf of the Registrar.

MICHAEL PHILIP PEPPER

Michael Philip Pepper ("Pepper") was the first witness for the Registrar.

He is the Chief Executive Officer of the Travel Industry Council of Ontario and the Registrar under the Act. In his capacity as Registrar his responsibilities include ensuring that:

- Registrants' under the Act comply with the Act and its regulations and that certain standards and criteria are met by Registrants
- Financial filings by Registrants required in terms of the regulations are complied with and that contributions to the Compensation Fund established under the regulations are made by Registrants
- Working capital requirements under the regulations are being met and that consumer's monies are kept in a trust account as required by the regulations

The duty to regularly monitor Registrants is to ensure that consumers and their monies are not at risk and that Registrants are financially viable. In addition the Registrar attempts to ensure that complaints of consumers regarding Registrants are attended to by Registrants and are resolved where possible.

Pepper also stated that when the Applicant was originally registered as a travel agent, on September 22, 1998, it executed, through its duly authorized officer, an acknowledgment that it would comply with the terms and conditions imposed upon it by the regulations to the Act. When it was brought to his notice that the Applicant appeared to be putting through double debits on consumer's credit cards, Pepper decided that it was necessary to immediately suspend the Applicant's registration and did so by notice dated June 21, 2000.

The apparent double billing to consumers' credit cards caused the Registrar concern respecting the financial viability of the Applicant as it could indicate a cash flow problem. The double billing against consumers' credit cards could indicate the opportunity for the Applicant to create additional cash flow to satisfy a cash flow problem. In the present instance there were eight consumers who has complained to the Registrar's office that they had been double billed by the Applicant without their authority or permission. The Applicant had also failed, despite repeated requests by the Registrar, to file financial statements as required by the regulations and had not filed Form 1 as required by the regulations regarding compulsory contributions due by it to the Ontario Travel Industry Compensation Fund. ("Compensation Fund")

Taking into account the complaints of numerous consumers, the failure to file financial statements as called for by the regulations as well as the failure to file Form 1 and make payment of amounts due to the Compensation Fund, the Registrar issued the Proposal to revoke the Applicant's registration.

In concluding his testimony, Pepper stated that it is accepted in the travel industry that when a consumer tenders his or her credit card to a travel agent in payment of anticipated travel services to be supplied by an end supplier, the cost of such services are debited by the end supplier only against the credit card of the consumer. The Travel agent does not charge the consumer with the cost of anticipated travel services

LORI FURLAN

The next witness called to testify on behalf of the Registrar was Lori Furlan who stated that she is the claim's coordinator in the office of the Registrar and as such is responsible for the assessment of all Registrants' obligations under the regulations insofar as their contributions to the Compensation Fund are concerned.

Form 1 filings and Compensation Fund payments

Furlan testified that she is familiar with the Applicant. She became involved with the Applicant when it failed to file the Form 1 due to be filed for the period ending November 30, 1999. All registrants, including the Applicant, are required to contribute twice a year to the Compensation Fund. Such contributions are based upon financial information disclosed by a Registrant in the Form 1.

Contributions to the Compensation Fund shall be made within 45 days after the end of a Registrant's fiscal year and fiscal half year. The fiscal year end of the Applicant is November 30.

Furlan testified that the Form 1 due for the fiscal period ending May 31, 1999 was filed by the Applicant on August 27, 1999 although the due date for filing same was July 15, 1999.

The Form 1 for the fiscal period ending November 30, 1999 due to be filed by January 14, 2000 has not been filed by the Applicant despite reminders sent to the Applicant on January 27, 2000 and February 9, 2000.

Financial Statements

Furlan stated that under section 24 of the regulations under the Act, Registrants must file with the Registrar financial statements for each fiscal year.

The Applicant was required to file financial statements for the fiscal period ending November 30, 1999 by February 29, 2000. The Applicant was advised by letter dated November 4, 1999 from the Registrar that the aforementioned statement was due on February 29, 2000 but was not filed by Applicant. On March 2, 2000, the Applicant was again reminded by the Registrar to file such statement and was given until March 24, 2000 to file same. On March 24, 2000, Roy Smith an employee of the Applicant advised the Registrar that such statements would be filed by April 15, 2000.

Despite Smith's promise, no financial statements, as required by the regulations, have been filed by the Applicant with the Registrar.

RACHEL PALOZZI

Rachel Palozzi was the next witness to testify on behalf of the Registrar. She stated that she is a compliance officer and investigator with the office of the Registrar. She was made aware of certain complaints by consumers against the Applicant, and made certain enquiries and investigations. The following consumers' complaints are those of which Palozzi became aware.

Complaint by Patricia Onysko

Onysko's complaint was that in February 1999 she had booked four airline tickets with the Applicant and had paid the cost of such tickets, totaling \$1,820.00 by way of her mother's credit card. Subsequently, when her mother received her credit card statement from the bank she found that she had been debited by Air Transat in the sum of \$1,820.00 and had been debited a further \$1,820.00 by the Applicant.

The aforesaid debits were entered on the cardholder's account at the beginning of February 1999. By approximately the end of April 1999 this double charge against the cardholder's account had not been rectified by the Applicant despite the complaint having been brought to the Applicant's attention by Onysko as far back as March 22, 1999. When Onysko complained to the Applicant regarding the double debit, the Applicant "as a goodwill gesture" undertook to pay the cost of early seat selection for the four tickets. Despite this undertaking, a charge of \$120.00 appeared on the cardholder's account in respect of early seat selection.

Upon Onysko filing a complaint with the Registrar, Palozzi unsuccessfully attempted to communicate with the Applicant by telephone. Accordingly, Palozzi made a site inspection of the Applicant's premises. When Palozzi came to the Applicant's premises, she noted that the site was under construction and did not appear to contain an office of a travel agent.

Some four days after the site visit, Palozzi was able to speak with Roy Smith, an employee of the Applicant. Palozzi advised Smith of Onysko's complaint and requested an explanation or response. Subsequent to speaking with Smith, Palozzi met with Smith and the President of the Applicant, one Edward Barclay, on May 10, 2000.

Only then were the charges by the Applicant of \$1,820.00 and \$120.00 resolved, by the Applicant passing the necessary credits to the cardholder's account.

Complaint by David Strachan

Strachan booked hotel accommodation in the United States through the Applicant and authorized the use of his credit card for payment of \$400.00 as a deposit on the accommodation. On March 24, 1999 this sum was debited to Strachan's credit card account by the hotel. The cost of hotel accommodation (less the deposit) was to be paid by Strachan to the hotel when the services were provided to Strachan. The Applicant had no permission from Strachan to authorize any other debit to his credit card. Despite this Strachan, when he received his credit card account, found an unauthorized debit of \$1,000.00 by the Applicant for the cost of hotel accommodation. When in the United States, Strachan had already paid the hotel for the cost of accommodation. At that time he had not received his credit card account reflecting the charge of \$1,000.00 by the Applicant.

When Strachan, after his return from the United States, received his credit card account, he contacted the Applicant. Unsuccessful in obtaining repayment of the charge put through by the Applicant, Strachan enlisted the assistance of the Registrar who took the matter up with the Applicant. It was only on July 9, 1999 that the Registrar closed its file when, not having heard further from Strachan the Registrar assumed the matter had been settled by Applicant to Strachan's satisfaction.

Complaint by Mary DeSwert

On February 4, 2000, Scotiabank wrote to Palozzi on behalf of a customer, one Ms. DeSwert, who claimed that her credit card had been debited by Premier Holidays for travel services supplied to DeSwert. This charge for \$675.00, was entered against DeSwert's credit card account on March 15, 1999. On April 27, 1999 a further debit for the sum of \$675.00 was passed against DeSwert's same account by the Applicant. Upon complaining to the Applicant regarding the unauthorized charge by the Applicant, the matter was rectified by the Applicant passing a credit against her account.

In January 2000, DeSwert noticed that once again her credit card account had been debited with the sum of \$675.00 by the Applicant. No permission or authorization from DeSwert had been given to the Applicant regarding this debit. On February 9, 2000, the Registrar, following a complaint made by DeSwert, wrote to the Applicant for an explanation. Not having heard from the Applicant, the Registrar wrote again on February 29, 2000 requesting an explanation.

By letter dated March 8, 2000 addressed to the Registrar, the Applicant stated that it had corrected the January 2000 debit passed against DeSwert's credit card account.

Complaint by William Curry

According to Palozzi, Mr. Curry advised the Registrar on February 18, 2000 that he had purchased two air tickets through the Applicant for the sum of \$1,320.00. This purchase was made on January 12, 2000. Curry stated that his credit card account was debited twice in regard to this transaction, once by Air Transat on January 13, 2000 and again by the Applicant on the same date. In both instances the debits were for \$1,320.00. When Curry complained to the Applicant on January 25, 2000, he was assured that the debit passed by the Applicant would be reversed. By February 18, 2000 no credit had been passed to the account of Curry and after being assured by the credit card company that it had received no reversal notice from the Applicant, Curry took the matter up with the Registrar.

Palozzi testified that a letter was addressed to the Applicant on February 29, 2000 and telephone messages were subsequently left with the Applicant. On March 8, 2000 the Applicant furnished the Registrar with documentation to the effect that Curry's complaint had been resolved.

Complaint by Paul Gazo

On March 15, 2000 the Registrar received a complaint from Paul Gazo who stated that he booked two airline tickets to Vienna through the Applicant. Gazo gave his credit card number to the Applicant and authorized the debit only of the deposit of \$400.00 to his credit card account. Gazo was advised by the Applicant that the balance on the airline tickets would become due by mid April 2000. When Gazo received his credit card statement there appeared two charges on that statement, each charge being for \$1,500.00. One charge was in favour of Canada 3000, an airline, and the other charge was in favour of the Applicant.

When Gazo complained to the Applicant, he was assured the double billing would be rectified by the Applicant. When no rectification took place, Gazo contacted the credit card company who "charged back" \$1,500.00 to his account. Gazo was expecting a charge of only \$400.00 on his credit card account. The credit card company at the request of Gazo "charged back" the second \$1,500.00 charge as well.

When Gazo's complaint came into the hands of the Registrar, a complaints officer named Minah Oh contacted the Applicant and spoke with Smith of the Applicant who stated "the tour operator" had charged \$1,500.00, the full cost of the airline tickets, when only the deposit of \$400.00 should have been charged. The Applicant, according to Smith, then guaranteed the full amount of the two airline tickets to the "tour operator". The Applicant at that time placed a \$400.00 charge in respect of the deposit against Gazo's credit card account. He explained that the two airline tickets, the cost being

guaranteed by the Applicant, were then delivered to the Applicant's office, and on payment by Gazo to the Applicant of the cost of the tickets the Applicant would release the tickets to Gazo.

No further assistance was required of the Registrar to finalize the matter.

Complaint by Joe D'urzo

D'Urzo complained to the Registrar that he had booked six airline tickets, at \$199.00 per ticket, through the Applicant. The total charge for the tickets was \$1,194.00. However, the Applicant also placed a charge of \$123.00 per ticket against the credit card of D'Urzo for a total \$738.00 in respect of "service charges and taxes". When D'Urzo queried this latter charge, he was advised by the Applicant that it would be rectified. According to Palozzi, there is no indication that this matter has been rectified by the Applicant.

Complaint by John Andrews

Andrews' complaint relates to a hotel booking at Nassau Beach. The Applicant made this booking on behalf of Andrews. The cost of the accommodation was \$1,052.00 and was paid by Andrews authorizing a charge against his credit card account. When Andrews received his credit card statement, there were two charges reflected on the account, each for \$1,052.00. Both charges were entered against his account on April 17, 2000. One charge was in favour of Sunquest Vacations, the supplier, and the other charge was in favour of the Applicant. Palozzi stated in her testimony that no resolution of Andrews' complaint of double billing has been reached, and the unauthorized charge of \$1,052.00 by the Applicant has not been reversed.

Complaint by North American Leisure Group

Palozzi testified that the above group operates under the name of Sunquest Vacations, suppliers of package vacations.

On June 20, 2000, the collection coordinator of the Group contacted Palozzi and reported that the Group's bank had advised that three consumers had complained to the bank "regarding double charges" that the Applicant had made. The three consumers were Nuno Martins, Emilia Lonsdale and Peter Frankfort, and the amount involved in each instance was \$2,110.52, \$1,400.00 and \$1,569.76 respectively. In each instance, Sunquest Vacations had charged the above persons for travel services in the amounts stated while at the same time the Applicant through whom the travel service reservations were made, had put through identical charges against the persons' credit card accounts.

The dates on which the double charges were put through by the Applicant, according to the documents supplied by Sunquest Vacations to Palozzi, were April 10, May 5 and May 1, 2000 respectively.

Due to the recent nature of these allegations, Palozzi could not comment on whether the double charges had been resolved.

Complaint by Conquest Vacations

Palozzi testified that Travel Reservations drew a cheque dated June 14, 2000 payable to "Conquest" for \$356.22. "Conquest" is a tour operator and a supplier of travel services. This cheque was not honoured by Travel Reservations bank upon presentation for payment and was returned to Conquest marked "N.S.F.".

The Ministry of Consumer and Commercial Relations (the "Companies Branch") issued a report produced by it on June 21, 2000 that the Applicant had on April 4, 1999 registered as one of its current business names, the name "Travel Reservations".

Palozzi further testified that the Registrar's inspector stated that when serving the Temporary Suspension Order on the Applicant on June 21, 2000, he was advised by Roy Smith that the Applicant had that morning delivered to Conquest Vacations a money order dated June 21, 2000 for \$381.22 in respect of the dishonoured cheque. Roy Smith also informed the inspector that the Form 1 filing together with accompanying payment, as well as overdue financial statements, "were at the Licence Appeal Tribunal".

Following the Registrar's witnesses, Roy F. Smith, agent for the Applicant gave evidence.

ROY F. SMITH

Smith testified that he is employed by the Applicant on a contract basis to assist in the administration of the Applicant's business. In that capacity, he manages the accounting aspects of the Applicant. He stated that he was a licenced Chartered Accountant in Ontario and has some 20 years experience in the travel industry, having been employed with various travel agencies during that time. Since the Applicant's registration in September 1998, he has worked for the Applicant.

Financial Statements

Smith stated he was aware that the Applicant is obliged to file financial statements and Form 1's with the Registrar as prescribed by the Act and its regulations.

He is aware that the Applicant is required to file financial statements for each fiscal year. The filing of financial statements is to be made within three months of the end of the fiscal year; semi-annual financial statements are to be filed within forty five days of the end of each half year during the fiscal year. The Applicant originally chose August 31 as its fiscal year end but changed this fiscal year end to November 30.

He conceded that the Applicant was reminded by the Registrar on November 4, 1999 that the November 30, 1999 financial statements were to be filed by no later than February 29, 2000. He further acknowledged that the Registrar wrote to the Applicant on March 2, 2000 reminding the Applicant to file the then overdue November 30, 1999 financial statements. Again on March 9, 2000, the Registrar wrote to the Applicant requesting the filing of the financial statements for the fiscal year ended November 30, 1999 by no later than March 24, 2000. He further conceded that when on March 27, 2000, one Jack Foster, an inspector designated by the Registrar, visited the Applicant, Foster again reminded him that the overdue financial statements had yet to be filed by the Applicant.

Smith admitted that to date no financial statements have been filed by the Applicant with the Registrar which comply with section 24(1) of regulation 806/93 and the Applicant has not complied with either sections 24(2) or (3) or (4) of that regulation.

Form 1

Smith stated he knew Form 1 filings were to be made by the Applicant and were to be accompanied by payment as required by the regulations under the Act. He knew that such filings and payments are to be made within forty five days after the Applicant's fiscal year end and fiscal half-year end.

Smith conceded that the Form 1 filing due on July 15, 1999 for the original fiscal year ending May 31, 1999 had only been filed on August 27, 1999. He also conceded that the Form 1 filing due for the period ending November 30, 1999 was not filed by the due date of January 4, 2000 and that the Registrar had written the Applicant by letter dated January 27, 2000, giving it until February 10, 2000 to file and make due payment. Smith conceded that a further letter was sent by the Registrar to the Applicant requiring the filing of this Form 1 by no later than February 24, 2000.

Smith also stated that on July 7, 2000, after the service of the Notice of Proposal to Revoke the Applicant's registration and after the commencement of the hearing of the Applicant's appeal, the Applicant did file the Form 1 that was originally due for filing by January 14, 2000.

Trust Account

Smith stated that the Applicant was receiving monies from clients and that the Applicant's trust account was active. He also stated that the Applicant's trust account was "running" in a negative position at various times and that he knew this "is not proper". He further stated that, for a time, payments received by the Applicant from consumers were being deposited by the Applicant into its General banking account.

Smith also stated that the Applicant had four permitted and authorized bank accounts upon which it operated. There was, he stated, a corporation unrelated to the Applicant that conducted a banking account under the style or name of Travel Reservations. This corporation had authorized Smith to operate on its aforesaid banking account.

Smith stated that funds were received by the Applicant from a client of the Applicant for travel services. These travel services were to be supplied by Conquest Vacations. Smith stated that a cheque drawn by Travel Reservations on its banking account in favour of Conquest Vacations in payment of this client's travel services was dishonoured on presentation by Conquest Vacations to the bank. This cheque was dated June 14, 2000 and was for the sum of \$365.22. Smith stated further that this non-payment of monies due to Conquest Vacations had been rectified by the Applicant on June 21, 2000 when a money order was sent to Conquest Vacations. Smith conceded that the funds due for the Conquest Vacations travel services were not deposited to Applicant's trust account as they should have been.

Complaint by Patricia Onysko

Smith did not deny that both Air Transat and the Applicant had charged Onysko the sum of \$1,820.00 for air tickets issued by Air Transat. Smith stated that the Applicant took details of Onysko's credit card from her and obtained her authorization to have the cost

of the air tickets debited to her credit card account. The Applicant obtained approval from the credit card company and passed the approval number given to the Applicant to Air Transat so that the latter could charge the air tickets to Onysko's credit card account. The Applicant advised Air Transat of the approval number.

Smith conceded that the Applicant also charged Onysko's credit card account with the sum of \$1,820.00 upon obtaining the credit card company's approval. He denied that the Applicant received a credit to its bank account in respect of the charge it made against Onysko's account. He also denied that the \$120.00 charge against Onysko's account was an error and stated it was never agreed that the seat selection charge would be free to Onysko. He did concede that the Applicant did pass credits to Onysko's account in respect of the charges of \$1,820.00 and \$120.00.

Complaint by David Strachan

Smith stated that Strachan booked a package deal through the Applicant. The package was in respect of accommodation at Seacrest Resort in Myrtle Beach together with golf privileges. He stated that Strachan gave the Applicant his credit card account number so that the Applicant could attend to the reservation in Myrtle Beach and that he passed Strachan's credit card information to the Seacrest Resort. Seacrest Resort charged the credit card account of Strachan with \$200.00 U.S. (\$306.76 Canadian) being the deposit required to reserve the accommodation.

Smith admitted that the Applicant also put through a charge against Strachan's credit card account for \$1,000.00. This sum, he said, was then forwarded by the Applicant to Seacrest Resort on behalf of Strachan for accommodation services that Strachan would receive from Seacrest Resort. Strachan was due to arrive at the resort on April 3, 1999 but did not show up until April 4, 1999 at which time the accommodation was no longer available to Strachan and he was told by the resort that the \$1,000.00 paid by the Applicant on his behalf was forfeited. The resort, however, did obtain other accommodation for Strachan which Strachan then paid. When Strachan returned to Toronto after his trip, he lodged a complaint. The Applicant then approached the Seacrest Resort and as a result refunded the \$1,000.00 to the Applicant which was in turn refunded to Strachan.

Complaint by DeSwert

Smith stated that it obtained travel services for DeSwert through a wholesaler, Premier Holidays. DeSwert authorized the cost of the Travel Services, namely \$675.00, to be debited to her credit card account. She gave the Applicant details of her credit card, which the Applicant passed to Premier Holidays who, on March 15, 1999, charged the \$675.00 to DeSwert's account. The Applicant also debited \$675.00 to her account on the same date that Premier Holidays charged \$675.00 to DeSwert's account. When this latter debit of \$675.00 was brought to the Applicant's attention, it passed a credit on April 27, 1999 to DeSwert's account. Smith stated that the credit of the \$675.00 was passed as the debit was an error and unauthorized by DeSwert.

Subsequently, on June 21, 2000, the Applicant again charged the credit card account of DeSwert with \$675.00 which Smith stated was reversed after Palozzi of the Registrar's office took the matter up with the Applicant following a complaint lodged with the Registrar by DeSwert.

Complaint by Curry

Smith stated the while he does not dispute that Curry's credit card statement reflects two debits of \$1,320.00 each, one regarding Air Transat and the other regarding the Applicant, the Applicant at no time requested the credit card company to debit Curry's credit card statement with \$1,320.00. Smith could not say how it occurred that the Applicant was shown on Curry's credit card statement to have been paid or credited with the sum of \$1,320.00.

Complaint by Gazo

Smith stated that Gazo did book air tickets on Canada 3000 through the Applicant. Gazo gave his credit card account information to the Applicant and authorized payment to be made against his card account. The cost of the air tickets, namely \$1,500.00, was charged by Canada 3000 against the credit card account of Gazo. Simultaneously, the Applicant charged the credit card of Gazo with \$1,500.00. This charge by the Applicant was conceded by Smith to have been made in error by the Applicant who had no authorization from Gazo to charge this account. When the Applicant discovered its error, it reversed the charge of \$1,500.00 although the reversal took some time to take effect.

Complaint by D'Urzo

Smith conceded the there had been an incorrect charge made by the Applicant to the credit card account of D'Urzo. The incorrect charge related to service charges and taxes on air tickets debited D'Urzo on May 2, 2000.

Smith contended that the fare charged by the Applicant for each air ticket was \$199.00. In addition, the Applicant charged \$123.00 per ticket in respect of service charges and taxes. There were six air tickets charged to D'Urzo which, including taxes and service charges, totalled \$1,932.00. D'Urzo complained to the Applicant that he had been overcharged on service charges and taxes. Upon investigating, the Applicant discovered there had been an overcharge on service charges and taxes of \$24.00 per ticket, which amounted to a total overcharge by the Applicant in respect of the six air tickets of \$144.00. Smith contended that this sum of \$144.00 was refunded to D'Urzo by cheque dated May 19, 2000.

Complaint by Andrews

Smith conceded that the Applicant had debited the credit card account of Andrews with the amount of \$1,052.00. He also conceded that Sunquest Vacations had on the same date debited Andrew's account with \$1,052.00. He stated that the Applicant had obtained Andrew's credit card information from Andrews and had passed this information through to Sunquest Vacations, the supplier of the travel services. The Applicant had no authorization from Andrews to charge Andrew's account with travel services.

Complaint by North America Group

Smith denied that the Applicant had charged the credit card accounts of Martins, Lonsdale or Frankfort with any amounts as alleged by these three parties.

FACTS FOUND PROVEN:

The following facts are found to have been proven.

1. The Applicant's application for registration as a travel agent was approved on September 22, 1998.
2. Edward R. Barclay is the first and sole director of the Applicant as well as its President and sole shareholder.
3. The Applicant registered as business names under which it would operate the name Bargain Travel Holidays and the further name Travel-Reservations. The registration of the aforementioned names were effective as of May 19, 1998 and April 12, 1998 respectively and are currently registered business names.
4. The original fiscal year end of the Applicant was August 31 which date was subsequently changed to February 28.
5. The Form 1 filing by the Applicant for the fiscal period ending May 31, 1999 was due to be filed by the Applicant by July 15, 1999 and was filed by the Applicant on August 27, 1999.
6. The Form 1 filing for the period ending November 30, 1999 which was due to be filed by January 14, 2000 was not filed by the Applicant as at the date of July 7, 2000.
7. The Applicant has not filed with the Registrar financial statements as required by the Regulations to the Act.
8. From time to time since the Applicant has obtained registration as a travel agent, the Applicant has operated with its trust account being overdrawn and with a negative balance.
9. Without authorization from Patricia Onysko, the Applicant wrongfully caused a charge to be recorded in the Applicant's favour against Onysko's credit card account for the sums of \$1,820.00 and \$120.00.
10. Without authorization from David Strachan, the Applicant wrongfully caused a charge to be recorded in the Applicant's favour against Strachan's credit card account for the sum of \$1,000.00.
11. Without authorization from Mary DeSwert, the Applicant wrongfully caused a charge to be recorded in the Applicant's favour against DeSwert's credit card account for the sum of \$675.00.
12. Without authorization from William Curry, the Applicant wrongfully caused a charge to be recorded in the Applicant's favour against Curry's credit card account in the sum of \$1,320.00.
13. Without authorization from Paul Gazo, the Applicant wrongfully caused a charge to be recorded in the Applicant's favour against Gazo's credit card account in the sum of \$1,100.00.

14. Without authorization from Joe D'Urzo, the Applicant wrongfully caused a charge to be recorded in the Applicant's favour against D'Urzo's credit card account in the sum of \$144.00.
15. Without authorization from John Andrews, the Applicant wrongfully caused a charge to be recorded in the Applicant's favour against Andrew's credit card account in the sum of \$1052.00.
16. Without authorization from Nuno Martins, Emilia Lonsdale and Peter Frankfort, the Applicant wrongfully caused charges to be recorded in favour of the Applicant against Martin's, Lonsdale's and Frankfort's credit card accounts in the sums of \$2,110.52, \$1,400.00 and \$ 1,569.76 respectively.
17. On June 14, 2000, the Applicant drew a cheque for \$356.22 in favour of Conquest Vacations which cheque was, when presented for payment, dishonoured by non payment and was marked "N.S.F.".
18. It is normal and accepted practice in the Travel Industry in Ontario that a travel agent when selling travel services to a consumer, which travel services are to be supplied by a wholesaler, shall not debit or charge the consumer's credit card account for such travel services and that such travel services are only debited or charged by the wholesale supplier of the travel services to the credit card account of the consumer.

DECISION AND REASONS:

The onus of proof in this matter falls on the Registrar.

The Tribunal has had the opportunity to listen to and observe the various witnesses for the Registrar as well as Roy F. Smith the sole witness for the Applicant. There was some divergence as regards the evidence tendered by the Registrar and his witnesses and the evidence of Smith. Where the parties' evidence diverged the Tribunal prefers the evidence of the Registrar and his witnesses to the evidence of Smith. The Tribunal was not impressed by Smith's evidence. The Tribunal found Smith's testimony to be without credibility on a number of major issues. He was also evasive when giving testimony and under cross-examination.

The Tribunal rejects the contention advanced by Smith that even where a consumer has produced his or her credit card statement which shows that the Applicant had charged for travel services, the Applicant has not received payment for such travel services by way of a credit to its bank account. This contention is inconsistent with the Applicant, time and time again, making restitution to consumers. The Applicant would not have done this if the Applicant had not originally debited the consumers' credit card accounts and obtained payment from such consumers' credit card company.

The Tribunal finds that where a consumer's credit card statement reflects a charge against the consumer in favour of the Applicant, the Applicant was in fact paid such sum as is reflected on the statement.

The requirement that registrants file financial statements in terms of section 24(1) of the Regulation 806/93 and file Form 1 with the requisite payment in terms of section 47(1) of Regulation 806/93 are peremptory. The reason for the filing of financial statements

for each fiscal year is to enable the Registrar to adequately gauge the financial health of a registrant. In this matter, no financial statements have been filed by the Applicant with the Registrar, and accordingly the Applicant has not complied with section 24 of regulation 806/93. If the Registrar had ignored the Applicant's failure to file financial statements, the Registrar would have failed in his duties under the Act to monitor the financial health of the Applicant and to protect the interests of the consumer which are of paramount importance.

The failure of the Applicant to file financial statements leads to an inability by the Registrar to determine the minimum working capital that the Applicant should maintain as required by section 25 of regulation 806/93.

The Applicant contended, through the testimony of Smith, that difficulties the Applicant experienced with its accountants and/or Revenue Canada in the completion of its balance sheet was a reason or excuse for the not filing Form 1 on its due date. The Tribunal does not agree. The form need not be accompanied by financial statements. All that is required is the completion of Form 1 indicating the registrant's sales for the reporting period and the payment of any amount owing to the Compensation Fund in respect of sales during the reporting period. There has clearly been a failure on the part of the Applicant to comply with the mandatory requirements of section 47(1) of regulation 806/93.

In addition, Section 36(1) of the aforementioned regulation requires all registrants to maintain a trust account and 36(2) requires all registrants to deposit all customer funds received into that account. While the Applicant may have maintained a trust account, Smith conceded that the Applicant's trust account was in a negative position from time to time. From the documentary evidence placed before the Tribunal it is apparent that the Applicant's trust account reflects a negative balance on many occasions. This Smith conceded was improper.

The Tribunal views the fact that the trust account of the Applicant was in negative position as indicative of poor or inadequate supervision of customer's monies which should have been scrupulously safeguarded in a properly managed trust account. In and of itself, this poorly managed account indicates and supports the Registrar's belief that the Applicant cannot reasonably be expected to be financially responsible in the conduct of its business.

As to the complaints by various consumers, the Tribunal reiterates that the evidence of witnesses for the Registrar, whose evidence was supported by documentary evidence, is far more compelling and probable than Smith's testimony. Quite apart from the aforesaid, Smith conceded that the Applicant passed debits against consumers well knowing that those consumers also faced a legitimate debit by the supplier of travel services. When faced with repeated evidence of so called "double debits", Smith attempted to have the Tribunal accept that such double debits were due to errors committed by the Applicant. The Tribunal does not accept that the repeated double debiting by the Applicant were errors. The repeated double debiting by the Applicant indicates, in the Tribunal's opinion, a deliberate course of conduct by the Applicant to, as Pepper stated in his testimony, create additional cash flow for the Applicant at the expense of innocent consumers.

The Applicant, by debiting various customers' credit card accounts with unauthorized amounts, wrongfully obtained the use of funds for varying periods of time. Its repetition

indicatives and supports the belief of the Registrar that a cash flow problem exists and there was and is justifiable concern as to the financial viability of the Applicant.

In summary therefore the Tribunal finds that,

- the non filing of financial statements by the Applicant as required by the regulations,
- the non filing of Form 1 by the Applicant as required by the regulations,
- the negative balance in the Applicant's trust account over various periods of time,
- the Applicant as recently as June 14, 2000 issuing a cheque to a supplier of travel services without having the necessary funds to meet that cheque resulting in that cheque being dishonoured and marked "N.S.F.", and
- the unauthorized debiting of customer's credit card accounts thereby obtaining the use of funds when those funds were not due to the Applicant,

all lead the Tribunal to find that the Applicant cannot reasonably be expected to be financially responsible in the conduct of it business as is required by section 4(1)(c)(ii) of the Act. Also, the Tribunal finds that the Applicant is carrying on activities that are in contravention of the Act or the regulations as stated in section 4(1)(d) of the Act.

DECISION:

Pursuant to the authority vested in it by subsection 6(4) of the Travel Industry Act, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of the 1296347 Ontario Ltd. o/a Bargain Travel Holidays.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: August 8, 2000

GENERAL MOTORS ACCEPTANCE CORPORATION OF CANADA LIMITED

IN THE MATTER of the Highway Traffic Act,
R.S.O. 1990, c.H.8 as amended, Section 50.2;

AND IN THE MATTER of a motion by General
Motors Acceptance Corporation Of Canada Limited
seeking an extension of the time requirements for
this Applicant to commence this appeal from an
impoundment order of the Registrar under Section
55.1 of the Highway Traffic Act;

AND IN THE MATTER of

**GENERAL MOTORS ACCEPTANCE CORPORATION OF CANADA
LIMITED**

APPLICANT

- and -

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: Nives Montano, Presiding Member

APPEARANCES: Kim Grosskurth
Representative for the Registrar of Motor Vehicles

Paul Lewin
Solicitor for Karen A. Vivian, lessee and agent for
General Motors Acceptance Corporation Of Canada
Limited ("GMAC Leaseco")
Applicant

DATE OF
MOTION: August 4, 2000

ORDER

A motion was heard on August 4, 2000, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to Section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the Highway Traffic Act, R.S.O. 1990. c.H.8 amended ("HTA").

Submissions of Written Material

The Applicant submitted the following documents:

1. Copy of Notice of Appeal/Owner's Position in Appeal received July 14, 2000 (Exhibit #1).

2. Copy of letter from GMAC Leaseco dated July 13, 2000 authorizing Ms. Vivian to appeal the impoundment (Exhibit #2).
3. Copy of a letter dated June 12, 2000 from the Ministry of Transportation addressed to Ms. Vivian advising of the 180-day impoundment (Exhibit #3).
4. Copy of owner's vehicle ownership permits (Exhibit #4).
5. Notice of Motion dated and received by the Tribunal on July 25, 2000 by Paul S. Lewin, Agent for Ms. Vivian (Exhibit #5).
6. Copy of Ministry of Transportation's Notice of Motion to dismiss ground of exceptional hardship (Exhibit "6").
7. Certified copies of 5 Orders to Impound for GMAC Leaseco including Ms. Vivian's recent impound (Exhibit "7").

The Facts

The Applicant is the owner of a motor vehicle impounded for a period of 180 days pursuant to an order of the Registrar issued under section 55.1 of the Highway Traffic Act R.S.O. 1990, c. H.8 as amended (the "Act"). The Applicant leases the vehicle to Karen A. Vivian, who entered into a 3-year lease agreement with the Applicant in April, 1998. Karen A Vivian acted as agent for the Applicant in this appeal.

The Applicant's explanation for not filing an appeal of the impoundment of its vehicle within the required 15 days was that:

1. The motor vehicle was impounded on June 11, 2000, by Ms. Vivian's son-in-law, whose driver's licence was under suspension at the time of impoundment. An Order to Impound was issued on June 12, 2000.
2. The Applicant testified that she is employed by the New Democratic Party ("NDP"). The NDP's annual convention was to take place on June 14, 2000 through to June 18, 2000. She was obliged to work late leading up to the convention as well as having to stay in Hamilton during the course of the convention.
3. During the week of June 19, 2000, after her return from the convention, she spent the week trying to contact the Ministry of Transportation as well as the Licence Appeal Tribunal at the phone numbers provided on the back of the yellow copy of the Notice to Registrar without success.
4. On or about June 26, 2000, Ms. Vivian faxed the Ministry of Transportation hoping that someone would contact her with regard to this impoundment. Once she did speak with someone at the Ministry of Transportation, she was advised that the reason for the 180-day impoundment was because she had a history of vehicle impoundments. The Ministry of Transportation advised her in calling GMAC Leaseco to obtain information with regard to the impoundment.
5. On or about July 4, 2000, Ms. Vivian contacted the Licence Appeal Tribunal to obtain information and documentation with regard to the appeal process for her impounded vehicle. She received the materials sent by the Tribunal with regard to appealing the impoundment on July 10, 2000.
6. GMAC Leaseco forwarded their authorization letter to Ms. Vivian by letter dated July 13, 2000 to bring this appeal.
7. The Notice of Appeal together with the Owner's Position in Appeal was submitted and received by the Tribunal on July 14, 2000.

The Law

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Board under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Board within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Board may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

The Order

THE TRIBUNAL RULED TO REFUSE TO GRANT an extension of the time to commence this appeal for the following reasons.

REASONS FOR ORDER

Section 20(7) of Regulation 632/98, provides the Tribunal with the specific criteria that the Applicant must meet to satisfy the Tribunal that an extension of the time for commencing an appeal ought to be granted. The Applicant must establish that the owner, acting in good faith, was unable through accident, illness or other cause beyond the owner's control to bring the appeal within the prescribed 15 days in circumstances where the Registrar does not give his or her consent in writing for an appeal to be commenced after the expiry of the prescribed time. The criteria listed in Section 20(7), which the Tribunal should consider in granting an extension, are matters outside the Appellant's control. There is no provision for the Applicant's failure to communicate with the Ministry of Transportation and the Licence Appeal Tribunal. Such circumstances are not beyond the Applicant's control.

The evidence presented does not establish that the Applicant's delay in appealing the order impounding the vehicle, under Section 55.1 of the Highway Traffic Act, was the result of accident, illness or other cause beyond the Applicant's control as required by section 20(1) as read with section 20(7) of Regulation 632/98.

Accordingly, the Applicant has not demonstrated to the Tribunal that there was cause beyond the Applicant's control to bring the appeal within the prescribed 15 days as required by section 20(1) as read with section 20(7) of Regulation 632/98.

Shortly after Ms. Vivian was provided with the yellow copy of the Notice to Registrar from her son-in-law following the impoundment, it is the Tribunal's opinion that reasonable steps were not taken on Ms. Vivian's part to expeditiously inquiry and/or file the necessary paperwork for the appeal process. In lieu of the fact that she was detained on work-related issues for

approximately 1 week, the option of having a friend, family member and/or her son-in-law look into determining what steps she should need to take during her absence were not considered.

Ms. Vivian's Notice of Appeal to the impoundment was dated July 14, 2000. The Tribunal received it on the same day, 33 days into the impoundment period, and 18 days past the appeal deadline date prescribed by Section 20(1) of Regulation 632/98 made under the Highway Traffic Act. The motion presently before the Tribunal is for an order, in terms of section 20(7) of the above regulation, for an extension of the time for the filing of the Notice of Appeal.

Further, the Applicant has not demonstrated to the Tribunal that there are reasonable grounds for applying for the extension and for granting relief. Accordingly, the requirements under section 7 of the Licence Appeal Tribunal Act also have not been met.

The motion brought by the Applicant to the Tribunal for an extension of time to appeal is therefore dismissed. It follows that this Tribunal will not proceed with the Applicant's appeal, and that the proceedings in this matter are therefore concluded.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: August 4, 2000

COLLAKU

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
VEBI COLLAKU

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

VEBI COLLAKU

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

ZANCOR HOMES LIMITED

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 9 and 10, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing on a *peremptory* basis against the *Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., on Wednesday, September 27, 2000, and to continue September 28, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair, presiding

Sheena MacAskill
Vice-Chair

Released: August 9, 2000

SHAQIQ, MOHAMMAD AMIN o/a EAST & WEST USED CAR SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MOHAMMAD AMIN SHAQIQ O/A EAST AND WEST USED CAR SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: March 23rd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MOHAMMAD AMIN SHAQIQ O/A EAST AND WEST
USED CAR SALES

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on August 17, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal *peremptory* adjourns the hearing *against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, September 8, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 23rd, 2000

LAGACE, GAETAN O/A GATER'S AUTO REFINISHING AND AUTO SALES AND 1302734
ONTARIO INC.

GAETAN LAGACE O/A GATER'S AUTO REFINISHING AND
AUTO SALES AND 1302734 ONTARIO INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE THE REGISTRATION OF GAETAN LAGACE O/A
GATER'S AUTO REFINISHING AND AUTO SALES

TO REFUSE THE REGISTRATION OF 1302734 ONTARIO INC.

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES: JILL COPELAND, Counsel, representing the Applicants
MITCHELL GOLDBLOOM, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATES OF HEARING: May 29, 30, 31, 2000
and June 1, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar, Motor Vehicle Dealers Act, issued his Notice of Proposal on February 3, 1999, to revoke the registration of Gaetan Lagace o/a Gater's Auto Refinishing and Auto Sales and to refuse the registration of 1302734 Ontario Inc. By letter dated February 11, 1999, the Applicants requested a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal). A Notice of Further or Other Particulars was issued by the Registrar on May 3, 1999.

The initial hearing dates for this matter were scheduled for June 9,10,11, 1999. At the request of the Registrar an adjournment was granted. The hearing was adjourned to September 9, 1999 for a prehearing. No prehearing was held on September 9, 1999. On consent of the parties the matter was scheduled for a hearing for January 26, 27, and 28, 2000. The parties then agreed to a further adjournment but could not agree as to the length of the adjournment. A motion on that issue was held on January 26, 2000. The order by the Tribunal was to adjourn the matter for a hearing to start on May 29 and continue as necessary on May 30, 31 and June 1, 2000. A prehearing was scheduled for May 1, 2000. The prehearing proceeded, and the Tribunal made certain orders as to disclosure of documents and the evidence to be presented by certain witnesses. The hearing proceeded before all parties on May 29, 30, 31 and June 1, 2000.

ISSUES:

Did the Registrar have reasonable grounds for belief that the Applicants will not carry on their business in accordance with law and with integrity and honesty?

PRELIMINARY ISSUES:

It was brought to the attention of the Tribunal by Counsel for the Applicants and Counsel for the Registrar that there were issues as to the admissibility of certain evidence; in particular, the Tribunal was asked to consider the witness statements of consumers who would not be testifying at the hearing. Counsel agreed to hear the evidence of several of the customers and of the police officers who had been subpoenaed and ready to present their evidence. The argument on the admissibility of hearsay evidence was put over to the second day of the hearing. The Tribunal will deal with this matter now and then proceed to comment on the evidence of the witnesses.

Position of Counsel for the Applicants:

Counsel for the Applicants argued that while section 15 of the Statutory Powers Procedures Act permits the Tribunal to admit hearsay evidence, the Tribunal should refuse to admit such evidence if its admission will cause unfairness and violate the rules of natural justice. Counsel, argued that the hearsay evidence provided by consumers who did testify, for example, what a mechanic said to them, should not be admitted. She also argued against admitting as evidence the statements of what consumers who would not be testifying at the hearing said to an investigator for the Registrar. Her points were as follows:

1. This is a hearing for the revocation of a licence. It has serious impact on the ability of the Applicants to earn a livelihood. Any allegations made by such consumers as to dishonesty go straight to the issue of the credibility of the Applicants.
2. Cross-examination is an important concept of the rules of natural justice and one cannot cross-examine their evidence through a third person or via witness with say statements. In this case, evidence from 6 or 7 consumers would not be open to cross-examination by Counsel for the Applicants.

Counsel for the Applicant referred to a number of cases as follows:

RE Coates et al and Registrar of Motor Vehicle Dealers and Salesmen (1988) 65 O.R.(2d) 526 Div. Ct. which states at page 534: "In revoking a registration the tribunal is interfering with a right to make a living that has been equated to a property right...." "While the grant or refusal of a licence may be regulated as a matter of privilege, rather than right, the revocation of an existing licence has always been regarded as an interference with a right, not a privilege."

Re: B and Catholic Children's Aid Society of Metropolitan Toronto (1987) 59 O.R. (2d) 417 Div.Ct., which at page 420 dealt with there being no reason why the victim could not have testified. At page 421 the Court states: "It is our view that in the circumstances mentioned, where the appellant was denied the right to cross-examine the alleged victim, the admission of hearsay evidence did amount to a denial of natural justice; the hearing in this case fell below the minimum requirement of fairness."

Innisfil Township v Vespra Township (1981) 2 S.C.R.145 which states at page 165: “The Statutory Powers Procedure Act 1971 supra does not assist the respondent or the intervener, the Attorney General of Ontario in their opposition to the cross-examination of Mr. Fleming on the letter.....Section 10(c) is directly applicable to the issue at hand.”

Gilbert v Ontario (Provincial Police) (1999) O.J.No. 4784 (Sup.Ct.) which at page 2 speaks of the principle in Re B and Catholic Children’s Aid Society of Metropolitan Toronto “that the admission of hearsay evidence may result in a denial of natural justice if it prevents the subject of the inquiry from cross examining the complainant in respect of vital issues.”

Willette v R.C.M.P. (1985) 1 F.C. 423 (C.A.) at page 429 states: “The role of cross-examination has been described by the learned editors of Wigmore on Evidence (Chadbourn Rev.1974) vol. 5 at page 32, para. 1367, “as a vital feature of the law”, and as “the greatest legal engine ever invented for discovery of truth”. It has been observed that while an untruthful witness may show no sign of untruthfulness in his examination in chief yet “under skillful cross-examination it may be disclosed that he is unworthy of belief, that he is affected by some motive or bias which wholly destroys the value of his evidence”... and at page 430 refers to the Cheung v Minister of Employment and Immigration (1981) 2 F.C.764 decision where Mr. Justice Heald stated at p. 770 “essential that applicant’s counsel be given the opportunity to test and challenge” the evidence by cross-examination.

Jackson v Region 2 Hospital Corp. (1994) 24 Admin L.R. (2d) 220 (N.B.Q.B.) page 222 where Madam Justice L’Heureux-Dube stated at page 46 of the Knight v Indian Head School Division No. 19 (1990) 106 N.R. 17 (S.C.C.) “Like the principles of natural justice, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case,” with the Innisfil and Willette cases being quoted on page 223.

Bond v New Brunswick (Board of Management) (1992) 8 Admin. L.R.(2d) 100 (N.B.C.A.) which states at page104: “Is there a duty, however, on the adjudicator with respect to the grievor and the absence of this key evidence? I think that this was the fundamental concern of the judge on judicial review, that is, procedural fairness and natural justice.”

Barftashunas v Psychology Examiners (Ont. Div. Ct.) (1992) O.J.no. 1845 which states at page 3: “Under the SPPA hearsay evidence is admissible so long as its admission does not in the circumstances result in unfairness.”

Dayday v MacEwan (Ont. Div. Ct.) (1987) O.J.no. 1675 which states at page 8: “ I add only that, as a general rule, a trier of fact must always be vigilant of the inherent unreliability of hearsay evidence and that only in limited circumstances may a person properly be deprived of his liberty on the strength of such evidence.”

Position of Counsel for the Registrar:

Counsel for the Registrar stated that while some of the consumers will testify via the telephone, others were unable to be found. They have all given witness will say statements both to the police and to the Registrar's investigator. Counsel for the Registrar argued that the counsel for the Applicant can cross-examine the investigator

as to the circumstances of the statements. It is entirely a fair procedure. There is no prejudice to the Applicants as will say statements have been provided.

Counsel argued that in the Dayday case, above, the court held that section 15 of the Statutory Powers and Procedures Act was applicable and that the review board did not error in its decision to admit and rely upon hearsay evidence.

In the Bartashunas case supra, the court held on page 4: "Although the Statutory Powers and Procedures Act might permit a wider use of this evidence than could be made in a court proceeding, it is clear that even on the civil or criminal standard the evidence was admissible and no misuse was made of it."

The RE: B and Catholic Children's Aid Society of Metropolitan Toronto case dealt with an alleged victim whose had recanted her previous testimony, which counsel stated is not the case here.

ORDER OF TRIBUNAL RESPECTING ADMISSABILITY OF EVIDENCE:

The oral decision of the Tribunal was to allow the hearsay evidence of those consumers who testified. They spoke of their cars being examined by mechanics, and they spoke of what these mechanics said to them as to the condition of their cars. Counsel for the Applicants had the opportunity to test them on their statements. The hearsay evidence was relevant to the proceeding. Its value outweighed any prejudice in it being hearsay. The Tribunal has the authority to allow such evidence under the Statutory Powers and Procedures Act ("SPPA"). The Tribunal can put such weight on this evidence as it feels it warrants under the circumstances.

The oral decision of the Tribunal was to disallow the hearsay evidence of the investigators who had spoken or interviewed certain consumers as to what those consumers were told by others, where these consumers would not be testifying at the hearing. The testimony of the consumers goes straight to the issues at hand – are these Applicants dishonest and lacking in integrity? There is no method by which the counsel for the Applicants can cross-examine these consumers. Cross-examination of a third party does not permit any opportunity to test those consumers for improper motive or bias or lack of recollection.

Procedural fairness is a concept that must be recognized by adjudicators of administrative tribunals and determined by the adjudicator in the particular circumstances of each case. It is trite law that the opportunity to cross-examine is a fundamental element of natural justice, which should be discarded lightly.

In this case, the statements of the consumers as to what Mr. or Mrs. Legace said to consumers who were examining vehicles at their motor vehicle dealership is key evidence to the proposal of the Registrar to revoke their licence. The Tribunal must always balance the duty to protect the public with the ability of an applicant to work in a regulated industry. Taking away the right of an applicant to have his business is an extremely serious action, and it should only be done when the Tribunal is convinced by the evidence before it. Hearsay evidence requires a consideration not only of its weight, but also its prejudice to the applicants. The ability to cross-examine is enshrined in the SPPA at section 10.

In this case, counsel for the Registrar has put before the Tribunal a number of consumers as witnesses. Counsel for the Applicants has had the opportunity to fully cross-examine those witnesses. This is the best evidence and should be viewed as such by the Tribunal. The decision to deny the hearsay evidence of a number of other consumers does not mean that the Registrar has had no ability to present his case. In these circumstances this Tribunal finds that the prejudicial nature of the hearsay evidence of the consumers not before this the Tribunal as witnesses outweighs its relevance to the case, and that evidence is excluded from this hearing.

EVIDENCE:

Testimony of Eric Lemieux:

Mr. Lemieux testified that he bought a 94 Mercury Tracer from Gater's Auto in September, 1998. The Tracer is the American version of the Escort. Mr. Lemieux spoke to Mr. Lagace and agreed upon the price of \$7,000.00. Mr. Lagace told Mr. Lemieux that the car had been repaired and there was a spot showing from overspray from the paint used to repair the car. Mr. Lagace never told him that the car had been damaged. Mr. Lemieux does not remember if he asked Mr. Lagace if Mr. Lagace had repaired the car. Mr. Lemieux testified that he probably would have bought the car if he had known it was a salvage repair.

Under cross-examination Mr. Lemieux stated that Mr. Lagace had told him that the car looked like it could have been repaired but he did not know for sure.

Testimony of Laurie Noel:

Ms. Noel testified that she bought a 1995 Neon in October, 1997 from Gater's Auto. Mr. Lagace sold it to her. Ms. Noel obtained a lien package, checked the car, and there were no problems. It was an American car and it had a little rear end damage, minor damage, but no frame damage, according to Mr. Lagace. It had low mileage and was a low price, that being \$9,000.00. About a year to a year and a half after buying the car, the police came and took it from her under a search and seizure warrant. They kept her car for about two months. She testified that she would not have purchased the car if she had known it was a write off. She was without a car for two months. Now she is nervous going across the U.S.A./Canada border in her car.

Under cross-examination, Ms. Noel agreed that her bill of sale states the car was accident repaired. She twice saw the car before buying it. She had her father with her, and they both talked to Mr. Lagace. Mr. Lagace said it was a minor fender bender. They thought he meant the bumper.

Ms. Noel agreed that the statement about no frame damage had not been mentioned to the police or the OMVIC investigator and she cannot be sure if Mr. Lagace said that.

Ms. Noel said her opinion of her car would have been affected even if she were told that only one part of it was damaged. She had an accident in April, 1998 on the QEW and sustained minor damage to her car and some back problems.

Testimony of Rich Ornel:

Mr. Ornel bought a 1995 Z24 Cavalier from Gater's Auto on March 18, 1998. He was told by Mr. Lagace that it had light front end damage. He noticed that the wiring was taped up and he was told it came from the manufacturers like that. Mr. Lagace told him it had two new air bags and a new windshield.

Mr. Ornel took his car to a mechanic who told him the car had been straightened out in the rear, the wheels were not parallel, the trunk closes in a crooked fashion and there has been bodywork done on the vehicle. The mechanic saw these things when he had the car up on the lift. Mr. Ornel stated that if he had known about this damage, he would not have purchased the car.

Under cross-examination Mr. Ornel stated that Mr. Lagace had told him it was an American car and that the air bags and the windshield had been replaced. He was told it was a light front end accident. He had seen the car 2 or 3 times before buying it. His statement to the police was made 8 months after buying the car, and his statement to the Registrar's investigator was in March, 1999. The car had gone to the mechanic as a prospective purchaser wanted it checked out. Mr. Ornel agreed that he had not told the Registrar's investigator about the doors and hood of the car not being parallel.

Testimony of Ann Robb:

Ms. Robb produced her retail bill of sale which did not have stamped on it a notation that it was an accident repair. The copy of her retail bill of sale in the documents submitted by the Registrar had accident repair stamped on it.

Ms. Robb testified that she bought a 1996 Dodge Neon from Gater's Auto. She was told by Mr. Lagace that it was an American car with 80,000 miles. She was told by Mr. Lagace that it had a little bit of damage to the right front end but nothing major. She took the car for two test drives and then bought it.

Ms. Robb submitted her estimates that she obtained after the car was returned to her from the police. The estimate showed work was required on her air conditioner, the left front bumper skirt, the left inner tie rod, and the right front strut. The repairs previously done to the car; including the right fender, rear exhaust and transmission, appear to be safe and functioning properly.

Ms. Robb testified that the police came on November 22, 1998 and took away her car under a warrant. She got it back in early February, 1999. In January, 1999 she suffered from depression and was hospitalized for 24 days. She was a high school teacher and could not work at her job again until April, 1999.

She understood that her car had come from Florida, gone to the west and then come to Gater's Auto. Mr. Lagace had said to her that it had been in a minor accident to the right front end with the damage being under \$1000.00. Mr. Lagace said he repaired it.

Ms. Robb testified that in March, 1999 she had four new tires, and a brake system installed at Speedy Muffler. The mechanic pointed out to her that there were two different colour paints on the car – one red and the other blue. Ms Robb took her car back to Gater's as the rear speakers did not work and the car windows whistled. Mr. Lagace did give her two new speakers

Ms. Robb stated that she now understands that the right front end of her car has been replaced, including the strut, the tie rod, the drive axle and the transmission. If she had known of the car's condition, she would not have purchased the car.

Under cross-examination, Ms. Robb stated that her original bill of sale did not have accident repair stamped on it. She did get a safety certificate from another person. She had two visits with her father to view the car before she bought it. She gave a statement to the police in November, 1998 and a statement by telephone to Ian Knox of the Registrar's office in March, 1999.

Ms. Robb agreed that she cannot recall the exact words of her conversations with Mr. Lagace. She remembered Mr. Lagace saying "nothing major" and probably he said no frame damage. She knew it was an American car. She knew the warranty was voided due to the accident. She purchased another warranty, but she cannot recall if she paid extra for that warranty.

Ms. Robb stated that the police officers told her that they had traced the history of her car, and it had been involved in a severe car accident and had been US salvage. Mr. Knox told her they have pictures of the damage to her car.

Ms. Robb stated she was not told what is meant by "wreck" or "salvage". She thought the insurance company determines that. When she was out of the hospital, she did confront Mr. Lagace about her car.

Ms. Robb agreed that Mr. Lagace had offered to fix the whistling windows, but she had not brought the car back to allow him to do that.

Testimony of Jeff Levesque:

Mr. Levesque bought a 1995 Pontiac Sunfire from Mr. Lagace. He was told by Mr. Lagace that it had been in a minor rear end accident.

Under cross-examination Mr. Levesque stated that he had been told by Mr. Lagace that the rear end of the vehicle had been repaired. He cannot remember if Mr. Lagace used the word "minor". His statement to the Registrar's investigator states it was minor, but that word is not used in his statement to the police. The car was bought in July, 1997, and the invoice states it is accident repaired.

Testimony of Douglas Victor Cousens:

Mr. Cousens has been an officer with the Ontario Provincial Police ("O.P.P") since 1983. Prior to that time he worked for the Metropolitan Toronto police force. He has been assigned to the auto theft unit since February, 1995. He took a course on auto theft at the Canadian Police College in 1995. Since then, he has had on the job training and works in close liaison with vehicle manufacturers. He has not taken a course in auto body repair work.

Mr. Cousens testified that his primary concern is with the identification of cars. He determines the history and background of the cars. His main focus is not on the repairs made to the car.

Mr. Cousens testified that he assisted with the execution of some of the search warrants.

Mr. Cousens stated that he examined a 1995 red Sunfire with VIN# 3G2JB5246SS806498 on December 9, 1998. He noticed evidence of stickers on the back trunk lid. The language was in French and there was a telephone number. He found no one at that telephone number.

Mr. Cousens examined a 1995 red Neon vehicle with VIN#1P3ES47C6CD325271 on January, 1999. This vehicle had high profile stickers (anti theft stickers) with the VIN# 1B3ES47C6SD325271 and 1B3ES47C5TD512830. Mr. Cousens concluded that this vehicle had been made up from two different vehicles. He thought the VIN high profile stickers were original ones. Airbags are to have ID stickers but on this car both the airbag stickers had been removed.

Mr. Cousens examined a 1995 purple Cavalier VIN # 1G1JF12D1S7219299 on January 12, 1999. The front right fender was off this vehicle. There were parts of the vehicle in its interior and the passenger side airbag had only 3 of the 4 bolts.

Mr. Cousens examined a 1995 red Cavalier Z24 VIN#1G1JF12D6S7196943 on November 24, and 25, 1998. He found evidence of body work to the front end. There was no secondary number found where normally there should be one.

Under cross-examination Mr. Cousens testified that it takes from one half day to two days to examine the cars. He looks for secondary numbers and to do so he must remove parts of the car. The public VIN number is found on the dashboard and the Federal certificate label is found on the driver's door. The secondary VIN numbers are confidential and only known to insurance adjusters and specialized officers. In the normal course of business these numbers would not be known by motor vehicle dealers or salespersons.

Mr. Cousens stated that the 1995 red Sunfire's public and secondary VIN numbers matched. He spent 8 hours examining this car and concluded that it was likely not stolen. The sticker on the back trunk lid was from a car wash.

Regarding the 1995 red Neon, Mr. Cousens stated that he examined this car for 9 hours. He had to remove parts of the car to check for the ID stickers on the airbags. He has on file that this is not a stolen vehicle but a salvage vehicle, which had been sold for \$1925.00. He knew nothing about an accident with this vehicle on the QEW.

Regarding the 1995 purple Cavalier, Mr. Cousens stated that the car was in the process of being repaired. He understood that the damage to the right front of the car was due to the owner of the vehicle being in an accident. He does not know why the bolt was missing from the airbag. He spent 7 hours examining this car.

Regarding the 1995 red Cavalier Z24, he spent 7 hours examining this vehicle. Mr. Cousens stated that he cannot tell the precise details of the repairs to this vehicle.

Mr. Cousens stated that he recommended returning the cars to their owners. He agreed that it is not unlawful to rebuild salvage cars or to use parts of salvage cars for repairs.

On redirect, Mr. Cousens testified that on the 1995 red Neon the component numbers for the rear right fender, and the front left fender had been removed. There were no stickers on the front bumper and the rear bumper was a genuine Chrysler replacement part.

Testimony of David Robinson:

Mr. Robinson testified that he had been an OPP officer since November, 1988. Since April, 1995 he had worked with the criminal investigation bureau on the auto theft team and had achieved the rank of Detective Constable. His duties included the identification of motor vehicles and dealing with auto theft investigations. He also lectures at the OPP academy.

Mr. Robinson testified that he took the advanced auto investigators course at the Canadian Police Academy in Ottawa in 1995. He is a member of the International Association of Auto theft investigators. He takes many tours of vehicle and heavy equipment manufacturers plants. He has not taken a course in auto body work. His job is to identify stolen vehicles and the primary responsibility is not to look at repair work. Mr. Robinson is a class A motor vehicle mechanic.

On November 22, 1998 Mr. Robinson examined a 1992 blue Ford van VIN #1FMDA31XXP2A653354 for four hours. The secondary numbers matched as did the transmission engine number. The vehicle had been repainted and had a history of being a salvage vehicle.

On December 3, 1998 Mr. Robinson examined a 1994 white Mercury Tracer VIN #3MARM10J9RR610986 for five hours. The secondary numbers matched as did the engine transmission number. It had a history as a salvage vehicle.

On January 11, 1999 Mr. Robinson examined a 1996 green Cavalier for seven hours. The secondary numbers matched as did the engine transmission number. It had a history as a rebuilt salvage vehicle.

Under cross-examination, Mr. Robinson stated that he looked at the insurance crime prevention records to find the salvage histories of the vehicles. He agreed that the history must be done to determine if they are salvage vehicles.

Testimony of Malcolm Roy Barber:

Mr. Barber is an OPP officer with the rank of detective constable. He has been with the OPP for eighteen years. He is a member of the Western Region auto theft team, the International association of auto theft investigators, and the Ontario auto theft team. He took a course on auto theft at the Canadian police academy in Ottawa. He has taken no auto bodywork courses.

Mr. Barber stated that he is involved with the identification of the vehicles which may be stolen vehicles, not with examining the vehicles for bodywork repairs.

Mr. Barber stated that on January 11, 1999 he examined a 1996 tan Cavalier VIN#3G1JF5246TS899792 for six hours. The secondary numbers matched. A parts # 1G1JC5245S7207155 belonged to a 1995 Chevy Cavalier whose owner was Gater's Auto Refinishing. He found blue paint on the roof and gas lid of the gas tank. He concluded that two cars had been welded together to make one car. The dashboard

had been previously removed and a key behind it belonged to Aderly Chevrolet. Some of the component parts had labels removed.

Under cross-examination, Mr. Barber stated that he checks component numbers and with those numbers can check the public VIN numbers with the car manufacturers. To check this car, he had to disassemble some of the components. He found that the little plastic keepers were broken after he had removed the dashboard. Mr. Barber could not state what were the specific repairs.

Testimony of Bruce Crocker:

Mr. Crocker is a special agent with the Insurance Crime Prevention Bureau. It is linked to the Canadian Automobile Theft Bureau or CATB. He is a retired police officer, and he works as a liaison person with the police and insurance agencies. There is also a National Insurance Crime Bureau or NICB which is located in the United States.

Mr. Crocker testified that when there is a theft of a car and it is written off, the insurance companies report it to either the Canadian or American database.

In the latter part of 1998, Mr. Crocker was asked to assist the OPP and the Niagara police with their investigations. He made database inquiries using VIN numbers supplied by the officers.

Mr. Crocker stated the State Farm Insurance company report from Maine, USA on a 1997 Pontiac Grand Prix showed a cash value of \$20,875.00 and a salvage value of \$4,100.00. This indicated to him that there had been appreciable repairs to the vehicle. It was considered as a total loss by the insurance company on the basis that the repairs could not be justified. Mr. Crocker had contacted the State Farm insurance company for these documents, and he had made them available to both the police authorities and to OMVIC.

Mr. Crocker stated that the Liberty Mutual Insurance report on a 1994 Mercury Tracer showed a market value of \$8,343.00 and a salvage value of \$1,125.00

Mr. Crocker stated that the insurance report on a Honda Accord showed a cash value of \$12,700.00 and a salvage value of \$4,700.00.

Some of the vehicles did not have such an insurance report. The use of the databases in Canada and some states of the United States are voluntary with the insurance companies.

Mr. Crocker stated that the insurance report on a 1994 Pontiac Grand AM showed a market value of \$10,925.00 and a salvage value of \$1,550.00.

Mr. Crocker stated that the insurance report on a 1995 Cavalier showed it to be an inactive vehicle which means it was stolen and recovered. Its market value was \$14,000.00 and a salvage value of \$2,278.00.

Mr. Crocker stated that the insurance report on a 1996 Neon showed it to have a market value of \$12,610.00 and a salvage value of \$1,500.00.

Mr. Crocker testified that the insurance report on a 1995 Neon showed a market value of \$10,875.00 and a salvage value of \$1,925.00.

Mr. Crocker testified that the insurance report on an Aerostar ford showed it was a salvage vehicle.

Mr. Crocker testified that the insurance report on a Cavalier showed it to be a salvage vehicle.

Mr. Crocker testified that the insurance report on a 1995 Escort showed it to be a salvage vehicle with a market value of \$12,400.00 and a salvage value of \$1,776.00.

Under cross-examination, Mr. Crocker testified that neither the police nor the public have access to the Canadian and American databases. In the insurance industry, terms are used such as "total loss". On the registration such a car is called a "salvage vehicle". An insurance company identifies a vehicle as a salvage vehicle if it feels that the car either could not be repaired or it is not commercially viable to repair the vehicle. The term salvage by itself does not mean the car cannot be repaired and it does not mean that the entire car has suffered damage. Once a car is declared salvage there is no manufacturer's warranty. The Branding program in Ontario came into effect on July 27, 1998. It is a voluntary program. "Irreparable" is now a term used for the branding program.

Mr. Crocker testified that he does not know the precise definition of the specific insurance companies in declaring a car to be salvage. Prior to July, 1998 there had been no distinction between a car in an accident and one that was salvaged. Now there is a structural inspection required if the car is branded as a salvage vehicle.

Mr. Crocker testified that branding is to protect the public and to insure that the proper repairs are made. He acknowledged that the database system in Canada is not yet designed to be used by the motor vehicle dealers to check on the status of a vehicle.

Testimony of Brian Smith:

Mr. Smith is a sergeant with the Halton Regional Police. He has been with that police force for twenty three years, fourteen in the detective bureau. He has spent ten years dealing with auto theft and for the past four years has been on the Provincial auto theft team. He attended courses on auto theft at the Canadian Police college in Ottawa and in New York City. He is a member of the International association of auto theft investigators, has lectured on the subject and has toured the manufacturer's plants. He has not taken a course on autobody work. He stated that his responsibility is to identify vehicles and to determine if vehicles have been damaged and repaired. He does the body work on his own cars.

On November 24, 1998 and on February 1, 1999, Mr. Smith examined a 97 Grand Prix GT with a VIN #1G2WP52K0VF305167. It had extensive damage to the driver's side, both the doors, and the post column. He found shards of glass under the floor panel. He determined that the two doors on the driver's side were from another vehicle. The high profile number had been removed from the left rear door. The records from State Farm Insurance showed the car to be a total loss on June 15, 1998 and the photographs from the insurance company showed the damage to the driver's side.

Under cross-examination, Mr. Smith stated that he had to remove some of the components to examine the vehicle. When he took up the floor carpeting he found the shards of glass and the newly welded door post. The rear door had no public number

on it. The public and secondary VIN numbers were fine. It was not a stolen car but a repaired/damaged vehicle. The roofline had buckled, as shown by the welding of the post.

Testimony of Ernie Sersen:

Mr. Sersen testified that he bought a 92 Accord from Mr. Lagace. It had low mileage. He had it examined by a mechanic who found it to be sound. There was small damage on the passenger side at the front and rear. The speedometer was in miles.

Mr. Sersen stated that the police came with a search warrant and took away his car. It was returned two months later. He understood it was from Quebec. The police said it had been in an accident. Mr. Sersen said he looked in the *Lemon Aid* book for prices and if he had known the car had been in a major accident, he would not have paid the price for it that he did. He was under the impression that Mr. Lagace had done the work, on his car but he never directly asked Mr. Lagace that question.

Under cross-examination, Mr. Sersen said that the damage was to the right front fender and the right rear fender. He has no recollection that anyone told him that Mr. Lagace had done the repair work. He agreed with his statement made to the police that the car had come from Florida. When he took the car to the mechanic, he had told the mechanic that he was interested in buying the car. Although he did not recall the exact words of Mr. Lagace, his understanding of what he said was quite clear.

Testimony of Todd Maccabe:

Mr. Maccabe bought a 1997 Grand Prix from Gater's Auto. He dealt with Mrs. Lagace. He was told by her that there was minor damage to the driver's side door and that Gater's Auto had done the repairs to the car. He only had the car for about 3 or 4 days before the police took it. The police had it for about ten weeks, and they damaged it. The police showed him the photographs of the damage to the driver's side from front to rear. They labelled it as serious damage and it did not seem to him to be minor damage.

Under cross-examination, Mr. Maccabe stated that he knew the car had been damaged when he bought it. He recalls making statements to the police and the Registrar's investigator and agreed that his memory was better then than now.

He recalls Mrs. Lagace telling him the car was smashed up. There was no mention in his statement to the police that she had said the damage was minor. He did tell the Registrar's investigator that he did not know the extent of the damage of the car. But, when he got the car back from the police, they did show him the damage records for the car. He cannot recall the date when he talked to the Registrar's investigator.

Mr. Maccabe stated that Mrs. Lagace had told him that Gater's Auto had repaired the car. This was not in the police statement.

Testimony of William Arthur:

Mr. Arthur testified that he has been a provincial offences officer with the Ontario Motor Vehicle Industry Council ("OMVIC") since April, 1997. From 1986 to 1996 he worked at the OPP. He worked in vice and auto theft and outlaw motorgang team. From 1994 to 1996 he worked on the homicide squad. The Provincial auto theft team invited him to

attend with them at Gater's Auto on November 22, 1998. Mr. Arthur's role was to explain the contents of the documents that they found on the premises. In February, 1999 the OPP provided him with the wholesale documents from Gater's Auto.

Mr. Arthur examined the wholesale and retail documents from Gater's Auto. For the 1994 Mercury Tracer, the retail bill is dated September 1, 1998 and the wholesale bill is dated September 21, 1998. For the 1992 Honda Accord, the retail bill is dated September 1, 1998, while the wholesale bill is dated September 30, 1998 and has accident reconstructed written on it in French. For the 1996 Cavalier, the wholesale bill is dated 10/06/98 and has accident reconstructed in French on it. The retail bill does not have a date, but it has accident repaired stamped on it, and the VIN number for the car differs from the VIN number for the car on the wholesale bill of sale. For the 1995 Cavalier, the wholesale bill is dated April 28, 1998, while the retail bill is dated March 18, 1998. The wholesale bill for the 1996 Neon is dated January 7, 1998, while the retail bill is dated December 23, 1997 and has accident repaired stamped on it. The 1995 Neon wholesale bill is dated October 22, 1997, and the retail bill is dated October 7, 1997, and has accident repaired stamped on it.

Mr. Arthur testified that there is a voluntary branding agreement between the insurance companies and the Province of Ontario. A car that is a total write off to the insurance company is either considered as repairable salvage or as irreparable salvage only to be used for parts. Not all insurance companies are participating in this voluntary plan. Mr. Arthur testified that none of the vehicles he dealt with from Gater's Auto were purchased from an insurance company. Most came from auto wholesalers located in the Province of Quebec.

Mr. Arthur examined a number of cars with their VIN numbers as listed in the wholesale dealer contract from Auto LN Inc. to Gater's Auto Refinishing. He could not find these cars listed in the garage registry for Gater's Auto. An examination of the garage registry for Gater's Auto showed that none of the odometer readings for the cars were listed. It did list in most cases where he purchased the cars, their VIN numbers, the date and who was the person who bought the car. Garage registries are kept by auto wrecking yards, used autoparts businesses and motor vehicle dealerships. Of all the wholesale dealer contracts that Mr. Arthur examined and then compared to the garage registry, none of the cars listed on the wholesale dealer contracts were listed in the garage registry of Gater's Auto except for one vehicle. That was a 1997 Jimmy on a wholesale contract dated November 6, 1998 from Les Automobiles Lin Inc. The registration permits for these cars were found in purolator packages being sent to Quebec dealers. According to Mr. Arthur, all the registrations listed the cars as brand-salvage which means the cars can be repaired.

There were salvage bills of sale which corresponded to the cars listed on the wholesale contracts. These bills of sale mostly showed that the cars were purchased by Quebec dealers at salvage auctions in Western Canada. Not all of these salvage bills of sale identified the cars as salvage vehicles. A few stated the cars were sold "as is" and some stated the cars were a "write off" from out of province. At least one of the cars was from the United States and had an Ohio Certificate of Title showing the car to be a salvage vehicle.

Mr. Arthur also examined a cheque dated November 6, 1998 from Automobiles L.N. Inc to Gater's for the amount of \$2247.00. It did not state the reason for payment to Gater's by this dealer.

Under cross-examination, Mr. Arthur stated that he saw the documents being seized by the police authorities. The documents had been kept in the filing cabinets at Gater's Auto. He himself did not personally seize the documents.

Mr. Arthur agreed that it is not required by law to put the word salvage on the bill of sale. The insurance adjusters determine if the car can be repaired. The voluntary Branding program has only been in operation since September, 1998.

Mr. Arthur agreed that the criminal charges against Gater's Auto are still before the courts. He agreed that section 60 of the Highway Traffic Act deals with buying or selling wrecks. It does not say that transfer of ownership must be entered into the garage registry. There is nothing to show that the vehicles listed in the wholesale dealer contracts were ever in Ontario or at Gater's Auto.

Mr. Arthur agreed that the registration of a vehicle can be done by someone who is not the owner of that vehicle. He is not aware of investigators going into Gater's Auto before November, 1998. He agreed that there is no legal requirement that a cheque for the purchase of a vehicle be made out to the person who buys the vehicle.

He agreed that the notes by the Ministry of Transportation on how to keep a garage registry are not part of Regulation 595.

Testimony of Mary Jane South:

Ms. South is the deputy registrar and director of operations at OMVIC. Section 5 of the Motor Vehicle Dealers Act provides the criteria and requirements for the issuance and revocation of registration as a motor vehicle dealer.

Ms. South stated that it is in the public interest that those purchasing a motor vehicle be aware that the vehicle is an insurance write off. Ms. South was concerned about the non disclosure to customers that the vehicles were salvage vehicles. In her opinion, the vehicle could be unsafe. The knowledge that the vehicle is a salvage vehicle is important from the financial aspect as well as from the public safety aspect.

When a wrecker purchases a salvage vehicle, they often get a statement of loss form issued by the insurance company.

In the opinion of Ms. South, there are ways for a dealer to investigate the history of a vehicle. One of those ways is through the use of Carfax, a database from insurance companies that is on the internet now and is available to motor vehicle dealers. It is a voluntary database system. An inquiry is made using the serial number of the vehicle.

Another method is via the warranty records kept by car manufacturers. The manufacturer's warranty can be voided for such cars.

Ms. South stated that consumers should be armed with sufficient information so there is no misrepresentation as to the extent of the damage to the vehicle. The extent of damage can affect the price of the vehicle or whether the vehicle is purchased.

Although some of the bills of sale are stamped accident repair, in the opinion of Ms. South, this is not sufficient disclosure as it does not state the extent of the damage done in the accident. There needs to be sufficient disclosure to the consumer, such as, the car was a write off.

In the case of Ms. Robb there was no accident disclosure on her original bill of sale though there was a stamp of accident repair on the copy of it. There should not be different versions of the bill of sale.

All material facts in the contract of purchase are required under the Business Practices Act. In the opinion of Ms. South a write off is a material fact.

Ms. South was concerned that the retail bills of sale had sale dates earlier than the wholesale bills of sale. Therefore, Gater did not own the car when it was sold to the consumer. There were no consignment agreements between Gater and the wholesale dealers. Ms. South questioned whether, if Gater sells vehicles that it does not own. Gater is selling vehicles away from the place of business or is acting as an unregistered sales person for the owner of the car. She would like to have seen consignment agreements for these vehicles.

Ms. South testified that everyone who is in the business of selling cars should be registered. As well, Ms. South had concern as to why Gater's was putting vehicles into its name for registration, this a scheme to try to clean up titles. She noted that the registration system is not a title system.

Under cross-examination, Ms. South said that some of the purchase transactions of the cars in Western Canada occurred after the start of the voluntary branding program in Ontario, when such salvage bills of sale of the vehicles would be branded salvage by the Ministry of Transportation ("MTO"). Ms. South was unsure if the old registrations for a vehicle is required in order to register that vehicle in other provinces. She agreed that the vehicles listed in the wholesale contracts were all registered as brand salvage. She agreed that if there is proper disclosure to the consumers, then it is fine to sell salvaged vehicles.

Ms. South testified that OMVIC has started a certification course in November, 1999. She understood that the course stated that "as is" should be put on such contracts but was uncertain if the word "salvage" is to be used. OMVIC now has Rules of Business Practice as of the spring of 2000. All new dealership registration kits now contain copies of the relevant legislation. OMVIC has not issued any written directives on how to disclose the condition of vehicles or the level of disclosure that should be standard for dealerships.

Ms. South agreed that salvage vehicles can be repaired. She testified that it is important to differentiate between irreparable cars and salvage cars. The safety certificate is the minimum standard for a vehicle to be driven on the highway.

Ms. South felt that the dealers could ask the insurance companies for the statement of loss or at least ask for the name of the insurance company and its policy number. She is unsure if this is standard practice with dealers. She felt that Carfax would usually have the information on Canadian and American cars.

Ms. South testified as to information she had obtained from her own searches using the Carfax system of the vehicles in question at this hearing. Ms. South stated that unlimited use of the Carfax system for a period of 60 days is available for the cost of \$19.95. It is a voluntary database. The Robson vehicle did not show any salvage history. The Noel vehicle did not show any salvage history. The Robb vehicle did show that it was a salvage title issued in the State of Connecticut. The Sersen vehicle,

Lemieux vehicle, and Ormel vehicle all showed a salvage title. The Maccabe vehicle showed no salvage history.

Ms. South stated that Carfax was available prior to 1998, but she was unsure when the internet service commenced. Prior to using internet, a search was available via fax or telephone.

Ms. South agreed that there are no written directives stating you must say "salvage" or "write off" on the retail bill of sale. She was relying on the Business Practices Act and standards of integrity in the industry. She agreed that the MTO registration history depends on the truthfulness of information provided by the previous owner. She also agreed that the check on manufacturer's warranty is applicable to warranty repairs only. Ms. South reiterated that the consumer needs to know the extent of the repairs and that can only be provided by clear written disclosure. In her opinion the standard should be to put in writing any major accident and expensive repairs made on the vehicle.

Ms. South stated that the Used Cars Dealers Association ("UCDA") requires that dealers disclose accident repairs for "as is" vehicles. She was unsure if "as is" means "salvage".

Testimony of Gaetan Lagace:

Mr. Lagace testified that he has been married to Susan Lagace for 22 years, and they have three daughters age 20,18,and 13. He has a Grade 12 education and is certified as an autobody damage repair person. He has no criminal record. He does community service such as sponsoring a baseball team, helping with fundraisers for children with cancer and youth bowling. He is a member of the Sacred Heart Roman Catholic church.

Mr. Lagace testified that he has had his dealership since 1987. There are pending criminal charges to which he has pleaded not guilty and the criminal matter continues in September, 2000.

Mr. Lagace testified that the cars sold by him come mainly from dealers in Quebec. He stated that he repaired a 1993 Aerostar Ford van and sold it to Alice Zimmer. He repaired a 1995 Ford Escort wagon and sold it to Mr. Robson.

Mr. Lagace stated that he mainly deals with Auto C.B., M.I. Auto, Auto. L.N., Lis Recycle, Auto Deslaroché, Berio Automobile and 1317 Auto, all being motor vehicle dealers in the province of Quebec. He would call the dealers and ask for a type of car. Sometimes the dealers called him about selling a certain car. He would get the VIN number for the car and fax it to Autochek. He would look at the results of that search and then decide to take the car or not. If he took the car he would sell it to his customer and then pay the dealer off. Mr. Lagace stated that 90% of the cars on his lot were accident repair cars. He might repair about 25% of those cars himself. The dealers in Quebec would tell him where the car had been damaged, such as, hit in the front.

Mr. Lagace said Autochek is an accident reporting system that tells you the amount of claim and the damage to the car. He would do an Autochek search for most of his cars. He did not keep the searches, and the police took what ones he did have when they searched his dealership.

Mr. Lagace stated that Autochek would fax him information within a couple of hours. The search would show of any activity, the VIN number of the car, if it had been in an accident, the market value of the car before the accident and the value of the damage. For instance, Mr. Lagace bought a 1992 Ford F150 truck. He saw that the value of the damage was more than the market value of the truck, but Mr. Lagace was able to fix up that truck for about \$6000.00 and has been driving it for the past three years.

Mr. Lagace stated that if customers asked about the car, he would tell him the car has had accident repairs and has no factory warranty. The customer could stay or could leave the lot. He would tell the customer if the car was from the USA. He would not say if the damage was minor or major.

When Mr. Lagace initially obtained a car from the dealer, he would visually examine it and see if the components worked. He stated that if a car is repaired properly, one cannot tell the nature of the precise repairs. He did not put a car on a hoist or take it apart.

Because the warranties were void with these cars, Mr. Lagace would provide a 2 year, 40,000 km warranty on all cars 1998 or newer. For the older cars he provided an one year, 20,000 km warranty. Lubrico provided warranties which Mr. Lagace would purchase. Lubrico has been in that business since 1976.

Mr. Lagace stated that he had been doing business with the various Quebec dealers for the past 4 or 5 years. He had a relationship with one Quebec dealer who told him about the other dealers. He relied on what the Quebec dealers told him about the damage. He had not seen the insurance company reports on the cars prior to selling them. Now he knows that the dealers were right on some cars and misled him about others. He trusted the dealers too much, and he would not buy cars from them again.

Mr. Lagace stated that to him salvage was a car in an accident. If the value of the estimate for car repairs and car rental exceeded 75% of the value of the car than the insurance company would write it off and get the policy holder a new car. But Mr. Lagace stated that the car could be rebuilt and rebuilt cheaper than what was quoted by the insurance companies. He would use new and old parts. For instance, he would use rebuilt air bags as new one could cost up to \$6000.00. He could buy these used parts which were just as good as new. But someone who had a new car did not want it to be repaired with used parts. Mr. Lagace stated that he knew how to rebuild a car properly as he took a five year course. He knew how to use the machinery and the books with the factory specifications. He agreed that there are some people who do not know how to rebuild cars properly, but he had no concerns with his own rebuilt truck. His labour costs were cheaper as well.

Mr. Lagace stated that if the title document said a vehicle was not repairable, that meant it could not be licenced again and could be used only for parts.

Mr. Lagace testified that he gave the same information to his customers as was given to him by the Quebec dealers. He did not use the words "salvage" or "write off" but used the words "accident repair".

Mr. Lagace stated that the cars he sold in the fall of 1998 were involved in their accidents prior to the voluntary branding program becoming into operation.

Mr. Lagace stated that about 3 or 4 years ago he spoke to Mr. Hamilton, lawyer for the Used Cars Dealers Association about the nature of disclosure. He was told that he should tell customers that the car was an accident repair car and where the car had been repaired. He told Mr. Hamilton about putting a stamp on his retail bill of sale, and Mr. Hamilton told him his action was better than 75% of used car dealers.

Mr. Lagace testified that he never intended to mislead his customers by not using the term salvage. He told customers everything he knew about the cars.

Mr. Lagace testified that his wife answered the telephone and did the paperwork at the dealership, but she has not come into the dealership since November, 1998. Mr. Lagace regularly works 12 to 16 hours at the dealership. One day he decided to take the day off and go fishing, and he left his wife in charge of the shop. Although Susan, his wife, had a salesperson registration in 1993/94 she did not have one in November, 1998 when Mr. Maccabe bought his car. It was a mistake and will not happen again. He has instructed her to tell customers to come back when he is there.

Regarding the 1997 Pontiac Grand Prix that he sold to Mr. Maccabe, Mr. Lagace stated that the dealer had told him the damage was on the driver's side and it was repaired. He gave that information to Susan when she telephoned him about the car. Susan does not deal with the Quebec dealers because she does not speak French.

Regarding the 1994 Mercury Tracer that he sold to Mr. Lemieux, Mr. Lagace stated that he told Mr. Lemieux that the car was repaired in the front and that the car was from the United States.

Regarding the 1992 Honda Accord that he sold to Mr. Sersen, Mr. Lagace was told by the Quebec dealer that it was repaired in the front and back and that is what he told Mr. Sersen. Mr. Sersen wanted to take the car to his mechanic and Mr. Lagace agreed to that. Then Mr. Sersen purchased the car.

Mr. Lagace testified that often customers will take cars to be examined by mechanics before they buy the car. Mr. Lagace stated that he did not tell Mr. Sersen that the damage was minor or small.

Mr. Lagace sold a 1995 Cavalier Z24 to Mr. Ormel. He was told by the Quebec dealer that the car was repaired in the front and that the air bags had been deployed and the windshield replaced. Mr. Lagace told Mr. Ormel about the front end repair and the airbags and also that it had no factory warranty. He cannot remember if he told Mr. Ormel about the windshield. He did not say it had light front end damage.

Regarding the 1996 Neon that he sold to Ms Robb, Mr. Lagace was told by the Quebec dealer that the car had been repaired in the front. Ms. Robb had come to the dealership with her father and a friend who repairs car and who is known to Mr. Lagace. They took the car for a ride for a couple of hours. He told her there was no factory warranty. When she had problems with the speakers he got her new ones but they were the wrong kind. Ms. Robb worked in London, and it was difficult as she was only home on weekends and he was only open to 2 p.m. on Saturdays. He remembers telling her father and her friend about the repairs in the front but did not say the damage was minor. His copy of the retail bill of sale was seized by the police. The retail bill of sale is preprinted carbonless. The stamp does not go through it and both copies have to be stamped.

Regarding the 1995 Neon that he sold to Ms. Noel, Mr. Lagace was told by the Quebec dealer that the car was repaired at the back. Mr. Lagace told that to her and her father and said there was no factory warranty. It sold the car to her with a two year warranty. He did not tell her the repair was minor.

Regarding the 1995 Pontiac Sunfire that he sold to Mr. Levesque Mr. Lagace stated that he would have told him what the Quebec dealer told him. He lives in a small town and he cannot lie to his customers.

Mr. Lagace cannot remember if he did Autochek searches on all of the vehicles, and his records were seized by the police.

Mr. Lagace stated that he still sells accident repair cars, but he buys them from an autobody shop called Semmones. They get the cars from PH & H vehicle management who get them from the insurance companies. That accounts for 90% of his cars. The other cars he buys at auctions. He goes to car auctions held by Impacts in London and other places. He repairs the cars. They are branded salvage under the voluntary branding program. Once the cars are rebuilt, he takes them to the inspection centre where a structural inspection is done. The inspector looks at the frame and the parts used. It is a body safety inspection. Then, he takes the structural inspection document to the licence bureau and has the car's status changed from salvage to rebuilt. The registration permit then says the car was rebuilt. That designation stays with the car for the rest of its life. That is the registration that is given to the customers. Mr. Lagace stated that about 90% of the cars he sells are branded.

Mr. Lagace stated that he would be willing to look at conditions on his registration and take any dealer education courses. He stated that the cars he buys and sells are put into the garage registry.

Those cars listed on the wholesale dealer contracts from dealers in Quebec are ones where he is just doing a transfer of registration and putting the car into his name. He gets the wholesale contract and then sends back the registration permit. With the wholesale contract, he gets the auction bill of sale. In Western Canada the cars at auctions come with a bill of sale as the titles are returned to the Ministry. In Ontario you can get registration with a bill of sale but not in Quebec. Mr. Lagace stated that he never purchased the cars, he just changed the registration into his name. These cars never come to Ontario. The registration shows them to be branded.

If a vehicle is a salvage car, in Quebec it is stamped "garvemente accidente". It is not a rebuilt car and there are no inspections. If it is a rebuilt car, in Quebec it is stamped "reconstruit", and it must have gone through two inspections- structural and mechanical. The Quebec dealers want to rebuild the cars at their own shops in Quebec so they cannot get them registered in Western Canada.

Mr. Lagace stated that doing such a registration does not permit you to hide the history of the car. He wrote "service charge" on the bill as he was not purchasing the car, and he did not put it in his garage registry. But he did keep these records at the dealership. Other dealers do this, such as, Coast to Coast Auto in Orillia, L.F. Auto in Brantford and T & T Auto in Thunderbay. It was the dealer in Brantford who told him about the process of taking the original bill of sale to the licence bureau and filling out the forms. The registrations are all branded as salvage. Mr. Lagace stated that some of his cars were from the United States and had been branded salvage there. Again those cars

were not in his garage registry as he did not purchase them. He did purchase the 1997 Jimmy and he made out the cheque for it to the name of the individual as requested. That car is in his garage registry.

The cheque for the \$2,247.00 was his payment for "service charges" for the transfer of registrations.

Mr. Lagace stated that he spoke to a Claudia Sabona at the licence bureau in Welland about this process. She checked it out and told him the Ministry of Transportation had no problems with it. The original bill of sale is required to obtain registration.

Mr. Lagace stated that he paid the dealer in Quebec after he had sold the car to the customer in Ontario. The cars were brought in to be sold and when sold, the Quebec dealer was paid. He did not use any consignment document. He was not aware of any restrictions about selling cars on his property. His garage registry was inspected by the Ministry sometime in 1996 or 1997 and nothing was said about this. He had started doing business with the Quebec dealers about 4 or 5 years ago.

Regarding the Maccabe vehicle, the Autochek search showed accident damage of \$11,512.00. The Autochek search on the Lemieux vehicle showed accident damage of \$7,235.00. The Autocheck on the Sersen vehicle showed accident damage of \$10,349.00. That vehicle could be worth \$20,000.00 or \$21,000.00. It was labelled a total loss by the insurance company because they did not repair it.

Mr. Lagace stated that he had not heard of Carfax until the hearing.

Under cross-examination Mr. Lagace stated he did not know if the figures for the accident damage was in American or Canadian dollars. You need to look at the mileage of the car, its year and the condition of the car.

Mr. Lagace knew that the branding system is voluntary. He knew the vehicles were accident repairs. He had met some of the dealers and others he had inquired about through his friend. He knew that the cars did not have to be inspected in Quebec for them to be sold in Ontario. He trusted the Quebec dealers. He had a floater insurance policy which covered the cars even if they were not owned by him.

Mr. Lagace stated that he did not ask how serious the damage was when speaking to the Quebec dealers. He did not know the specifics of the repairs to the car. He knew he was dealing with accident repair cars. He would open the hood and doors and take the cars for test drives. He got his training at Centennial College with a 7200 hour apprenticeship plus 2 months per year in the class room for two years. He knows how to dismantle a car and join cars together. He would look at the door gaps, for ripples, paint job and how it drove. He could tell what was new and old on a car. Since the police involvement, Mr. Lagace has stopped doing business with the Quebec dealers. Some of those dealers did not tell him the correct information on the condition of the cars.

Mr. Lagace stated he never told Mr. Maccabe that the damage was minor. He never told Mr. Sersen that the front end damage was light. He never told Ms Robb that it was a small accident. He would have sold maybe 50 to 75 cars in 1998 and he kept no notes of his conversations with the customers, but he knew he never said minor or major damage. He would tell the customers that he bought the car repaired, except for the cars that he himself repaired. He agreed that there was nothing on the Bill of Sale to Mr. Sersen saying it was an accident repair vehicle.

Mr. Lagace stated that he spoke to the Lubrico representative, Mr. Ron Bosche, and told him that the cars were accident repairs. He knows the system in Quebec where photo's are taken of the unrepaired car, the repair made, a full wheel alignment done and take the vehicle to the inspection station with the photos to obtain the body inspection certificate, and then attendance at the licence bureau.

Mr. Lagace agreed that he had not told the customers that they were getting cars with used parts. He saw no difference between an accident and a salvage car. The car had to be in an accident before the insurance company would declare it to be a total loss.

Mr. Lagace stated that he knew of no legal requirement to have a written consignment agreement rather than a verbal deal. He had no concerns with selling other dealers' cars and indeed does that all the time.

Testimony of Ron Bosche:

Mr. Bosche is a sales distributor for the Niagara Region for Lubrico, a company based in London, Ontario. Lubrico began in 1977. It offers car warranties to licensed car dealers. There are a wide range of warranties, though none for car body work. The primary focus of the company is on supplying warranties for used vehicles. These warranties are reinsured by London Guarantee.

Mr. Bosche testified that he started having business dealings with Mr. Lagace about 1990. Mr. Bosche knew that the majority of the cars being warranted were accident repair cars. He does business with several hundred dealers, and he considers Mr. Lagace to be in the top 25% of those dealers. In his opinion, Mr. Lagace is a good dealer who is honest and has integrity. His company likes to do business with dealers who take pride in their product.

Under cross-examination, Mr. Bosche stated that he understands that Mr. Lagace uses Lubrico exclusively. Mr. Bosche is paid sales commissions, but he stated that he receives only small commissions from his dealings with Mr. Lagace. Mr. Bosche knows that some of his warranty customers have called his company when their cars were seized by the police. Their cars were returned by the police as it was not proven the cars had been stolen. Mr. Bosche extended the warranty for those customers. Mr. Bosche stated that he understood the purpose of this hearing.

Testimony of Luc Gaston Bissonnette:

Mr. Bissonnette works in the casino at Niagara Falls. He has known Mr. Lagace since 1983. He apprenticed under Mr. Lagace from 1989 to 1991. He knows of the criminal charges against Mr. Lagace, and he knows the purpose of this hearing. He believes that the people in the community trust Mr. Lagace. He, himself, trusts Mr. Lagace.

Under cross-examination Mr. Bissonnette agreed that he has no specific knowledge of the consumers in question and their cars.

Testimony of Liliane Guertin:

Ms. Guertin testified that she was born and raised in Welland. She sells after market car parts through her company, LMG Distributing in Welland. She has known Mr. Lagace for almost sixteen years. When Mr. Lagace was fourteen years old, he worked for her husband. She is aware of the criminal charges against Mr. Lagace. She knows the purpose of this hearing. Ms. Guertin knows that Mr. and Mrs. Lagace are honest people. She knows nothing derogatory about them. She will continue to send customers to them.

Under cross-examination, Ms. Guertin stated that Mr. Lagace is not one of her biggest clients. She does not know the specifics of the customers in question or their cars.

Testimony of James F. Hamilton:

Mr. Hamilton is a lawyer and has been employed as Counsel for the Used Car Dealers Association since March, 1996. This is a non profit corporation which acts as a trade association for the used car dealers. The members pay membership fees to the association. Mr. Lagace became a member in 1993.

Mr. Hamilton stated that he does not have an independent recollection of a conversation with Mr. Lagace some years ago. He stated that it is his opinion that the dealer should be general in speaking of the condition of the car and not be specific about which area of the car has been repaired. He advises dealers to tell their customers about the accident damage if it is serious or material. He considers serious damage to include structural or frame damage. If the car has been seriously damaged and the dealer does not know the particulars, then he should find out about that damage.

Mr. Hamilton stated that he thought using a stamp saying accident repair on the bill of sale was a good idea as it tells the customers that the car has been in an accident.

Mr. Hamilton stated that if a dealer knows the vehicle has been a total loss, a write off or salvage, it is a good idea to write that on the bill of sale but disclosure using these labels does not mean much to the customers. For instance, write off and total loss are economic terms used by insurance companies who decide to buy off the vehicle rather than repair it. The term write off could include accident damaged, stolen damage or constructive write off.

Mr. Hamilton stated that in a perfect situation the dealer would write accident damage, accident repair or write off. But if a dealer does not know if it is a salvage vehicle, then the dealer should use the term "accident repair". If a dealer does know it is a salvage vehicle then put the term salvage or write off on the bill of sale.

Under cross-examination, Mr. Hamilton stated that disclosing that a vehicle was an accident repair vehicle is the fact of principal importance. There is no obligation by law to put salvage or write off on a bill of sale. This is done to protect the dealers from the customers. It is a grey area whether or not a dealer should say anything more about accident damage. But if a vehicle has a serious accident damage, such as frame damage, then a dealer should disclose it. For instance if a car worth \$20,000.00 sustains over \$10,000.00 in repairs plus frame damage, then that is a serious accident

and should be disclosed. It is necessary to look at the value of the car and the nature of the repair. If the damage is a \$2,000.00 bumper on a \$20,000.00 car, then it need not be disclosed.

Mr. Hamilton testified that there is a grey area between minor and major damage. A dealer should err on the side of caution; that is, disclose the damage and avoid criticism in the future. If over one half of the value of the car is in repairs, then that is a seriously damaged vehicle, and a dealer must say to the customer that there has been accident repair.

Mr. Hamilton agreed that it was amazing what a good bodyshop could do in repairing cars. He stated that an accident repair car can be safe.

Mr. Hamilton stated that if a dealer feels his disclosure is accurate, it is not wrong to tell that to the customer.

There is no law on "as is". The Used Car Dealers Association has printed on its bill of sale an "as is" clause which says that the car is not fit for the road and can cost money to fix it. The Association recommends that the customer sign beside this clause. In such a case, the customer should not drive that car off the lot but have it towed off. Under the Sale of Goods Act, there is an implied warranty of fitness so the "as is" clause was developed by the Association. An "as is" vehicle is not a roadworthy vehicle.

CLOSING STATEMENTS:

Counsel for OMVIC:

Counsel stated that Mr. Lagace did not tell his customers about not having an ownership interest in the cars, what kind of repairs were done to the cars and where the car was repaired. Mr. Lagace is saying that the customers are all wrong; yet, the consumers all had a similar pattern of conduct. Counsel submitted that Mr. Lagace should have told his customers about the accidents.

Counsel submitted that Mr. Lagace is now changing his practice and not buying from the Quebec dealers. He is trying to say he is a victim, but the consumers are the victims. The testimony of the consumers is that, except for one, they would not have bought the cars.

Counsel submitted that it was dishonest for Mr. Lagace to stamp only one copy of the Bill of Sale for the Robb purchase. Counsel submitted that one incident justifies revocation of his registration under the Act. As well, Mr. Sersen's bill of sale does not say accident repaired on it.

Counsel stated that the issue was what were the consumers being told. One needs to look at the standards of the Motor Vehicle Dealers Act and the Business Practices Act. Mr. Lagace made no meaningful inquiry on the condition of the cars. There is no paperwork on the condition of the cars.

Mechanics showed both Ms. Robb and Mr. Ormel the problems with the repairs in their cars. With due diligence, Mr. Lagace could have known the extent of the repairs on the cars.

Counsel for the Registrar stated that record keeping is a concern. The motor vehicle industry is a regulated industry, and it is important to know who owns the vehicles. Normally, a dealer sells cars that are his own. The Ministry of Transportation provides a garage registry which has space for the odometer readings of vehicles. Why is Mr. Lagace registering cars in his name when the vehicles are in Quebec? It is a questionable activity. Under section 13 of Regulation 801 a salesperson cannot be registered to more than one dealer unless they have common controlling interests. The lack of paperwork on the sale of the vehicles is of concern to the Registrar.

Counsel for the Applicant:

It is the position of the Applicant that he did not act intentionally in a dishonest fashion or lack integrity in his acts. This is different from odometer tampering which is a deliberate act of dishonesty. Here, all of the consumers were told the cars had been in accidents and told the general area of repair. As well, Mr. Lagace has stopped dealing with those Quebec dealers since the search warrant in November, 1998. The Registrar has pointed out some methods that dealers can follow. There is no industry standard or practice or even a "norm" to follow in this situation.

It is the position of the Applicant that if the Registrar's concern has not been particularized, it cannot be grounds for a revocation. Here the issue is the past conduct of the Applicant and whether the past conduct provides reasonable grounds to believe that the Applicant's conduct in the future will not be carried out in accordance with honesty and integrity.

Mr. Lagace in his evidence stated he would be prepared to live with terms and conditions.

Counsel for the Applicant stated that the standard of proof is found in the Brenner case, supra. If the Tribunal finds that the Registrar is wrong then the Tribunal can intervene. In the Coates v Ontario (Registrar of Motor Vehicle Dealers and Salesmen) 65 O.R.(2d) 526 the Divisional Court stated at page 534 "In revoking a registration the tribunal is interfering with a right to make a living that has been equated to a property right: see Evans, Janisch, Mullan and Risk *Administrative Law* 2d ed. (Toronto, Edmond-Montgomery Publications, 1984) at p.80. While the grant or refusal of a licence may be regulated as a matter of privilege, rather than a right, the revocation of an existing licence has always been regarded as an interference with a right, not a privilege." In that case, the Divisional Court held to the standard of proof as found in the RE Bernstein and College of Physicians and Surgeons of Ontario (1977) 15 O.R. (2d) 447 where Garrett, J. stated at p. 485 "I hold that the degree of proof required in disciplinary matters of this kind is that the proof must be clear and convincing and based upon cogent evidence which is accepted by the tribunal."

Counsel submitted that the evidence of the Applicant was honest, forthright and consistent. He has lived in this community all his life. He knows how to repair cars. There is character evidence which should be given some significance.

Regarding the issues of disclosure, Mr. Lagace used Autochek which is fallible as is Carfax. Mr. Lagace would look at the cost of repairs and based on what the dealers said in Quebec he would take the car. He would do a visual inspection and a test drive to verify the information given to him by the Quebec dealers. Mr. Lagace had testified that he equated salvage repair to accident repair as they all came due to an accident. Mr.

Lagace did not have a practice of saying the repair was minor or major. He never lied to his customers who are his livelihood.

Regarding the seven customers that testified before the tribunal, all seven said the car had been in an accident and repaired but four said they were told the damage was minor. Mr. Maccabe testified that he was told the car was smashed up, not that there was minor or major damage. Mr. Lemieux was not told of major or minor damage. Mr. Levesque had no recollection of being told of major or minor damage. Regarding the others, they are trying to recall events that occurred two to three years ago. They cannot recall the exact words. If these customers got the wrong impression or failed to ask the questions, that does not make Mr. Lagace dishonest. Mr. Sersen had a mechanic look at the car who said the damage was minor. Mr. Ormel knew the air bags had been engaged and the windshield broken. Ms. Noel had poor recollection. Ms. Robb had a hospital stay due to depression and an overdose and that affects her state of mind. All of these customers could have taken the car to an independent mechanic prior to purchasing it.

Counsel for the Applicant submitted that the onus is on the Registrar, and if there is any doubt the Tribunal should find for Mr. Lagace. It is credible that Mr. Lagace states that he has a general practice of not saying minor or major repairs. It is important to note that there are no written directives from OMVIC regarding such disclosure. Even the course recently started states that the dealer should give full disclosure, but it is unsure if the dealer needs to put salvage or write off on the documents. Here, the customer was told of accident repairs.

Counsel submitted that section 2 of the Business Practices Act deals with a question of interpretation. Here, there is an unintentional lack of disclosure. Mr. Lagace felt he was making the required disclosure to his customers. If he was wrong, then the Tribunal can put on conditions and a period of supervision and training to his registration. Counsel referred to the case of Keshvari-Rasti (c.o.b. North York Fine Cars) (1999) O.C.R.A.T.D. No. 17 whereby extensions terms and conditions were put on the registration of the dealer. Mr. Lagace has stopped buying from the Quebec dealers and when he repairs the cars, they are branded.

Regarding Ms. Robb's bill of sale, Mr. Lagace stated he had forgotten to stamp her copy of it. He had done so for Mr. Levesque and Ms. Noel.

Regarding Mr. Lagace's research methods, Counsel submitted that none of them are foolproof. Mr. Lagace asked for information from the Quebec dealers. He did a visual inspection and test drove the car. He used Autochek. Neither Autochek or Carfax have all the cars listed or all of the information required on the cars. Asking the manufacturer about the void warranty does not tell you the exact damage or its amount. Dealers are not being encouraged to use the Canadian and American databases established by the insurance companies.

According to Counsel, as the cars were not in Ontario and Mr. Lagace did not buy or sell them he was not obliged to put them into the garage registry. It is permissible to register a car in Ontario without the car being in Ontario. Mr. Lagace had confirmed this with the licence bureau. A registration is not a declaration of ownership. There is no evidence that such a registration was done to hide the history of the car. There is no legal requirement to put the car odometer reading in the garage registry. There is no statutory requirement to have a written consignment agreement. This is not dealt with under section 13 of Regulation 801.

Counsel stated that Mrs. Lagace had dealt with Mr. Maccabe and that was wrong. She would not do that again.

Counsel referred to the cases of Brenner (c.o.b. Monster Deals) (1999) O.C.R.A.T.D. No. 139 for the proposition of whether or not the dealer can be governable; Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesmen) (1983) O.J. No. 1017 for the proposition that the Tribunal should look at the passage of time since the Registrar's Proposal was issued; and Ontario (Registrar of Motor Vehicle Dealers and Salesman) v. Clermont (1974) O.J. No. 1028 for the proposition that one should look at the complete context of the case when viewing past conduct.

Reply by Counsel for the Registrar:

Counsel for the Registrar stated in reply that Sersen and Maccabb's evidence was that they were told the damage was minor. One should note the practice of having the client initial beside the accident repair stamp on the bill of sale. Both Sersen and Maccabb had the impression that the damage was minor and that is found under the Business Practices Act.

LEGISLATION:

The Motor Vehicle Dealers Act provides:

Section 4 of the Act states as follows:

Section 4. A motor vehicle dealer shall not retain the services of a salesperson who is not registered under this Act.

Section 5 of the Act states as follows:

Section 5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

(c) the applicant is a corporation and,

.....

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

Section 6 of the Act states as follows:

Section 6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

Section 6(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 7 of the Act states as follows:

.....

Section 7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Section 7(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Regulation 801

Section 15. Every motor vehicle dealer shall, with respect to the purchase or sale of a motor vehicle, maintain for a period of two years from the date of expiry of any warranty or service plan covering the vehicle, all purchase orders, sales orders and written records of all transactions resulting in the purchase or sale of the motor vehicle and in the case of a used motor vehicle,

- (a) a complete record of any reconditioning or other work performed on the vehicle that includes the date and particulars of the work done, repair orders and the cost of the work done; and
- (b) the details and cost of any inspection conducted under Regulation 611 of Revised Regulations of Ontario.

The Highway Traffic Act provides:

Section 60(1) Every person who buys, sells, wrecks or otherwise deals in second-hand motor vehicles, trailers or bicycles shall keep a complete record of all motor vehicles, trailers and bicycles bought, sold or wrecked and of the information that will enable the motor vehicles, trailers and bicycles to be readily identified, and shall transmit to the Ministry, within six days after the event, on forms furnished by the Ministry, a statement

of each motor vehicle or trailer bought, sold or wrecked by the person and the information with reference thereto that may be required by the Ministry.

ANALYSIS:

This is a case dealing with the revocation of the registration of a motor vehicle dealer, Gaetan Lagace who carries on a business known as Gater's Auto Refinishing and Auto Sales and also the refusal to allow the registration of a numbered company 1302734 Ontario Inc. This numbered company would be under the control of Mr. Lagace. The issues in this case were (1) whether or not Mr. Lagace failed to disclose the true condition and history of motor vehicles that he sold to members of the public, and (2) whether or not Mr. Lagace failed to keep his books and records in accordance with relevant legislation.

During the course of testimony, a number of other issues were mentioned such as Mrs. Lagace acting as an unregistered salesperson for the sale of one of the vehicles and whether or not there was some sort of scheme to violate legislation by obtaining Ontario registration papers for cars situated in Quebec. These issues were not mentioned in the particulars of the Proposal of the Registrar but presumably were brought to the attention of the Tribunal as matters that affected the credibility of the registrant. The Tribunal will comment on them in the course of this decision.

The Motor Vehicle Dealers Act is a piece of legislation designed to both protect the public and to regulate the industry. The Registrar is concerned with ensuring that the public has confidence in the motor vehicle industry and in those who choose to work within this industry. As a regulated industry, the motor vehicle dealers and salespersons have responsibilities under the legislation. The Tribunal must balance the interests of the public against those who wish to make a livelihood within a regulated industry. Those working within the motor vehicle industry must abide by the standards of conduct as set forth in the Motor Vehicle Dealers Act.

The legislation states that a registration can be revoked or not granted if the Registrar feels the applicant/registrant lacks honesty, integrity or does not act in accordance with the law. This is what the Registrar is alleging against Mr. Lagace. In making this assessment, the Registrar is required by the legislation to consider the past conduct of the applicant. The case law since Brenner v The Registrar of Motor Vehicle Dealers and Salesmen (1983) O.J. No. 1017 has been quite clear that neither the Registrar nor the Tribunal should be considering the prospective conduct of the Applicant but should be basing their decisions on the Applicant's past conduct. Recent caselaw in the Divisional Court has emphasized that the Tribunal in making its decision has to carefully review the facts of the particular case and state the basis of its decision. The Tribunal, as stated in Keith Mark Baldwin (1997) CRAT 19, must consider the whole of the evidence in arriving at its decision. The Tribunal must assess the evidence as it relates to the dictates of the relevant legislation.

The Tribunal has concerns regarding the conduct of Mr. Lagace as a motor vehicle dealer. The Tribunal has a duty to protect the public who wish to buy or lease motor vehicles. They should not be deceived as to what they have purchased. But the Tribunal also is concerned over the revocation of a registration as that is interference with the right to make a living. As stated by the Divisional Court in Coates supra "While the grant or refusal of a licence may be regulated as a matter of privilege, rather than right, the revocation of an existing licence has always been regarded as an interference

with a right, not a privilege.” In the present case, this Tribunal is prepared to grant the registration as a motor vehicle dealer to Mr. Lagace on terms and conditions. However, this Tribunal agrees with the Registrar that the granting of a registration as a motor vehicle dealer to the numbered company, 1302734 Ontario Inc. be refused at this time. Mr. Lagace is the sole officer and director of this company. As the Tribunal finds that he requires supervision on his business dealings under his sole proprietorship, it is not prepared to allow him to expand his business dealings until he has demonstrated to the Registrar that he fully understands and complies with his responsibilities under the Act.

Regarding the matter of Mrs. Lagace’s conduct in acting as an unregistered sales person, the Tribunal cannot condone such behaviour which contravenes the whole purpose of the Act. One such incident has been brought to the attention of the Tribunal, that being the sale of a vehicle to Mr. Maccabe. That occurred in November, 1998. Mr. Lagace has testified, and there has been no evidence to the contrary, that Mrs. Lagace no longer does her bookkeeping at the dealership since the police raid in November, 1998. He has instructed her to refer customers to himself. She does not deal with the car buying public. He admits it was a mistake. The Tribunal is not prepared to deny him his registration based on this incident, particularly when it is not enumerated in the particulars of the Registrar’s Proposal. If the Registrar wished to make this incident part of the past conduct of the registrant, the Registrar should have amended his Proposal to mention it.

There was considerable evidence as to the actions of the registrant in acting as a conduit for Quebec dealers by registering their cars in Ontario when the vehicles were not brought to Ontario nor ever in the possession of Mr. Lagace. Although the Tribunal shares the disquiet of the Registrar that this kind of arrangement looks suspicious, closer examination does not show that it violates any rule or regulation currently in force in Ontario. The registration process in Ontario does not confirm ownership of the vehicles, just that the vehicle has been registered to a particular person. The registration forms entered into evidence all show that the cars have been branded salvage. There is a paper trail of their history. The car dealers in Quebec wish to avoid having to repair the vehicles at out of province shops. In Western Canada, title only goes with the vehicle if it has been repaired there. Cars can be registered in Ontario with a bill of sale but cannot be registered with a bill of sale in Quebec. The scheme does permit the car dealers in Quebec to bring in vehicles that have not been repaired, then repair them in their shops and have them inspected and sold in Quebec. It is cheaper for the Quebec car dealers to do their own repairs then have a repair shop in Western Canada do the repairs.

The Tribunal does not find that Mr. Lagace’s involvement in this scheme violates any provision of the Motor Vehicle Dealers Act or its regulations. If the Registrar frowns upon it, then the Registrar needs to educate the dealers not to do it, seek a change to the Act or its regulations to forbid it or seek a change in the registration process so it cannot be done. The Tribunal does not see how the public, whether in Quebec or Ontario, is harmed by this scheme; consequently, the Tribunal will not impose any sanctions upon Mr. Lagace for his participation in it. As well, this matter was not mentioned in the Proposal of the Registrar or his Particulars. If the Registrar wished to impose sanctions on the registrant for this type of conduct he should have revised his Notice of Proposal.

One issue that was mentioned in the Notice of Further or Other Particulars was whether Mr. Lagace’s failed to keep his books and records in accordance with either the Highway Traffic Act or the regulations attached to the Motor Vehicle Dealers Act. The

Tribunal initially had concerns as to Mr. Lagace selling cars for Quebec under verbal agreements. But the Tribunal was not shown any regulation which stated that this course of conduct was forbidden. It is trite law to say that verbal contracts are contracts but with some potential for problems on evidentiary issues. In his garage registry, Mr. Lagace put the date into stock and the date out of stock. So there were records available for inspection by the Ministry officials which showed he first sold the car and then bought the car from the Quebec dealer. There is nothing before the Tribunal stating that consignment agreements need to be signed on such deals. The Tribunal finds this omission in the legislation disquieting as it would be preferable that the public buying a car know that the person selling actually has title to that car. It would be preferable if the Ministry of Transportation had regulations clearly stating that the garage registry must list the odometer reading and similar pertinent information. While the forms given by the Ministry have a place to put such information, the Tribunal has found no duty on a motor vehicle dealer to fill in all of this information. Mr. Lagace did put in his garage registry the cars that he bought and sold, so he has technically complied with the regulation 801 under the Motor Vehicle Dealers Act and section 60(1) of the Highway Traffic Act.

As Mr. Lagace did not take ownership of the vehicles that he put under his registration on behalf of the Quebec dealers, he was not obliged to put the vehicles into his garage registry. The evidence shows that when he did purchase a 1997 Jimmy from Les Automobiles Lin Inc., that vehicle was listed in the garage registry.

The main contention by the Registrar was that Mr. Lagace did not disclose the true condition and history of the motor vehicle to his customers. The evidence before the Tribunal does not display a pattern of patent dishonesty but it does indicate that Mr. Lagace was playing close to the line when he spoke to his customers and that he failed to be pro active in obtaining information from the Quebec dealers on the accident history of the vehicles. Because of these aspects of the evidence, the Tribunal feels Mr. Lagace needs to be supervised to ensure that he understand his responsibilities to his customers.

The difficult point in this case is that there is nothing in the legislation that clearly sets out the level of disclosure to be given to customers. The Tribunal notes that while the Registrar would like the motor vehicle dealers to state that the vehicles are salvage vehicles or have the phrase "write off" on the bill of sale, the Ontario Motor Vehicle Industry Council has not issued any written directives on how to disclose the condition of the vehicles or the level of disclosure that should be standard for dealerships. Indeed, the branding program which only was proclaimed in July, 1998 and became actively used in the Fall of 1998 is a voluntary program for the insurance companies.

All of the disclosure programs mentioned in this case such as Carfax or Autochek are voluntary programs. A car may be severely damaged in an accident and if the insurance company fails to list its condition with such disclosure or branding programs, then both the motor vehicle dealer and the consumer will not obtain the correct information. The Tribunal agrees with the statement of Ms. South that consumers should be armed with sufficient information so there is no misrepresentation as to the extent of the damage to the vehicle. However, the tools to allow this to happen have not been provided by OMVIC, the provincial government or the insurance industry.

The Tribunal found the testimony of Mr. Hamilton to be informative. Mr. Hamilton is the Counsel for the Used Car Dealers Association. This Association helps used car dealers and collects a membership fee from them. Mr. Hamilton felt that dealers should advise their customers of serious or material accident damage. He stated that the terms "write

off", "salvage" and "total loss" are not necessarily helpful terms to the buying public as they are economic terms used by the insurance companies. Mr. Hamilton felt that it was very important to disclose that a car has been accident repaired. He thought there was some grey areas on what is minor damage or major damage, and it is best to put "accident repair" on a dealer's bill of sale. His comments on "as is" were of interest to the Tribunal.

He advises the used car dealers to put "as is" on vehicles that are not fit for the road. He agreed that under the Sale of Goods Act there is an implied warranty on fitness. The Tribunal found the evidence of Mr. Hamilton to be clear and concise and has placed a great deal of reliance upon it. It is obvious that the consumer needs to know that the vehicle has been in an accident. If a used car dealer states that a vehicle has been in an accident and there is no manufacturer's warranty, a reasonable consumer would take that to mean that the car has suffered sufficient damage to void the manufacturer's warranty and that further investigation is required.

The evidence of the customers is obviously of importance in determining this issue. Mr. Lemieux knew he had bought a car that had been repaired even though he was not sure where exactly the car had been damaged. He had no complaints about Mr. Lagace. Ms Noel was more upset about the extent of repairs done to her vehicle. She knew it was accident repaired, and the bill of sale is stamped accident repaired. She is vague about what exactly Mr. Lagace said to her, as evidenced in her mention of frame damage but not mentioning this to the police or Registrar's investigator.

Mr. Orel stated he would not have bought his car if he had known about its damage. He was told by Mr. Lagace that it was an accident repair and had new air bags and a new windshield.

Ms. Robb's bill of sale did not have accident repair upon it, though the copy of Mr. Lagace did have that stamp. She was very concerned about her car after being told of the extent of its repairs by the police. She testified that she suffered from depression and had a bout of hospitalization during the time her car had been seized by the police. She had a safety certificate for her car, and she knew the warranty was voided as she bought a new warranty when she bought the car. She agreed that Mr. Lagace had fixed items when she had brought the car back to his garage.

Mr. Levesque told the Registrar's investigator that Mr. Lagace had used the words "minor accident" but he did not say that to the police. His bill of sale stated it is an accident repair vehicle. Mr. Sersen had a mechanic examine the car prior to buying it from Mr. Lagace. The mechanic thought the car was sound. He knew that there had been damage to the passenger side of the car at the front and rear. He complained that he might have paid too much for the car, if it had suffered extensive damage.

Mr. Maccabe bought a car from Mrs. Lagace. He remembered her saying there had been minor damage to the car but there is nothing in the statements to the police or Registrar's investigator to corroborate that statement. He knew he had bought a damaged car.

Most of the evidence of the consumers was vague as to what exactly Mr. or Mrs. Lagace said as to the actual damage to the car. Some understood it to be minor damage, others did not know or care about the extent of the damage. Some were nervous about their car once they were told by the police as to the extent of the damage. None stated they had major problems with their cars prior to the police

involvement. All knew that their car had been in an accident. The evidence is not conclusive that Mr. or Mrs. Lagace deliberately misled the consumers as to the extent of the damage to the cars. Mr. Lagace stated in his evidence that he did not know precisely the extent of the damage as the Quebec dealers gave him only general information, such as front end damage. The Autochek program he used told him about the market value of the car prior to the accident and what it was worth after the accident. In many cases the difference was dramatic, but Mr. Lagace did state that insurance companies overstate the cost of repairing a vehicle when they consider whether or not to take an economic loss on the vehicle. For example, he fixed up a 1992 Ford F150 truck for considerably less than what was given as the damage value.

The Tribunal finds it disquieting that Mr. Lagace failed to ask the dealers for more information on the extent of repairs to these cars. The Tribunal finds it disquieting that Mr. Lagace had knowledge that some of these vehicles had substantial accident damage. For example, in the case of the Sersen vehicle the accident damage came to about 50% of the market value of the vehicle. That should have caused him to make further investigation on exactly what was the extent of the damage to that vehicle. Instead, Mr. Lagace took the easy way out. He relied on the verbal assurances of Quebec dealers, when he did not have any kind of a substantial relationship with many of them. As a used motor vehicle dealer, Mr. Lagace should not have been so cavalier in his approach regarding the extent of damage to a car. He has a duty to know enough about the prior history and condition of the vehicle that he can answer the queries of his customers.

On the other hand, his customers were buying relatively new vehicles at low prices. They were being told the car had been in an accident, and in most cases they were told the manufacturer's warranty was void. The customers had the opportunity to test drive the car. If they wished to have the car examined by their own mechanic, that was permitted by Mr. Lagace. The consumer has a responsibility as well to understand that they are not buying a brand new vehicle and further investigations are required especially when buying a newer car at lower than normal prices. If Mr. Lagace could not answer their questions about the specifics of the repairs, they could either do further investigation on the car after obtaining its VIN number or decide not to continue with the negotiations for its purchase.

None of the consumers complained of serious defects to their cars although some of them were shocked by the extent of the repairs and would not have bought the vehicle if the full information had been provided. Under the current legislation and regulations, no motor vehicle dealer has to provide that full information or state that a vehicle is an insurance write off or an total loss or a salvage vehicle. It is not even technically a requirement that the bill of sale have stamped on it accident repair, even though the practice encouraged by the Used Car Dealers Association. Only recently, OMVIC introduced courses for new dealers that looks at this issue, and there has been no industry wide policy implemented by OMVIC on this issue.

The Tribunal has concerns over the bill of sale to Ms. Robb not having an accident repair stamp on it though the dealer's copy does have such a stamp. Mr. Lagace explained that as his bill of sale documents are preprinted carbonless, stamp does not go through both copies. The Tribunal is prepared to accept the explanation of Mr. Lagace regarding Ms Robb's situation. There were several other bill of sales that did not have accident repair stamped on them. It is evidence of an inadequate business practice, and the Tribunal wishes to see improved business practices in place which will prevent such omissions in the future. It is important that consumers know they are

purchasing accident repair vehicles. Ms. Robb was told that her vehicle had been in an accident. She stated that Mr. Lagace said there was a little bit of damage to the right front end but nothing major. Mr. Lagace states that he told her there was no factory warranty but did not say that the damage was minor or major. Mr. Lagace states that it is his practice not to say to consumers whether the damage is minor or major but that the car had been in an accident, has been repaired and the general location of the repair. The Tribunal accepts the evidence of Mr. Lagace over that of Ms Robb. He spoke in a forthright fashion and was not evasive in his answers. Ms Robb was an emotional witness and has admitted suffering from depression in the recent past, which required 24 days of hospitalization. The Tribunal does not accept her claim that her hospitalization was due solely to the police seizure of her vehicle.

Though the Tribunal has concerns that Mr. Lagace was not fulsome in his comments to his customers on the extent of the damage to the vehicles, the Tribunal is prepared to give him the benefit of the doubt that this was not done in a dishonest fashion. The Tribunal accepts the standard of proof as found by the Divisional Court in Coates supra, that being that the "proof must be clear and convincing and based upon cogent evidence which is accepted by the tribunal".

The Tribunal finds that this is an appropriate case for conditions upon the registration. Mr. Lagace has stopped dealing with the Quebec auto dealers. He states that now 90% of the cars he sells are branded. He is prepared to accept conditions on his registration and to take education courses for motor vehicle dealers. The Tribunal finds that Mr. Lagace is governable and is a suitable person for the imposition of conditions on his dealership registration.

ORDER:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act* the Tribunal directs the Registrar to grant Mr. Lagace his registration as a motor vehicle dealer on the following terms and conditions:

1. Mr. Lagace is to inform the Registrar of any criminal charges laid against him.
2. Mr. Lagace is to stamp all bills of sale for accident repaired vehicles with the words "accident repair".
3. Mr. Lagace is to register all accident repair cars under the voluntary branding program as either salvage or rebuilt on the registration permits.
4. Mr. Lagace is to attend the motor vehicle dealer certification course offered by OMVIC. He is to provide a copy of his certificate from that course to the Registrar at the time of his next renewal of his dealership registration.
5. Mr. Lagace is to obtain a copy of the Rules of Business Practice as prepared by OMVIC. He is to follow those business practices in his dealership.
6. Mrs. Lagace is to have no involvement with the customers at the dealership unless she obtains her registration as a motor vehicle salesperson.
7. Mr. Lagace is to consistently utilize such programs as Autochek or Carfax when purchasing used vehicles.

8. These terms and conditions remain in force for two years from the date of the issuance of this order.

In accordance with the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act* the Tribunal directs the Registrar to carry out his Proposal to refuse to register 1302734 Ontario Inc. as a motor vehicle dealership.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: August 14, 2000

KENT

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
JULIE KENT

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

JULIE KENT

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TONY POLSINELLI

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on May 29 and 30, 2000;

AND WHEREAS, on May 29, 2000 the parties were in attendance at the Tribunal and at
the onset of the hearing, counsel for the Applicant requested an adjournment;

AND WHEREAS, upon consent of the parties the matter was adjourned to August 14
and 15, 2000;

AND WHEREAS, counsel for the Respondent requested a further adjournment;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m. on Thursday, September 28, 2000, and to continue on September 29, 2000 at 9:30 a.m., if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 24th, 2000

SCARCELLA, GEORGE and 1238800 ONTARIO INC. o/a AFFORDABLE MOTORS

1238800 ONTARIO INC. O/A AFFORDABLE MOTORS AND
GEORGE SCARCELLA

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: STEPHEN J. KELLY, Vice-Chair

APPEARANCES:

NO ONE APPEARING for the Applicants, George Scarcella and
1238800 Ontario Inc. o/a Affordable Motors
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: August 10, 2000 OTTAWA

ORDER

WHEREAS, a Notice of Proposal was issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar"), dated April 10, 2000, to Revoke the Registration of George Scarcella as a motor vehicle salesperson and 1238800 Ontario Inc. o/a Affordable Motors as a motor vehicle dealer (the "Applicants");

AND WHEREAS, the Applicants appealed the Notice of Proposal to the Tribunal;

AND WHEREAS, the Applicants appeal was set down for hearing before the Tribunal, on August 10, 2000, at 9:30 a.m. in Ottawa;

AND WHEREAS, Aviva R. Harari, counsel for the Registrar, was present at the hearing on August 10, 2000, and no one appeared for the Applicants;

AND WHEREAS, the Applicants were duly notified by Notice of Hearing, dated May 31, 2000, which was faxed to all parties in this matter. At 9:30 a.m. the hearing was adjourned until 10:00 a.m. to allow the Applicants time to arrive or make contact by telephone if they wished to participate. The panel chair then called both the Applicants' counsel and the Applicants and left a message. At 10:10 a.m., there being no communication from the Applicants, the hearing was carried on in their absence.

AND WHEREAS, Counsel for the Registrar moved for an order dismissing the Applicants' appeal and confirming the Registrar's Proposal;

NOW THEREFORE this Tribunal orders that the appeal of 1238800 Ontario Inc. o/a Affordable Motors and George Scarcella is hereby dismissed and the Tribunal directs the Registrar to carry out his Proposal dated April 10, 2000, to revoke the registration of 1238800 Ontario Inc. o/a Affordable Motors and George Scarcella.

LICENCE APPEAL TRIBUNAL

Stephen J. Kelly
Vice-Chair

Released: August 23, 2000

HAYNES

BRIDGETTE N. HAYNES

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

BRIDGETTE N. HAYNES, Applicant
unrepresented

DATE OF HEARING: August 15, 2000

DECISION RELEASED: August 17, 2000 Oshawa

REASONS FOR DECISION

A hearing was held on August 15, 2000, at Oshawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Bridgette N. Haynes (the “Applicant”)
Motor Vehicle: 1986 Dodge RMV Van, plate # 171 5EL (the “vehicle”)
Date of Appeal: July 31, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 15, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I need my van as I use it on a daily basis for work, and it is my only source of transportation. I have 2 children 5 months and 13 years old that I need to support. Without my van I can’t continue to work as my job totally relies on having a van. If I take any more time from work they will have to give my work to someone else as they are very busy at this time. I have already lost a weeks work which has caused me a lot of stress and financial problems as my rent is due, hydro food on the table for my kids ect. To sum this all up my van is a very important part of my life I can’t live without it. And I will make sure nothing like this happens again I will keep my keys on me at all times.

The following is a summary of the Applicant's testimony given under oath.

The Applicant is a mother of two children ages five months and thirteen years old. She currently owns two vehicles, the first vehicle is a 1986 Pontiac, which is inoperable due to problems with the motor, and the other is the impounded van. Jason Nugent, the alleged driver of the impounded vehicle is the common-law husband and sole provider for the family.

Mr. Nugent is employed at Kawartha Carpet & Tile Company Limited. He installs carpets, tiles and flooring. His income is approximately \$35 per hour. Mr. Nugent's uncle and Kevin Arscott own the company.

In her testimony, the Applicant left her job to chauffeur her common-law husband to and from work each day because he had a suspended licence. She spent many hours each day waiting for him either in the vehicle or on the job site. Since the impoundment, Mr. Nugent has been working in the company's warehouse, in Lindsay, one to two days a week earning approximately \$9 per hour. His contracted jobs have been delegated to other employees.

The family was evicted from their home on a verbal 30-day notice effective July 31, 2000. They extended their stay until August 31, 2000. The month of July represented their last month's rent and they currently do not have the funds to pay August's rent. They have not yet found accommodations commencing September 2000 and will not have the funds to pay the first and last month's rent on a new place.

The Applicant has looked into obtaining some financial assistance.

Due to various medical concerns, the Applicant, Mr. Nugent and their five-month-old child are awaiting medical results from their physician to determine whether their tap water has been contaminated.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 5 & 6):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jason Nugent;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 3, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Tribunal may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has appealed on the grounds of "exceptional hardship" as per section 50.2(3)(d).

Before investigating whether all the criteria has been established on the grounds of exceptional hardship, there is an important and vital matter to be considered by the Tribunal. The item for consideration is whether the police officer is "satisfied" that a person was driving the motor vehicle on a highway while that person's driver's licence was under suspension under section 41 or 42 of the *Highway Traffic Act* ("HTA").

Section 55.1 of the Act reads as follows:

(2) Where a police officer or officer appointed for carrying out the provisions of this Act is satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence is under suspension under section 41 or 42, even if it is under suspension at the time for any reason, the officer shall

- (a) notify the Registrar of the fact or cause the Registrar to be notified; and
- (b) detain the motor vehicle that was being driven by the person whose driver's licence is under suspension until the Registrar issues an order under subsection (3).

According to the Applicant's testimony, Mr. Nugent was making a purchase at a 711 store. Upon leaving the store, he found the police by the van. Mr. Nugent was then arrested and told that they received a report that someone was drinking while in care and control of the impounded vehicle. The impounded vehicle was searched and no alcohol was found.

The Applicant stated that she had been told that a witness had observed the driver. There was no evidence of whether the observation was made by the police officer, a known witness, or an unknown witness who called in an anonymous tip.

By the express wording of the Act, an impoundment under section 55.1 requires that a police officer be satisfied that a person was driving a motor vehicle on a highway while his or her driver's licence was under suspension.

There was no evidence from the police officer that he was "satisfied that Mr. Nugent was driving the motor vehicle on the highway while his driver's licence was under suspension. In the absence of the required proof, the Tribunal cannot assume that the arresting officer was "satisfied" as required by section 55.1 of the Act.

Under section 50.2(5), the Tribunal is given jurisdiction to "confirm or set aside the order to impound". The evidence is lacking with regard to section 55.1 of the Act, and therefore a fundamental condition required by the Tribunal before making its decision had not been met.

Accordingly, in the absence of this evidence, the ground of exceptional hardship upon which the Applicant appeals does not require consideration by the Tribunal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: *August 17, 2000*

1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS

1296347 ONTARIO LTD. O/A BARGAIN TRAVEL HOLIDAYS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: ROY F. SMITH, Agent, representing 1296347 Ontario Ltd. o/a
Bargain Travel Holidays
FATIMA HUSAIN, Counsel, representing the Registrar,
Travel Industry Act

DATES OF HEARING: July 7, July 18,
July 27, and August 2, 2000 Toronto

ORDER

WHEREAS, the Proposal of the Registrar was heard before the Tribunal on the dates stated above;

AND WHEREAS, at the commencement of the hearing on July 7, 2000, Counsel for the Registrar brought a motion under section 9(1) of *the Statutory Powers and Procedures Act* R.S.O. 1990, Chapter C. 22 and section 7 of the Rules of Practice of the Tribunal, requesting that certain documents contained in the Registrar's Book of Documents and in the Book of Documents of Bargain Travel Holidays, not be accessible to the public;

AND WHEREAS, Counsel for the Registrar submitted, that as the documents to which the public should not have access contained intimate financial or personal matters relating to certain consumers and it is desirable to avoid disclosure thereof in the interests of the effected consumers;

AND WHEREAS, the Agent for 1296347 Ontario Ltd., o/a Bargain Travel Holidays, consented to the Tribunal making an Order restricting public access to such documents;

NOW THEREFORE, the Tribunal orders in relation to the following documents, namely

1) Exhibit 3 (Respondent's Book of Documents)

(1) Tab 6

- page 6-1
- page 6-3
- page 6-6
- page 6-8, 6-9 and 6-10

(2) Tab 8

- page 8-3
- page 8-4

(3) Tab 9

- page 9-3
- page 9-4

(4) Tab 13

- page 13-4

(5) Tab 14

- page 14-4
- page 14-6
- page 14-7

(6) Tab 16

- page 16-2
- page 16-3
- page 16-4
- page 16-5

(7) Tab 17

- page 17-6

(8) Tab 18

- page 18-3

(9) Tab 20

- page 20-2
- page 20-3

(10) Tab 21

- page 21-2
- page 21-3

(11) Tab 22

- page 22-2
- page 22-3
- page 22-4

2) Exhibit 5 (Applicant's Book of Documents)

(1) Tab 4

- page 4-3
- page 4-4
- page 4-5
- page 4-6
- page 4-7
- page 4-8
- page 4-15
- page 4-16
- page 4-17
- page 4-18
- page 4-19
- page 4-21
- page 4-22
- page 4-24
- page 4-25
- page 4-26
- page 4-27
- page 4-29
- page 4-30
- page 4-31
- page 4-34
- page 4-35
- page 4-37
- page 4-38
- page 4-44
- page 4-46
- page 4-49
- page 4-53
- page 4-54
- page 4-55

as follows:

- (a) all such documents shall not be accessible to the public;
- (b) all such documents shall be kept separate from the public record;
- (c) access by the public to such documents shall only be by written order of the Tribunal or as otherwise authorized by law;
- (d) all such documents shall be separated from and removed from the Books of Documents, placed in a sealed envelope by the Registrar of the Tribunal which she shall mark "Confidential";

- (e) in the place of such removed documents there shall be a true copy thereof inserted which copy however shall have obliterated from it all references to bank account number, credit card account number as well as addresses of the holders of such bank and/or credit card number.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: August 22, 2000

VEITENBERG

TERESIA E. VEITENBERG

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK, Presiding Member
FRANK WOLMAN, Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

TERESIA E. VEITENBERG, Applicant
GLEN LIVINGSTON, Agent for the Applicant

DATE OF HEARING: August 16, 2000

DECISION RELEASED: August 23, 2000 Toronto

REASONS FOR DECISION

A hearing was held on August 16, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Teresia E. Veitenberg (the "Applicant")
Motor Vehicle:	1999 Nissan SXG, plate # TCK 529 (the "vehicle")
Date of Appeal:	July 28, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on August 16, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Applicant's representative submitted a letter from the Applicant dated August 15th, 2000.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- (1) owner was shown an invalid licence from an old picture licence found
- (2) owners vehicle used for emergency
- (3) owners vehicle being a handicap vehicle
- (4) owner 75 years old with chronic pain nurse's care & aid

I exercised diligence to determine status now I'm experiencing extreme hardship without my handicap vehicle for emergencies and dr. appy etc.

Mr. Glen Livingston, the Applicant's representative and the driver of the vehicle at the time of the impoundment, testified that he is a tenant of the Applicant, and also acts as her caregiver. The Applicant suffers from a variety of physical ailments. She is taking medication and is under a doctor's care.

Mr. Livingston was under the impression that his suspension had been served. Under this belief in July of this year, he offered to drive the Applicant's vehicle to assist her in her errands, and taking her to her medical appointments. He stated that the Applicant asked to see his driver's licence before he was given the keys to her car. Mr. Livingston further stated that he produced the photo card portion of an old licence that he still had in his possession. This was supported by the August 15th, 2000 letter of the Applicant in which she stated that she trusted the licence to be valid and that the photo was that of Mr. Livingston. He became aware that his licence was still under suspension when he was stopped for a traffic violation, and the vehicle was subsequently impounded. He stated that the vehicle carried a handicapped parking permit, but the vehicle was not equipped in any way with any special equipment that would facilitate a disabled person driving it.

Mr. Livingston further testified that since the loss of her vehicle, the Applicant has had to incur the financial burden of taking taxis to get to her medical appointments, and for her household errands.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Glen K. Livingston;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified or prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 8, 2002.

In response to the testimony and submissions of the Applicant, the Respondent submitted a letter from Abrams Towing Services Ltd., that was entered into evidence as exhibit #7. This letter stated that the impounded vehicle "*does not appear to be equipped to facilitate a disabled person*".

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relevant facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension as per section 50.2(3)(c) of the Act?

The Applicant's evidence is that one month prior to the impoundment, the Applicant asked for and was shown a driver's licence, prior to allowing Mr. Livingston to driver her car. Mr. Livingston believed that his licence suspension had been served, though he came to realize that, as he stated, he was "grossly mistaken". The documentary evidence before the Tribunal shows that Mr. Livingston's current suspension was in fact not due to have been completed until October of 2002. Furthermore, there was no evidence adduced that would indicate that the Ministry of Transportation had given any notification to Mr. Livingston that his licence had been re-instated. The last valid licence that Mr. Livingston would have held, would show an expiry date of February 11th, 1995. Had the Applicant checked the licence, she would have seen that it was no longer valid. At the time that two part licences were being issued, the photo card alone did not constitute the whole licence document, but only served to identify the bearer of the adjoining blue slip.

Since the Applicant would have been shown only part of an expired licence, which would clearly not be sufficient to determine the status of Mr. Livingston's suspension at that time, she would have still had to further rely upon Mr. Livingston's assurance that he believed that his suspension had been served, and that his licence had been reinstated. This is in spite of the fact that the Applicant only had this partial and expired licence document before her.

The Tribunal finds that the reliance upon the assurance of the driver that his driver's licence was valid, does not constitute due diligence as defined by the Act, and is not sufficient to meet the standards of this ground of appeal.

The Applicant has also appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself.

The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required by section 22(4) of the Regulation. Furthermore, no attempt was made by the Applicant to demonstrate to the Tribunal that no other alternatives to the impounded

vehicle existed. In fact, the Applicant's testimony was that she has made use of alternatives to the impounded vehicle, including taking taxis on a regular basis.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Frank Wolman, Member

RELEASED: August 23, 2000

BRYLIN CONSTRUCTION LTD.

BRYLIN CONSTRUCTION LTD.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*
TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: STEPHEN J. KELLY, Vice-Chair

APPEARANCES:

NO ONE APPEARING for the Applicant,
MARK FRIEDMAN, Counsel, representing the Registrar,
Ontario New Home Warranty Program

DATE OF
HEARING:

August 21, 2000

OTTAWA

ORDER

WHEREAS, a written Notice of Proposal dated February 25, 2000, to Refuse to Renew the Registration of Brylin Construction Ltd. (the "Applicant") was issued by the Registrar of the Ontario New Home Warranty Program (the "Registrar") as a builder pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS a Supplementary Notice of Proposal was issued by the Registrar under the Ontario New Home Warranty Program dated July 18, 2000;

AND WHEREAS, the Applicant appealed the Notice of Proposal to the Tribunal;

AND WHEREAS, the Applicant's appeal was set down for hearing before the Tribunal, on August 21, 22, 23 and 25, 2000, at 9:30 a.m. in Ottawa;

AND WHEREAS, Mark Friedman, Counsel for the Registrar, was present at the hearing on August 21, 2000, and no one appeared for the Applicant;

AND WHEREAS, the Applicant was duly notified by Notice of Hearing, dated June 22, 2000, which was faxed to both parties in this matter, confirmation received. At 9:30 a.m. the hearing was adjourned until 10:00 a.m. to allow the Applicant time to arrive or make contact by telephone if he wished to participate. The panel chair then called both the numbers listed in the Applicant's file and left a message. At 10:10 a.m., there being no communication from the Applicant, the hearing was carried on in its absence.

AND WHEREAS, Counsel for the Registrar moved for an order dismissing the Applicant's appeal and confirming the Registrar's Proposal;

NOW THEREFORE this Tribunal orders that the appeal of Brylin Construction Ltd. is hereby dismissed and the Tribunal directs the Registrar under the *Ontario New Home Warranties Plan Act* to carry out his Proposal dated February 25, 2000, to refuse to renew the registration of Brylin Construction Ltd.

LICENCE APPEAL TRIBUNAL

Stephen J. Kelly
Vice-Chair

Released: August 23, 2000

KELLY

MARC T. E. KELLY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the AAct@), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JEAN-MARC LEFEBVRE, Q.C.
Presiding Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

MARC T.E. KELLY, Applicant
unrepresented

DATE OF HEARING: August 14, 2000

DECISION RELEASED: August 23, 2000 Ottawa

REASONS FOR DECISION

A hearing was held on August 14, 2000, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (AHTA@ or the AAct@).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the *Act*).

The Registrar of Motor Vehicles (the *Registrar*), made an order under section 55.1 of the *Act* to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Marc T. E. Kelly (the <i>Applicant</i>)
Motor Vehicle:	1989 Pontiac Sunbird LE, plate # ACMP 723 (the <i>Vehicle</i>)
Date of Appeal:	July 28, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the *Tribunal*) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the *Act*.

This matter came before this Tribunal on August 14, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

my position is to appeal the vehicle impoundment
I have attached a written explanation of the reasons as they apply to me according to the
guidelines set out in Section 22

To whom it may concern;

I wish to appeal the decision to impound my vehicle for 45 days under the reasons set out in Section 22.(3), parts a) through d) which I feel directly and honestly apply to me and my family.

In part a) the guideline says: no alternative to the impounded vehicle is available;

This directly applies to me and is significantly felt by me and my family as we live two miles to the nearest village, twenty miles to the nearest town where we regularly buy groceries and necessities. I work sixty km away from home in Renfrew, Ont.

I start work at 3:30 p.m. and work until 2 a.m., Monday to Thursday. Finding a way to and from work is incredibly difficult and two days so far I have missed work, due to an inability to get there. I have two young daughters who live with me and are in a shared custody situation with their mother. Their mother has no vehicle and does not drive. The responsibility to transport the children is solely up to me. My children and I have suffered greatly in the past two weeks without a vehicle and I wish to be granted a successful appeal to continue driving to and from work, support my children and myself, and continue to be without a situation like this in the future.

In section b) it states: the loss will be immediate, significant and lasting. This directly applies to me and my family. When my vehicle was impounded, I was in Renfrew at the time. I was without transportation to home and was forced to find a way back to Westmeath by hitch-hiking. (Extremely humiliating and inconvenient) Since that day, I have had to rent a vehicle on days where I had to go to work, and pick up my children. I cannot afford to continue renting a vehicle to go to work and go to Pembroke to buy groceries and to pick up and drive my children to their mother's home. The significant impact of the loss of my vehicle is overwhelming, and I do not see how I can continue to be without it for another 32 days. I feel that section c) would be covered in my appeal as well.

Section d), [i] states: the impact of the loss will be upon a person other than the person whose driving while his or her's driver's license was under suspension resulted in the order to impound the motor vehicle and

[ii] will not be a result of a loss by the suspended driver of the type set out in clause 2(b),(c), or (d).

Section 4 requires that I demonstrate that every reasonable option has been considered to eliminate the loss of the vehicle.

I have done everything possible to find alternate ways to pick up my children, get to work, buy groceries and after nearly two weeks without my vehicle, I am at the end of my rope and can no longer be without my vehicle without the loss of said vehicle being a threat to our health and welfare, my job, my children's well-being. I no longer have a way to get to the basics of my family's needs. I urgently plea my appeal in all truth and honesty, with respect to legislation.

I hope to hear a reply as soon as possible. Sincerely;

Marc T. E. Kelly

The Applicant testified as follows:

The Applicant was a passenger in his own motor vehicle driven by an unlicensed driver; they were pulled over by an Ontario Provincial Police officer. The occupants of the

vehicle were driven home by the police officer who intercepted them. When the Applicant attended at the police station to retrieve his vehicle, he learned that the driver in question was a person under licence suspension, pursuant to sections 41 and 42 of the Highway Traffic Act of Ontario.

The Applicant readily admits that he now knows that it is his responsibility to inquire whether a person to whom he intends to loan his vehicle is the holder of a motor vehicle licence; he also admits that he merely assumed that the proposed driver was a licensed driver without making any inquiries whatsoever. His assumption was based upon the fact that he had seen the person in question driving another vehicle at various times in the recent past. The driver in question was a new acquaintance whom he did not really know.

The Applicant lives approximately two miles (3.2 kms.) from the hamlet of Westmeath, Ontario in a rural area; he works in Renfrew approximately 60 kms. from his home.

The Applicant's family consists of two young daughters and he enjoys shared custody of them, periodically, and at extended times during each month; the mother of his two daughters lives approximately 25 kms. away; the Applicant used to pick up and deliver the children himself using his vehicle, as the children's mother did not have an automobile; she got a car shortly after the Applicant's motor vehicle was impounded and she now assumes "pick up and delivery" of the children.

The Applicant testified that his job is not threatened but that it was incredibly difficult for him to get to and from work and that he now had no way to get to town for groceries or to the hospital for medication for one of his children who has an asthma condition; upon cross-examination, he admitted that he picks up his groceries using his parents' car; upon cross-examination he also stated that if a threat to the health and safety of his children arose, either with respect to running out of medication or for an emergency, he could and would, either call his parents or get an ambulance .

The Applicant has traveled to his work with his brother, who works in Pembroke, but he states that he cannot rely on him, as they work different shifts. Although the Applicant did miss eight (8) days of work, it happens that those days were during his employer's scheduled holidays and that he volunteered to work during the rest of the holidays to enhance his image at his new job and because he needed the money; he has not missed any regular employment days; he borrows (rents) his parents' car although this is very embarrassing to him and inconvenient for them; he borrowed a car to attend at the hearing.

The Applicant admits that he has not considered the possibility of renting an automobile from a rental company.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Tyson R. Forstner;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 17, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relevant facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to the first issue filed: the evidence established that the Applicant misapprehends the meaning of the phrase "exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension"; he understood this to mean that he could assume that the proposed driver was a licensed driver by the mere fact that he had seen him driving a motor vehicle often, recently, and that he did not need to ask for proof of his possession of a valid motor vehicle licence to drive or to inquire from the Registrar of Motor Vehicles whether the proposed driver was the holder of such a licence, and if not, to inquire whether the reason for not having such a licence was as a result of a conviction of a Criminal Code of Canada offence as contemplated by sections 41 and 42 of the Highway Traffic Act of Ontario.

With respect to the second issue filed: Whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Applicant has demonstrated that he has been able to cope; the Applicant has made use of various alternatives to get to work; his brother, his parents, as well as the mother of his two daughters, pick up and deliver his children to him when he does not have the use of his parents' vehicle. He has established that he does have alternatives and that he is using them to the maximum. The gist of the Applicant's submissions with respect to this issue is to the effect that it's a constant stress for him to find alternatives...it's just too much."

The Applicant has not met the "exceptional hardship" threshold to support his appeal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jean-Marc Lefebvre,
Presiding Member

RELEASED: August 23, 2000

DANNY'S PLACE SUPPORT SERVICES a.k.a. ONYEKA VENTURES

CHILD AND FAMILY SERVICES ACT
Revised Statutes of Ontario 1990, Chapter C.11
Section 197(2) as amended by the Licence Appeal Tribunal Act,
1999, S.O. 1999, Chapter 12, Schedule G.

IN THE MATTER OF
DANNY'S PLACE SUPPORT SERVICES a.k.a. ONYEKA VENTURES

AND IN THE MATTER of the PROPOSAL by
Director, under the *Child and Family Services Act*
TO REFUSE TO RENEW THE LICENCE
- Proposal dated: July 4th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DANNY'S PLACE SUPPORT SERVICES
a.k.a. ONYEKA VENTURES

Applicant

- and -

DIRECTOR, under the *CHILD AND FAMILY SERVICES ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on August 21, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Wednesday, September 6, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 24, 2000

PREHEARING

CHADO'S AUTO BODY INC. and CHARLES HAGE-AOUN

APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE
INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES
91(a) AND (e) AND CLAUSES 93(a) AND (c) OF THE *HIGHWAY
TRAFFIC ACT* R.S.O. 1990, CHAPTER H.8 AS AMENDED

To revoke Chado's Auto Body Inc. registration as a Motor Vehicle
Inspection Station and Charles Hage-Aoun's registration as a Motor
Vehicle Inspection Mechanic

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: Mark K. Habib, Counsel, representing the Applicants

Patrick Moore, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF HEARING: August 23, 2000 **(By teleconference)**

ORDER

Following attendances on August 23, 2000 at a pre-hearing before this Tribunal of Mark K. Habib, Counsel, on behalf of Chado's Auto Body Inc. and Charles Hage-Aoun (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on October 3, 2000, and to proceed if necessary, on October 4, 2000 at Gillespies Reporting Services, 200 Elgin Street, 9th Floor, Ottawa, Ontario;

1. The Parties to the hearing are

- (a) Chado's Auto Body Inc;
- (b) Charles Hage-Aoun; and
- (c) The Director

2. The Applicant, Charles Hage-Aoun, shall pay a filing fee of \$100.00 in respect of his appeal to the Director's Notice of Proposal, dated July 7, 2000. The Applicant, Chado's Auto Body Inc. has already paid its filing fee in respect of its appeal to the Director's Notice of Proposal.

3. The parties present at the pre-hearing recorded that there was no resolution of the issues raised in the Director's Notice of Proposal of July 7, 2000
4. The issues to be dealt with at the hearing shall be confined to the grounds stated in the Director's Notice of Proposal of July 7, 2000, namely:
 - (a) The Applicants made false statements in the issuance of Safety Standard Certificates; and
 - (b) The Applicants failed to comply with the *Highway Traffic Act* R.S.O. 1990, Chapter H (8), as amended and the regulations thereto, as alleged in the Director's Notice of Proposal of July 7, 2000.
5. The parties shall make disclosure as required by Rule 6 of the Rules of Practice of the Tribunal.
6.
 - (a) The Applicant's intend, at this time, to call possibly three witnesses to testify at the hearing including Charles Hage-Aoun.
 - (c) The Director intends, at this time, to call the following persons to testify as witnesses at the hearing:
 - Robert Riddel
 - Bert McInnes
 - Mete Kocygit

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: *August 23, 2000*

0149/ADLS/00/013

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: August 4, 2000 Toronto

DECISION

A hearing was held on August 4, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: August 8, 2000

0149/ADLS/00/013

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: August 4, 2000

DECISION
RELEASED: August 8, 2000 Toronto

REASONS FOR DECISION

A hearing was held on August 04, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 8, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 13, 2000, and was received by the Tribunal on July 13, 2000, together with the prescribed fee of \$100.00.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Respondent requested that the record be noted that the Applicant's medical information, i.e. page 2 of the Notice of Appeal and the report from Physician # 1 were filed late. So noted.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal – Page 1 of 2 - dated July 13, 2000
- Page 2 of 2 – dated July 31, 2000
- b) Exhibit #2 Notice to Registrar – dated June 30, 2000
- c) Exhibit #3 Letter from the (place of employment) – received July 13, 2000
- d) Exhibit #4 Workplace Safety and Insurance Appeal Application
- dated August 10, 1999
- e) Exhibit #5 Medical letter from Physician # 1 – dated January 7, 1999
- received August 2, 2000

By the Respondent:

- a) Exhibit #6 Ministry of Transportation submissions – 15 pages
- received July 31, 2000
- b) Exhibit #7 Videotape of the breath testing session – received August 2, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver’s licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant’s driver’s licence was suspended “June 30 2000” as set out in the Applicant’s Notice of Appeal. (Exhibit # 1)

An undated letter from (place of employment) confirms that the Applicant has been an employee *"...since 1994."* The signator, whose signature is illegible goes on to state that: *"...Before that he employed as an Appliance Refrigeration Technician... he was exposed to poisonous fumes... developed breathing difficulties which have symptoms similar to asthma..."* (Exhibit # 3)

An appeal application to the Workplace Safety and Insurance Appeals Tribunal indicates that the Applicant filed an appeal with the said Tribunal on August 10, 1999. (Exhibit # 4)

Page 2 of the Notice of Appeal, dated July 31, 2000, was prepared by Physician # 2, the Applicant's physician for 11 years. Physician # 2 verifies the Applicant suffers from *"...Acute anxiety and panic attacks related to low level odours and exposure; shortness of breath; allergic rhinitis; long standing since 1989."* (Exhibit # 5)

Physician # 2 lists the last visit to the office had occurred on 'Nov 30/98' when the Applicant was *"...referred to Physician # 3"* (Exhibit # 5)

A letter from Physician # 1, Occupational Services Program, dated January 7, 1999, specifies *"...history of recurrent anxiety, shortness of breath and intolerance to odourants ...He finds that he is now bothered by a variety of odourants such as hair sprays and pesticides... Physician # 4, an allergist/immunologist... felt that he had somatization with panic attacks ...Physician # 5, a neurologist ...could not find any underlying abnormality ...saw a respiratologist ...asthma ...was also negative ...does have allergic rhinitis both seasonal and perennial... referred him to Physician # 6, a psychiatrist..."*(Exhibit # 5)

The Respondent provided the following Documents:

- Notice to Registrar.
- Driving Record
- Vehicle Record
- Synopsis of Constable Officer # 1, Badge # (number), Toronto Police Service
- Videotape of Breath Testing Session.

Applicant's driver's record shows no infractions. (Exhibit # 7)

Synopsis of Constable Officer # 1, Badge # (number), Toronto Police Service, indicate that he turned the Applicant over to *"...PC Officer # 2 # (number), a qualified breath technician ...the accused made several attempts but failed to provide suitable samples of his breath..."* (Exhibit # 7)

At the hearing, the Applicant read a prepared statement. The Applicant described the incident that led to the collision and subsequently to the suspension of his licence. On his way home from work, the Applicant was involved in an accident. The Applicant testified that he was shook up after avoiding a *"...major..."* collision, and that he *"...repeatedly told the officers..."* he was having difficulties. Nonetheless, *"...the policemen were ignorant and ignored..."* his condition.

The Applicant further testified that while in the small room at the police station, he was feeling out of breath, but feels he was not understood by the officers. The Applicant asserted that after he got home and took a shower everything was back to normal.

The Applicant testified that he sees his physician three to four times a week. He did not see Physician # 2 after the incident as Physician # 2 was sick. He saw many doctors, but was only able to obtain the report on July 31, 2000.

The Respondent relied on the written information provided for the hearing, as well as on the testimony of PC Officer # 2, and the videotaping of the breathalyzer session at the station.

PC Officer # 2 testified that he is a qualified breath technician and has been since February 2000. PC Officer # 2 related the information provided to him by PC Officer # 1, and summarized his dealings with the Applicant.

The Applicant was given several opportunities to provide a breath sample, but failed to do so. PC Officer # 2 did not notice any breathing difficulties on the part of the Applicant and notes that the Applicant, *"...did not appear to be out of breath..."*

A videotape of the test showed that the Applicant claimed he is suffering from poisoning and his gums have been damaged as a result. The Applicant's ability to speak and the timbre of his voice exhibited no indication that he was short of breath.

At one point, the Applicant appeared to collapse and was assisted by PC Officer # 2.

APPLICATION OF THE LAW TO FACTS:

The Tribunal accepts and considered the Applicant's medical reports as evidence. Although the Respondent requested that the record be noted, no formal objection was raised by the Respondent as to admissibility.

Further, the Tribunal notes that the videotape of the breathalyzer session entered in evidence by the Respondent was submitted on the same day as the Applicant's reports.

At issue is, how does the medical condition of the Applicant relate to section 50.1 (2) (b) of the HTA, and did this medical reason cause him to fail or not comply with the breath demand. By section 13 of Regulation 574 (amended), the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed the "Applicant's Medical Information" prepared by the Applicant's physician on July 31, 2000, and the report from Physician # 1, dated January 7, 1999. The Tribunal concurs with the Respondent. It is hard to accept that the Applicant has severe breathing difficulties, for which he *"...sees a physician three or four times a week..."*

Physician # 2 diagnoses the Applicant with *"...Acute anxiety and panic attacks related to low level odours and exposure; shortness of breath; allergic rhinitis; long standing since 1989"*. Physician # 1 lists the various specialists seen by the Applicant *"...Physician # 4, an allergist/immunologist... felt that he had somatization with panic attacks ...Physician # 5, a neurologist ...could not find any underlying abnormality ...saw a respirologist ...asthma ...was also negative ...does have allergic rhinitis both seasonal and perennial..."* (Exhibit # 5)

Neither physician suggests the Applicant suffers from any respiratory condition, other than possible shortness of breath brought on by anxiety and panic attacks.

PC Officer # 2, affirmed that he did not, at any time, during the test, observe the Applicant to be out of breath. The videotape of the session corroborates PC Officer # 2's testimony. There is no indication from the Applicant's voice and demeanour that he was experiencing breathing difficulties, of any type.

During his last attempt to provide a breath sample, the Applicant appeared to collapse and was assisted by PC Officer # 2. The Tribunal finds the Applicant's instantaneous recovery incongruent with a collapse caused by medical reasons. The evidence supports PC Officer # 2's suggestion that the Applicant's apparent collapse was "...theatricals" on the part of the Applicant.

In assessing the Applicant's testimony at the hearing, the Tribunal is not satisfied as to its credibility. The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated June 30, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 23, 2000

BORG

GENE E. BORG

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT* TO REFUSE
REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

ALAN W. WINTERMUTE, Agent, representing the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

May 11, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Notice of Proposal dated January 11, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Gene E. Borg (the "Applicant") as a motor vehicle salesperson under the provisions of the Act. By Hearing Request Form dated February 11, 2000, the Applicant requested a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal), (the "Tribunal").

REGISTRAR'S POSITION

The particulars of the Applicant's past conduct which the Registrar found to be inconsistent with the intention and objectives of the Act are firstly set out in the Notice of Proposal to Refuse Registration dated January 11, 2000 and are as follows:

On the application of the Applicant for registration as a motor vehicle salesperson made on or about October 15, 1999, the Applicant answered "yes" to Question 9 which asks "Have you ever been found guilty or convicted of an offense under any law or are there any charges pending? This includes where a conditional discharge or absolute discharge has been ordered." The Applicant attached a one-page schedule to his application disclosing one conviction.

Subsequently, on or about December 20, 1999, the Registrar received further disclosure for the Applicant.

After running a criminal history check, it came to the Registrar's attention that the Applicant has the following convictions, which include but are not limited to:

- (a) possession of stolen property - July 2, 1980;
- (b) public mischief - March 22, 1982;
- (c) possession of property obtained by crime (2 charges) - October 7, 1987;
- (d) fraud - October 7, 1987;
- (e) failing to comply with recognizance - January 12, 1990;
- (f) failing to comply with recognizance - September 16, 1998; and
- (g) assault - November 20, 1998.

By Notice of Further or Other Particulars dated April 10, 2000, the Registrar gave notice to the Applicant that further information had come to the attention to the Registrar relating to the fitness for registration of the Applicant which further particulars are as follows:

1. the Applicant was previously registered as a motor vehicle dealer operating as Quinte Auto Sales from October 11, 1990 to October 11, 1992 at which time the registration lapsed;
2. a further application was submitted in November 1992 but the application was abandoned; and
3. the Applicant did not disclose his criminal record on the application submitted to the Registrar's office in 1990 and 1992.

THE EVIDENCE:

Mary Jane South, Deputy Registrar and Director of Operations of the Ontario Motor Vehicle Industry Council ("OMVIC"), after testifying with respect to the purposes of the Act and OMVIC's role with respect thereto, referred to the criminal record check at Tab 4 of the Book of Disclosure which had been entered as Exhibit 3 in these proceedings. Ms. South explained that where the criminal record check does not agree with an application received by OMVIC, OMVIC sends a copy of the criminal record check to the Applicant seeking an explanation for the discrepancy and the correspondence at Tab 5 of Exhibit 3 is the response from the Applicant to his criminal record provided by OMVIC.

Tab 7 of Exhibit 3 contains a copy of the first application of the Applicant dated September 28, 1990, where the Applicant answered "no" to Question 7 which is similar to Question 9 on the current application which, based upon the recent criminal record check, is an untrue answer. Ms. South testified that at the time that the September 1990 application was made, a record check was not done on every applicant.

Tab 6 of Exhibit 3 contains a copy of the application made by the Applicant in 1992 where, in response to Question 10 which is, again, similar in wording to Question 9 on the present application, the Applicant answered "no" with respect to convictions. Ms. South noted that there is no record as to what happened to this application, and it appears that it was abandoned.

In her testimony, Ms. South noted that in the addendum to the Applicant's current application, as an explanation as to why he answered "yes" to Question 9, the Applicant made reference to only one criminal charge being the assault charge and stated that this "...related to ongoing divorce. Appeal pending." but made no reference to the previous charges.

On cross-examination, it was acknowledged that the Applicant had stated that his birthday was August 14, 1963 and that at the time of the first charge, July 20, 1980, he would have been 16 years old and at the time of the second charge, March 20, 1982 for public mischief, the Applicant would have been 18 years of age.

The agent for the Applicant then suggested that under the *Young Offenders Act* certain convictions may not form part of a criminal or were removed if the accused did not re-offend within five years and perhaps the Applicant believed the earliest convictions were not part of his record. Ms. South testified that there had been a change in the wording of Question 9 from the previous applications to avoid such confusion.

The witness then confirmed that there were only two categories of registration, motor vehicle dealers or motor vehicle salespersons. When questioned regarding who could attend motor vehicle auctions, Ms. South acknowledged that one must be registered under the Act. Ms. South was then questioned with respect to the need for the same level of public protection if one was acting only as a "wholesaler" buying and selling at automobile auctions as opposed to dealing in the retail sector selling to consumers. Ms. South stated that there is no distinction for the purposes of registration. Ms. South did not agree with the assertion that there was not the same need for safeguards. When asked about the possibility of attaching terms and conditions to the registration of the Applicant, Ms. South responded that the Registrar did not believe that the Applicant would comply with such terms and conditions.

The Applicant testified that he had completed and signed the 1990 application and that he had completed and signed the 1992 application. With respect to the current application, the Applicant acknowledged that it was his signature but that he had been assisted by the sister of the owner of G.W. Motors and it was she who issued the cheque in payment of the application fee. The Applicant testified that the page attached to the application as an addendum setting forth the particulars of the assault conviction was one of two pages that were to have been attached, however, the other page which contained reference to other of the criminal charges had gone missing.

With respect to the various offenses, the Applicant testified that at the time he committed the offence for which he was convicted in 1980, he was 15 years old and that he had a solicitor who advised that he plead guilty. The same was true for the 1982 offence which occurred when he was 18 years old. The Applicant stated that at the time he was charged in 1987, he only spent half a day at the police station and was released on his own recognizance. His conviction for this offence, which was with respect to the possession of miscellaneous car parts, resulted in probation and he did not serve any time in prison.

The Applicant stated that he was not aware of the 1990 charge for failure to comply with recognizance and that with respect to the 1998 assault charge, it had been appealed and he had received a conditional discharge with probation and a prohibition regarding firearms, etc., for five years. It was the Applicant's testimony that he left a two page summary of his convictions with G.W. Motors who was to forward it together with a photocopy of his passport and a cheque. When the Applicant was contacted by Nita Castro, on the behalf of OMVIC, the Applicant provided the disclosure at Tab 5 which was similar to the missing page which was to have been affixed to the application.

Mr. Borg testified that he worked as an evaluator, attending at motor vehicle auctions and providing advice with respect to what cars to be purchased as he had some expertise with respect to used motor vehicles. The Applicant stated that he had taken mechanic's courses, however, he did not have a certificate. He worked part-time in the body shop and did miscellaneous jobs at the dealership. The Applicant indicated that he needed the registration in order to obtain regular employment and that when previously registered, he had been selling to the public and had received few, if any, complaints and those received were minor and were dealt with immediately.

Under cross-examination, Mr. Borg testified that he had had a serious snowmobile accident during the period of his earlier registration and that he had been unable to work. More recently, the Applicant stated he had been divorced and there were numerous court attendances with respect to those proceedings.

When questioned regarding the application at Tab 3, the Applicant repeated his testimony that he had been assisted by the sister of Mark Harris, an owner of G.W. Motors, but she was not available to attend this hearing. Efforts to locate the missing page had not been successful. He testified that the one page that was attached to the application was in the sister's handwriting.

Mr. Borg testified that he contacted Nita Castro after receiving messages that she had called G.W. Motors several times and, as two other applications which were made by the same dealer at the same time had been processed, Mr. Borg called to learn what, if anything, could be done to speed up his application. It was Mr. Borg's evidence that the letter appearing at Tab 5 of Exhibit 3 was typed out with the assistance of his previous lawyer's secretary and had been faxed to OMVIC and provided to Mark Harris who had read the letter and signed the bottom as it appears in Exhibit 3.

Mark Harris gave evidence on behalf of the Applicant. He stated that G.W. Motors was a small dealer of used cars in the retail and wholesale area and that the business was currently operated by him, his sister and his wife. Mr. Harris came to Canada in 1993 and came to know Mr. Borg through his sister who had had previous dealings with the Applicant. Mr. Harris testified that the dealership was dealing more with wholesale than retail sales and that they were looking for someone to assist with sales. Mr. Harris testified that they buy some vehicles from leasing companies but most are purchased at motor vehicle auctions.

Mr. Harris confirmed that he had signed the notation made, possibly by his wife, on the letter at Tab 5. He saw no reason why Mr. Borg should not be brought into what is essentially, a family operation. Mr. Harris testified that he had seen all the pages containing the application at Tab 3 of Exhibit 3 prior to signing the document on behalf of G.W. Motors. Mr. Harris confirmed that the application for Mr. Borg was mailed together with two other applications by his wife, Fiona Harris.

It was Mr. Harris' testimony that he viewed the majority of the convictions against Mr. Borg as being youthful mistakes which he did not find to be a reason not to hire the Applicant. Mr. Harris indicated that there had been no specific discussion with respect to with the Applicant's duties at the dealership.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

The Applicant answered Question 9 with respect to his criminal history in the affirmative, but the particulars provided made reference only to the most recent conviction and did not disclose prior convictions.

In his original application of September 1990, the Applicant answered a similar question in the negative even though at the time he had at least three convictions of which he was aware.

In making his application in 1992, the Applicant, once again, answered a question with regards to his criminal history in the negative even though the same three charges were known to him.

ISSUE:

The issue before this Tribunal is whether or not the Registrar has erred in proposing to deny the registration of the Applicant under the Act.

THE LAW:

The authority granted to the Registrar is provided in subsection 5(1)(b) of the Act which states:

Section 5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of Gene Borg should be refused.

This Tribunal must determine whether the past conduct of the Applicant provides the Registrar with reasonable grounds for the belief that the Applicant will not carry on business as required by section 5(1)(b) of the Act. It is the Registrar's belief which is at issue in these proceedings not that of the Tribunal.

In order for the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations.

The Registrar's concern with respect to the past conduct of the Applicant is twofold:

1. The Applicant, on two occasions, failed to disclose his criminal record and on the third occasion, disclosed only the most recent conviction which was for assault which could, arguably, not be directly related to the Applicant's activities as a motor vehicle salesperson if his registration was accepted.
2. Certain of the convictions are for offences which, by their nature, are of direct concern to the Registrar those being possession of stolen property, possession of property obtained by crime over \$1,000.00 (two charges) and fraud.

Although the Applicant suggested that there was confusion as to whether the first two convictions were still part of his criminal record, the Applicant chose not to disclose those convictions or to make inquiries in order to determine whether those convictions were still part of his criminal record.

The Tribunal gives no weight to the argument that the Applicant was only going to act as a salesperson at motor vehicle auctions as someone dealing in the wholesale area today might move to the retail area tomorrow and the registration would still be valid. Further, the evidence of Mr. Harris, who would be the Applicant's employer, was that the Applicant would carry on general duties at the dealership, and there was no suggestion that those activities would be limited solely to purchasing vehicles at auction.

DECISION AND ORDER:

In applying the evidence placed before to the relevant legal principles, the Tribunal finds that the past conduct of the Applicant did afford reasonable grounds for Registrar to believe that the Applicant will not carry on business in accordance with the law and with integrity and honesty.

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to carry out the Registrar's proposal dated January 11, 2000 to refuse the registration of Gene E. Borg as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: August 25, 2000

EASTERBROOK, BASIL and EASTERBROOK, JUSTIN and 1159274 ONTARIO LTD.
o/a THRIFTY AUTO SALES

1159274 ONTARIO LTD. O/A THRIFTY AUTO SALES AND
BASIL EASTERBROOK AND JUSTIN EASTERBROOK

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLES DEALERS ACT*

TO REVOKE THE REGISTRATIONS

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES: IAN BRADY, Counsel, representing the Applicants
MITCHELL GOLDBLOOM, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: August 9, 2000 Kingston

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing before the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal), arises out of a Notice of Proposal dated May 1, 2000 issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar, and the "Act" respectively).

1159274 Ontario Ltd. was incorporated in 1997 and carries on business as Thrifty Auto Sales ("the company"). It has two directors: Basil Easterbrook, who is the president, and Eleanor his wife, who is secretary-treasurer. A previous business which was started for an older son has been sold and this company business was started for the benefit of the younger son, Justin, who is 21 years old.

The father, Basil, who is 76 years old, has been in the auto trade business for some fifty years. The son Justin, has been around the business since he was 4 or 5 years old. All the family savings are now in Thrifty Auto Sales which has 11 full time employees.

Some records that would have been useful were not produced during the hearing. The Applicants only retained their counsel that day.

FACTS:

The Registrar proposed to revoke the registration of 1159274 Ontario Ltd. o/a Thrifty Auto Sales as a motor vehicle dealer and to revoke the registration of Basil Easterbrook and Justin Easterbrook as salespersons. The reasons relied on by the Registrar for the proposal are as follows.

The intention and objective of the Act is to protect the public interest. The requirements of the Act include that Registrants be financially responsible in the conduct of business and that Registrants carry on business in accordance with the law and with integrity and honesty. The registrants' past conduct is inconsistent with the intention and objective of the Act, and therefore warrants disentanglement to registration under the Act. Therefore, the Registrar is unwilling to continue the registration of 1159274 Ontario Ltd. o/a Thrifty Auto Sales and Basil Easterbrook and Justin Easterbrook.

PARTICULARS:

The reasons for the proposal are:

- 1) 1159274 Ontario Ltd o/a Thrifty Auto Sales has been registered as a motor vehicle dealer pursuant to the Motor Vehicles Dealers Act since on or about September 10, 1996.
- 2) Justin Easterbrook is a salesperson registered to the dealer. Justin Easterbrook has been registered under the Act since on or about June 2, 1997
- 3) On or about March 8, 2000 the dealer purchased a vehicle, vehicle identification number (VIN) 1GNDX06E1VD123703 with an odometer reading of 59,192 km and a declaration that the odometer is defective. The Dealer subsequently sold the vehicle but did not disclose that the odometer was defective.
- 4) On or about March 9, 2000 the Dealer through its salesperson Justin Easterbrook purchased a motor vehicle, VIN 3H1JF12T1VS843990 with the disclosure that the vehicle was accidented and repaired and had structural damage. The Dealer subsequently sold the vehicle without any disclosure.
- 5) On or about March 8, 2000 the Dealer purchased a motor vehicle VIN 12GCHK33F8WF032061 with the disclosure that the vehicle was accidented and repaired and had structural damage. The dealer subsequently sold the vehicle without any disclosure.

THE ISSUE:

With respect to the individual Applicants, the legal issue is whether their past conduct is such that the Registrar had reasonable grounds to believe that the Applicants would not carry on business in accordance with the law and with honesty and integrity. With respect to the corporation, the issue is whether the past conduct of its directors affords reasonable grounds for belief that its business will not be carried out with integrity and honesty.

THE LAW:

Under Section 5(1) of the Motor Vehicle Dealers Act, an Applicant is entitled to registration by Registrar, except where:

Section 5(1)

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with the law and with integrity and honesty;

Sections 7(4) and 7(5) set out the powers of the Tribunal at a hearing:

Section 7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Section 7(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

EVIDENCE:

There is no dispute about the evidence itself. The dispute between the parties is about its significance.

Both individual Applicants gave their evidence in a straightforward manner which is to their credit. It is clear that Justin, who is a registered salesperson, was given full authority to bind the company buying and selling motor vehicles at auctions where only registered salespersons people representing dealers are allowed to trade. Half of the buying for the company was done by Justin who has bought and sold about 50 to 60

cars a month during the current year. (This is a rate of several millions of dollars a year).

The three vehicle transactions complained of by the Registrar were at auctions.

On March 8, 2000 at the Adesa auction in Montreal, GMAC sold a 1997 Venture van for \$10,600.00 to Thrifty Auto Sales. On the sales agreement was the following notation.

"DEFECTIVE ODOMETER/ODOMETRE DEFECTIVE 59,192 KM AND MORE" .

Six days later Thrifty sold this vehicle, at the Toronto Auto Auctions for \$14,000.00 without any disclosure. In the meanwhile Justin had obtained and installed a used odometer with a reading of 57,652 .

Justin testified that he thought the odometer reading marked on the sales contract to Thrifty from GMAC looked about right as compared to the condition of the vehicle, but on cross examination admitted he could not say if the vehicle had 150,000 Km or 250,000 Km. His father, Basil Easterbrook, admitted the profit on the resale was larger than usual.

Also at the Adesa auctions in Montreal on March 8, 2000, Justin procured for Thrifty Auto Sales a 1998 Cheyenne from GMAC for \$19,600.00. Marked in capital letters on the sales contract was:

"ACCIDENTED AND REPAIRED FRAME DAMAGE..... STRUCTURAL DAMAGE"

The vehicle was resold in the Brampton auctions on April 5, 2000 for \$22,300.00. There was no disclosure made to the buyer about the accident, repairs or frame and structural damage. Consequently, the buyer bought the vehicle without being aware of the potential problems.

The profit was larger than usual according to Basil Easterbrook. He took the position that this sort of disclosure warning could be triggered simply by paint damage or a crimped unibody from a garage hoist. If there is real damage, he said, there are signs to look for such as welding, misaligned doors or hood and so on.

On March 9, at the Adesa auction in Vars, GMAC sold a 1997 Cavalier for \$8300.00 to Thrifty Auto Sales. Marked on the sales contract was,

"SOLD AS IS / VENDU TEL QUE TEL ACCIDENTED & REPAIRED"

Five days later, Thrifty sold the same vehicle for \$10,400.00 without disclosing anything. In the meanwhile, if the usual procedure had been followed, as long as no problems had been found on the inspection by their unlicensed mechanic and bodyman, the vehicle would be released for resale without the warning Thrifty had received. But no supporting records were produced by the Applicants to show this was in fact done although they have these records respecting time and parts used. In addition, Justin claimed that the GMAC representative said they had a policy to over declare to prevent recourse.

Basil Easterbrook agreed the profit was larger than usual, the average expense on a motor vehicle bought at auction being \$800.00. He emphasised that although not licensed, the mechanic who inspected the vehicles had been a long-term employee.

Justin said that the bodywork man was licenced. Had there been more than paint damage on any vehicle purchased, apart from a more thorough inspection, it called for the history which would have been obtained.

After the Registrar complained, Basil Easterbrook went through some of Justin's other transactions in the last three years and found two or three other similar discrepancies.

Justin testified he knew that these non-disclosures were wrong. The Toronto Auto Auctions have forbidden him to go to their auctions for six months.

On the other side, telling testimony was given by Aviva Harari for the Registrar. Her experience has been as counsel to the Registrar, as a manager and as an inspector. With great clarity she set out the significance of what had taken place and in that respect the Tribunal is entirely in agreement. These were serious infractions.

APPLICATION OF LAW TO FACTS:

The onus is on the Registrar in this hearing to justify the proposal being reviewed.

The test is set out in the leading case of Brenner and the Registrar of Motor Vehicle Dealers and Salesmen CRAT SCO Decision and Orders (1971-1989) as follows:

The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for belief that Brenner would not carry on business in accordance with the law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In Re Herman Motor Sales Inc and the Registrar of Motor Vehicles Dealers and Salesmen (1980) 29 OR 431 the Court made the point that in the experience of mankind, when assessing the probable future action of men, some reliance may properly be placed on the past act of the individual to be assessed. It then turned its attention to the importance of odometer readings. The Court stated that there can be no doubt that the readings form the basis for assessment in value of most vehicles. To tamper with the odometer readings must be considered seriously and must constitute a grave breach of the duty of the dealer. This statement by the Court underscores the fact that the odometer reading in motor vehicle dealings is central to consumer protection in the industry.

In the three transactions complained of, the Tribunal finds that the past conduct of Justin is inexcusable. It was clearly the type of conduct proscribed by the Act. The odometer infraction was grave, but the other two are potentially more serious as non-disclosures of accidents, as well as frame and structural damage, affect both price and safety.

Justin has done a great disservice to himself, and to his father and mother by bringing the whole business and his father's livelihood into jeopardy.

The situation with Basil Easterbrook is different. He is 76 years old, and has been in the business for fifty years without a blemish as far as is known. He was obviously irresponsible and sloppy by giving Jason such wide ranging responsibilities without a close scrutiny. How effective such a scrutiny would have been is hard to assess because until new draft standards were recently brought to his attention, the father did not believe that there was the same obligation of disclosure to dealers as there was to retail customers.

To revoke Basil Easterbrook's or Thrifty Auto Sales' registration, or to suspend them for a period of time would effectively destroy the business. On the other hand, there is no reason why known buyers who purchased without the full disclosure they should have had, should not be reasonably compensated .

DECISION:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal dated May 1, 2000 with respect to Justin Easterbrook to revoke his registration as a sales person. He can apply for registration in the future at the discretion of the Registrar.

With respect to the company, 1159274 o/a Thrifty Auto Sales within thirty days it is to notify the present owners of the three motor vehicles in the transactions complained of, giving them the particulars of the disclosure that should have been made. Copies of these notifications are to go concurrently to OMVIC.

With respect to Basil Easterbrook, subject to his taking and passing the certification course approved by the Ontario Motor Vehicle Industry Council for salespersons by the end of the year, his registration is to continue.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: August 25, 2000

RUNNALLS

ROSS RUNNALLS

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE MOTOR VEHICLE DEALERS
COMPENSATION FUND

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: ROSS RUNNALLS, representing himself,
LARRY A. BANACK, Counsel, representing the Board of Trustees
of the Motor Vehicle Dealers Compensation Fund

DATE OF HEARING: June 7, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) from a written decision of the Board of Trustees of the Motor Vehicle Dealers Compensation Fund (the "Board") dated December 14, 1999, wherein the Board denied the Applicant's claim as the Applicant did not appear to have suffered a pecuniary loss arising from a transaction involving a trade-in of a motor vehicle.

The basic facts giving rise to the claim of the Applicant are not in dispute and may be summarized as follows:

1. By agreement dated February 25, 1999, the Applicant agreed to purchase from Monster Deals of Waterloo, Ontario a 1997 beige Chevrolet Malibu (the "Malibu") showing a distance travelled of 7,020 (presumably kilometers although neither box was marked on the contract) for a purchase price of \$12,500.00 plus provincial sales tax of \$1,000.00, GST of \$875.00 and a registration fee of \$70.00 for a total acquisition cost of \$14,445.00.
2. The Applicant experienced problems with the vehicle and took it to a GM dealer to have certain warranty work done to the vehicle and was advised that the vehicle, contrary to the representations made to the Applicant by the salesperson at Monster Deals, was no longer under warranty as the vehicle had been written off due to a prior accident. The Applicant had various repairs made to the vehicle and ultimately traded the Malibu for a

1997 Buick LaSabre (the "Buick") which had a sale price of \$23,788.00 and received a trade-in credit for the Malibu of \$14,168.00.

POSITION OF THE PARTIES:

It is the Registrar's position that the Applicant purchased the Malibu for \$14,445.00 from Monster Deals, spent \$2,300.00 in repairs, drove the vehicle for 5,000 kilometers, traded it in to Kerr Cadillac Pontiac Buick Inc. ("Kerr Cadillac") and received a credit of \$14,168.00 for the vehicle and a \$2,100.00 savings on GST and PST. Therefore the Applicant has not suffered a pecuniary loss.

It is the Applicant's position that, because he was not told the vehicle had been written off, he incurred repair costs which he should not have had and ultimately had to trade the vehicle and received less for the vehicle when trading it in. The loss experienced on the trade-in together with the cost of repairs is \$7,540.10 and he claims the amount of the Kitchener Small Claims Court judgment he obtained against Monster Deals of \$6,100.00.

THE EVIDENCE:

At the commencement of the hearing, the Board's document brief was entered as Exhibit 3 and the Applicant's brief of documents was entered as Exhibit 4.

The Applicant testified that he purchased the 1997 Malibu for \$12,500.00 and believed the vehicle to be in excellent condition with low mileage (approximately 7,500 kilometers). He was advised that it had been in a minor accident but was under warranty. The Applicant did not drive the vehicle prior to purchasing it.

The Applicant referred to the letter written by the Applicant to the Board dated January 6, 2000, where he summarized his loss which is comprised of three components:

- (a) the sum of \$2,365.10 being the amount paid to Miltowne Collision Inc. for repairs made to the vehicle on or about July 5, 1999;
- (b) the amount he overpaid in acquiring the Buick to replace the Malibu, which overpayment is alleged to be \$5,095.00 based upon the Red Book values for the Buick and for the Malibu; and
- (c) an administration fee of \$80.00,

for a total of \$7,540.10.

In the Application for Claim (the "Application") completed by the Applicant, the Applicant claimed the amount of \$6,150.00 being the amount of the judgment obtained from the Kitchener Small Claims Court of \$6,000.00 plus \$150.00 for costs.

On cross-examination, the Applicant testified that he was a semi-retired real estate agent and that his previous occupation had been working in the pension department of Confederation Life Insurance Company for approximately 30 years. At the time of his retirement, the Applicant had been a manager of that department which was responsible for administration of pension benefits for group plans. The Applicant had

worked for Royal LePage selling real estate with approximately a 50/50 split between residential and commercial real estate.

The Applicant testified that he traded-in vehicles approximately every two to three years and travelled approximately 30,000 to 35,000 kilometers per year. It was the Applicant's evidence that when considering the purchase of a vehicle, he would shop around and that his main considerations were the age of the vehicle, the mileage and if it had a factory warranty. As part of his search, he would check the newspaper and the Auto Trader to see what was available and would then determine what price he was prepared to pay for the vehicle in which he was interested. Reference was made to the advertisement attached to the Applicant's Application at Tab 1 of Exhibit 3 which is an advertisement for various vehicles being sold by Monster Deals and shows the Malibu for a purchase price of \$13,250.00 in the March 8, 1999 Auto Mart magazine.

The Applicant testified that he called Monster Deals and went to see the vehicle and felt that it was a "attractive" price and was told that the vehicle was so priced as it had been in a minor accident. The Applicant was further told that the vehicle was still under factory warranty. The Applicant was advised that the purchase price had been reduced by approximately \$2,000.00 because of the accident and without the accident, the purchase price of the vehicle would have been \$15,250.00.

The Applicant stated that he had been looking for a vehicle to purchase for a month or so but not specifically for a Malibu. He could not explain how he knew that this was good price for this vehicle as he had not been looking specifically for a Malibu but was concentrating on vehicles of a certain age and mileage. He did indicate that he may have looked in the newspaper at advertisements for Malibus to determine a price for vehicles for a certain age and mileage. The Applicant saw the Malibu on only two occasions but did not test drive the vehicle or take the vehicle to a mechanic to be checked over.

The Applicant stated that he looked at the Malibu at the showroom and sat in it. It appeared to be in good condition and was told it was under warranty. He stated that he estimated that he had spent part of an hour at the dealership. The Applicant acknowledged that he was not mechanically inclined.

During his first visit to the dealership, the price was established at \$12,500.00, and it was the Applicant's belief that he gave a deposit. However, the Applicant's bank draft to Monster Deals, which was enclosed with the Application at Tab 1 of Exhibit 3, is for the full amount of \$14,445.00. The Applicant stated that an individual by the name of Mike Brenner was the salesperson involved in the transaction and it was he that made the notation "accident damage to vehicle repaired and declared" on the contract.

The Applicant stated that he spoke to Mike Brenner approximately one month after the transaction but after that conversation, he could not find Mr. Brenner and therefore did not have any further discussions regarding the state of the vehicle with Mr. Brenner.

When questioned about the price that the Applicant paid for the Malibu, the Applicant stated that he had done a price check previously and had anticipated paying about \$1,000.00 to \$1,500.00 more. It was his evidence that a 1997 Malibu would sell for between \$15,000.00 and \$16,000.00 and that he knew that it was a good deal to buy the car for \$12,500.00 especially if a factory warranty was in place which he understood applied to the moving parts but not the body. It was his evidence that the body work appeared to be fine.

When the Applicant took the vehicle to a Chevrolet dealership for some warranty work, he was advised that the vehicle had been written-off. It was in response to this information that he wrote to Mike Brenner at Monster Deals by letter dated March 20, 1999, which letter appears as part of the Applicant's Application at Tab 1 of Exhibit 3. The Applicant made reference to the VIN Search Synopsis - Record Retrieval appearing as Item 8 in Tab 1 of Exhibit 3.

The Applicant referred to the invoice from Miltowne Collision Inc. ("Miltowne") dated June 30, 1999 and explained that he had tried to drive the Malibu for a period of time then took it to Miltowne to try and have the various problems repaired. It was his evidence that there was a "clunk" in the car but unfortunately Miltowne was not able to fix the problem as it was an internal problem. The Applicant was uneasy with respect to the performance of the vehicle and took it back to Miltowne with a variety of other problems.

The Applicant testified that from February, when he purchased the Malibu, through to July 1999, he worked full-time and that in the period between when he purchased the Malibu and traded it in, he put on the vehicle approximately 5,000 kilometers. Mr. Runnalls decided to find a replacement vehicle and started looking for a good vehicle of about the same year. He drove by several lots but only visited one dealership. He did not inquire regarding the trade-in value of the Malibu. On one particular occasion, the Applicant drove by a lot and saw a vehicle that appealed to him. However, he was advised that it was not available, and the salesperson said that he would contact the Applicant if he had something that the salesperson thought that the Applicant might wish to consider.

When asked why the invoice for the purchase of the Buick did not indicate that the Malibu had been in an accident, the Applicant testified that although he told the Kerr Cadillac salespeople that there had been accident damage repaired, he did not tell them that the Malibu had been written-off and did not tell them that there was no longer a factory warranty. He stated that he told the Kerr Cadillac salesperson that repairs had been made by Miltowne but did not tell them what work had been done. He stated that he knew that he would not receive the same value if he disclosed that there was frame damage and that the Malibu was an insurance write-off.

When questioned regarding a previous transaction, the Applicant indicated that he understood that no GST or PST was payable on the value of a trade-in when another vehicle was being purchased.

When asked with respect to certain of the statements made in the Kitchener Small Claims Court claim and particularly, reference to certain items which needed to be repaired but were too costly, the Applicant indicated that one such item was the cruise control. He acknowledged that he did not inform Kerr Cadillac about such repairs.

When questioned further about the Small Claims Court action, the Applicant stated that he was not certain whether the trial occurred before or after he completed the transaction with Kerr Cadillac. Reference was made to the notation contained in the material provided by the Applicant wherein an entry is made showing that judgment for \$6,000.00 plus accrued interest was given on the 16th day of September, 1999. The Applicant stated that he had not and would not tell the Court about the Kerr Cadillac transaction in any event as he did not believe that it was relevant.

When questioned regarding the Kerr Cadillac transaction, the Applicant stated that he knew that the Buick was higher priced than other vehicles and he had checked out the price. He said that neither the purchase price for the vehicle or the trade-in value of the Malibu mattered as the only thing that was material was the final dollar amount that he had to pay in order to acquire the Buick. When asked regarding the figures that the Applicant had taken from the Red Book, he acknowledged that he had no practical experience with respect to the use of the Red Book and that he did not check the Red Book figures prior to completing his transaction with Kerr Cadillac.

It was suggested to the Applicant that if one took the total amount paid for the Malibu of \$14,445.00 added on the amount paid by the Applicant to Miltowne of \$2,365.00, the total was \$16,810.00. When one examines the value that the Applicant received for the trade-in, he received \$14,168.00 as a credit for the trade-in plus saved himself 15% of that amount or \$2,125.20 in taxes, for a total benefit of \$16,293.20 leaving a difference of \$526.00. It was also suggested to the Applicant that he paid more for the Buick because it was a more expensive car of a higher class than the Malibu, to which the Applicant responded that he purchased the Buick as he could not find a similar Malibu.

Jack Rudnicki was called to give evidence on behalf of the Board and stated that he had been with Kerr Cadillac for approximately two years and was now sales manager of its new and used car division. He had been with Saturn for five to six years before that and prior to that, had lived in Europe. Mr. Rudnicki confirmed that he was a registered salesperson.

Mr. Rudnicki testified that he had met the Applicant at the dealership three or four times and that he had been involved in the transaction with Mr. Runnalls with respect to the purchase of the Buick. Mr. Rudnicki explained that Kerr Cadillac was an Optimum dealership and that as part of the Optimum program, a sticker was placed on each used vehicle stating the mileage and the price, and that there was not a great deal of negotiating room between the sticker price and the final selling price of a vehicle. The witness testified that he had some experience with Malibus and referred to a 1998 Malibu that they had sold which had 20,000 to 26,000 kilometers on it for a price of approximately \$16,495.00.

When Mr. Rudnicki examined the Malibu, he noted that there was over-spray and was told that there was some damage but was not told the extent of the damage done to the vehicle. When asked what value would be attached to the vehicle had Mr. Rudnicki known then what he knows now about the condition of the Malibu, he gave a price of between \$8,000.00 and \$9,000.00. The witness testified that in his opinion a party trading in a vehicle has an obligation to tell the dealer of any serious accidents with respect to the vehicle.

With respect to the application of the Red Book prices and the Applicant's calculation of his loss, the witness testified that he did not agree that the Applicant had overpaid for the Buick even though the price paid was greater than that shown in the Red Book and stated that he was buying the Buick at retail and trading in the Malibu at wholesale and therefore, the Red Book value of the Malibu was irrelevant. A dealer, when taking a car in on a trade-in, has to take into consideration the profit margin, the cost of advertising, reconditioning, etc.

Mr. Rudnicki testified that under the Optimum program there would have been little or no change in the price of the Buick and that the price did not change due to the amount allocated to the trade-in. He stated that the price of the Buick was not inflated, and the

value attributed to the Malibu was not given in relationship to the price being charged for the Buick. The value of the trade-in made no difference in the price charged by Kerr Cadillac for the Buick.

The witness testified that two days after the transaction had been completed, a technician drew to his attention stretch marks on the frame. When interior panels were removed, they noted that serious damage had occurred to the vehicle and that led them to determine that the warranty had been cancelled because the vehicle had been written-off. The salesperson involved with the transaction, Doug Outerson, called the Applicant and reported back that the Applicant claimed to be unaware of the Malibu being in an accident. Kerr Cadillac found out through the Ontario Motor Vehicle Industry Council that Monster Deals had sold the Malibu to the Applicant.

A second telephone call was placed to the Applicant by Mr. Outerson in the presence of the witness, and the Applicant repeated that he did not know that the vehicle had been written off. The vehicle was ultimately sold at an auto auction by Kerr Cadillac for \$10,000.00 as evidenced by the form appearing at Tab 11 of Exhibit 3.

Reference was made to the Black Book values for a 1997 Malibu which appear at Tabs 12 and 13 of Exhibit 3 and show, respectively, that as of February 1, 1999, the rough value for the Malibu would have been \$12,500.00 and as of August 15, 1999, that value had dropped to \$11,900.00. The witness stated that he would have offered approximately \$11,000.00 for the Malibu if he would have taken it as a trade-in.

ISSUE:

The issue in this hearing is whether or not the Applicant suffered a pecuniary loss with respect to the series of transactions described in the evidence.

THE LAW:

It is the fundamental principle of the Compensation Fund that in order for a party to make a claim to the Fund, the party must have incurred a pecuniary loss and the relevant section of the Regulations under the Act appears as part of Regulation 801 under the Schedule "Terms of Compensation Fund", section 1 "Definitions" wherein a "claim" is defined to mean:

"a claim for *pecuniary loss* arising out of a transaction involving a trade in motor vehicle (emphasis added)."

DECISION:

In the present circumstances, it is impossible to accept that the Applicant has suffered a pecuniary loss with respect to the acquisition and disposition of the Malibu.

The Applicant purchased the vehicle for \$14,445.00, spent \$2,365.00 in repairs for a total of \$16,810.00, drove it for 5,000 kilometers and received a credit when trading the vehicle in of \$14,168.00 together with a tax benefit of \$2,125.20, for a total of \$16,293.20.

The Applicant's analysis that the difference between the Red Book values for a 1997 Buick and a 1997 Chevrolet Malibu is \$5,095.00 less than the difference that he paid when trading in the Malibu for the Buick is without merit. There is no indication that he should have only paid the Red Book value for the Buick in the first instance. To use the Red Book value for the value that the Applicant should have received for the Malibu ignores the fundamental point that a dealer when viewing a trade-in applies the wholesale scale for valuing the vehicle.

If any party suffered a pecuniary loss in these series of transactions, it was Kerr Cadillac who gave the Applicant credit in the amount of \$14,168.00 for a vehicle that they in turn were only able to sell through auction for \$10,000.00.

ORDER:

The Tribunal finds that the Applicant has not proven his claim for compensation and therefore, pursuant to the provisions of section 15(3) of the Schedule to Ontario Regulation 801, R.R.O., 1990 as amended, made pursuant to the Act, the Tribunal hereby confirms the decision of the Board with respect to the application of the Applicant.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: August 28, 2000

LEXCAR INC.

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF
LEXCAR INC.

AND IN THE MATTER OF the PROPOSAL of
the Registrar under the
Ontario New Home Warranties Plan Act

TO REFUSE TO RENEW REGISTRATION

AND IN THE MATTER OF a requirement for a hearing respecting
the said Proposal

LEXCAR INC.

Applicant

-and-

REGISTRAR, ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 21, and 22, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, October 26, 2000, and to continue October 27, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 28th, 2000

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to section
47(1) of the *Highway Traffic Act*;

AND IN THE MATTER of

0159/MED/00/015

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Monday, August 21, 2000 before the Tribunal;

AND WHEREAS a letter dated August 9, 2000 was filed by the Applicant requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 10:00 a.m. on Thursday, October 19, 2000 at Barrie Travelodge, 55 Hart Drive, Barrie, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: *August 22, 2000*

0162/MED/00/016

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROSS BENNETT, M.D., Member

APPEARANCES: ALANA BEST
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: August 18, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

a) Exhibit #1 Notice of Appeal – dated July 21, 2000

By the Respondent:

a) Exhibit #2 Ministry of Transportation submissions – tabs 1 – 11
- received August 3, 2000

PRELIMINARY MATTERS:

The Respondent submitted a file summary, containing an itemized list of the items submitted prior to the hearing.

FACTS:

The Applicant is appealing the suspension of driving privileges effective "99 01 22" as set out in the Applicant's Notice of Appeal. (Exhibit # 1)

In the Appeal Form the Applicant claims that:

*"Medical condition is stable
Vascular surgeon states there is no reason to prevent driving
need license for work + home
license renewal will help improve condition"*

Exhibit # 2 Tab 1, is a Ministry of Transportation driving Record for the Applicant since 1990, showing no offences.

The Applicant came to the attention of the Ministry as a result of an unsolicited letter, dated November 5, 1998. Physician # 1 informs the Ministry that the Applicant *"...has a thoracic aortic dissection with secondary aneurysmal dilation extending from her aortic arch to her common iliac artery on the left side ...aneurism measures six centimeters ...risk of rupture ...driving could result in a significant motor vehicle accident..."*. (Exhibit # 2 Tab 2)

On January 7, 1999, Physician # 2 reports to Physician # 1 *"...saw the Applicant...January 6th ...has chronic Type "B" dissection and the maximum transverse diameter is 53 mm. I do not believe she should be operated on now ...prescribed Atenolol ...continue on medical therapy and having annual thoracic CT scan..."* (Exhibit # 2 Tab 3)

A letter from Great-West Life, dated August 4, 1999, signed by Althea Carasco, denies disability, to the Applicant, on the grounds that information received from Physician # 1 confirmed the Applicant did *"...not have a physical disability related to ...problem ...but ...emotional disability"*. Applicant was referred to psychiatrist to deal with anxiety/panic attacks. (Exhibit # 2 Tab 5)

In a letter to the Ministry, dated August 11, 1999, the Applicant relays her belief that Physician # 1 only wrote to the Ministry to *"...eliminate liability..."* (Exhibit # 2 Tab 6)

A MEDICAL ADVISORY COMMITTEE CASE STUDY, dated September 13, 1999, upheld the suspension pending *"Satisfactory vascular surgeon's report"*. (Exhibit # 2 Tab 7)

An ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS, dated *"February 18, 2000"*, completed by Harry Ansara, Driver Improvement Counsellor, details the Applicant's history as explained by the Applicant. The Applicant was diagnosed in 1995 during her second pregnancy. There have been no hospitalizations due to her condition. The Applicant professes to having *"...adjusted to...illness well..."* and that

"...life is normal..." At this time, the Applicant is no longer on medication but *"...has CAT SCAN done twice a year and sees family doctor as needed..."* (Exhibit # 2 Tab 9)

By letter dated July 4, 2000, Physician # 1 reports that Applicant *"...had thoraco-abdominal aortic dissection about 3 years ago ...has been stable with no evidence of aneurism expansion ...reasonable that she be able to return to driving..."* (Exhibit # 2 Tab 11)

At the hearing, the Respondent reiterated the contents of the information contained in the written material provided for the hearing and filed as Exhibit # 2 Tabs 1 through 11, as well as on the text of the file summary.

The Applicant was assisted by her husband. Both the Applicant and her husband emphasized that it has been five years since the Applicant was first diagnosed. She has lead and continues to lead a normal life. Medication is no longer necessary.

The Applicant's husband pointed out that the Applicant had this condition for approximately one year prior to being diagnosed. He submitted that in fact anything can happen to any one at any time and thus, it is unfair to prohibit his wife from driving due to a problem that has stabilized. The Respondent was unable to provide the Applicant with statistics as to how many accidents occur to individuals in similar circumstances

As the Tribunal did not feel Physician # 1's last letter was satisfactory, an opportunity was afforded to the Applicant to provide a further more detailed report from a cardiologist. The Tribunal has received, within the time specified, a letter from the Applicant's husband, together with an e-mail from Physician # 1. Physician # 1 assures that he has *"...been following the Applicant for about 4 years ...been stable for many years ...a return to driving may be appropriate..."*

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;

- (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar to “...suspend or cancel” a driver's licence for “any...sufficient reason...”. The Registrar originally suspended the Applicant's driver's licence after receiving an unsolicited letter from Physician # 1 informing that the Applicant “...has a thoracic aortic dissection with secondary aneurysmal dilation extending from her aortic arch to her common iliac artery on the left side ...aneurism measures six centimeters ...risk of rupture ...driving could result in a significant motor vehicle accident...”. (Exhibit # 2 Tab 2)

Regulation 390/94, Section 14 (a) is clear in that:

“An applicant for a holder of a driver's licence must not,

- a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely...”*

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation in suspending the Applicant's driving privileges.

The original medical findings, by the physician involved, is indisputable, an aortic aneurism measuring six centimeters. Nonetheless, it is the opinion of Physician # 1, the vascular surgeon who has observed the Applicant for the past four years, that her condition “...has been stable with no evidence of aneurism expansion ...reasonable that she be able to return to driving...” (Exhibit # 2 Tab 11)

In his latest report, in the form of an e-mail addressed to the Applicant, Physician # 1 repeats his previous statement "...been stable for many years... a return to driving may be appropriate..."

In weighing the evidence presented and considering the criteria described in Regulation 340/94 section 14(a) of the HTA, the Tribunal concludes that the evidence does not establish that the Applicant is currently suffering from a physical disability likely to significantly interfere with her ability to drive a motor vehicle. Thus, the Tribunal orders that the Applicant's driver's licence be re-instated on condition that the Applicant provide the Ministry, every six months, with the results of a CAT SCAN.

DECISION:

Upon the application by the Applicant to appeal the decision, dated January 22, 1999, of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside provided the Applicant provide the Ministry every six months with the results of a recent CAT SCAN.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Ross Bennett, M.D.,
Member

RELEASED: *August 23, 2000*

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to section
47(1) of the *Highway Traffic Act*;

AND IN THE MATTER of

0172/MED/00/0018

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Monday, August 28, 2000 at the Tribunal;

AND WHEREAS a letter dated August 16, 2000 was filed by the Respondent requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 9:30 a.m. on Tuesday, September 12, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: *August 22, 2000*

0162/MED/00/016

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROSS C. BENNETT, M.D., Member

APPEARANCES: ALANA BEST,
Representative for the Registrar of Motor Vehicles

Applicant

DATE OF HEARING: August 18, 2000

ORDER

FOLLOWING attendance on August 18, 2000 before the Licence Appeal Tribunal of the Applicant and Ms. Alana Best, Agent on behalf of the Registrar of Motor Vehicles;

Take notice upon consent of both parties, the Tribunal orders that:

- (1) The Applicant is to provide additional detailed medical documentation from a Cardiologist by 1:00 p.m. on August 23, 2000 to the Tribunal and the representative of the Ministry of Transportation;
- (2) In the event that the Applicant did not submit the documentation to the Tribunal by 1:00 p.m. on August 23, 2000, the Tribunal shall issue its decision and order based upon the evidence already received by the Tribunal on July 26, 2000.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D., Presiding Member

Ross C. Bennett, M.D., Member

0128/MED/00/013

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: August 3, 2000 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – received June 12, 2000
- b) Exhibit #3 Letter from the Tom Baker Cancer Centre - dated July 4, 2000,
- received August 3, 2000

By the Respondent:

- a) Exhibit #2 Ministry of Transportation submissions – tabs 1 – 8
- received July 19, 2000

PRELIMINARY MATTERS:

The Respondent provided the Tribunal with a file summary with respect to this matter, as well a certified copy of document on file.

The Applicant submitted a letter, dated July 4, 2000, from the Tom Baker Cancer Centre. This letter was entered in evidence, with the consent of both parties, and filed as Exhibit # 3.

FACTS:

The Applicant is appealing the suspension of her driving privileges effective "00/03/04" as per Ministry of Transportation driver's record. (Exhibit # 2 Tab 8)

An unsolicited letter, written December 17, 1999 by neurologist Physician # 1, was received by the Ministry. Physician # 1 states *"...This is to inform you that the Applicant suffers from brain tumor and associated seizure disorder which is incompletely controlled..."*. (Exhibit # 2 Tab 1)

An unsolicited letter to the Ministry, written February 22, 2000, by Physician # 2, Geriatrics and Internal Medicine, states *"...continues to drive a car ...continues to have seizures on a daily basis ...very confused when attending the Credit Valley Day Hospital Program ...not willing to discontinue driving on the advise of the therapist ...or the physicians..."*. (Exhibit # 2 Tab 3)

A letter written March 28, 2000, by neurologists Physician # 1, states *"...has history of surgically treated left frontal tumor ...followed by radiation treatment in 1993 ... currently on Lamictal 300 mg p. bid, Topimax 200 mg per day and Frisium ...having brief episodes of right partial motor seizures involving her right face but not her arm. These are not associated with altered consciousness and there are no significant neurological deficits on bedside testing, She has not had a recent generalized tonic clonic seizure ...I believe the partial motor seizures involving the right of her face would not prevent her from safely operating a motor vehicle and certainly there is no neurological deficit at this time that would make her physically unable to maintain control of a vehicle."* (Exhibit # 2 Tab 4)

A Medical Advisory Committee hearing on April 12, 2000 upheld suspension, pending one year seizure free and an oncologist's report.

Exhibit # 2 Tab 8, Ministry of Transportation driving record for the Applicant since 1979, shows no infractions.

At the hearing, the Respondent relied on and reiterated the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 8.

The Applicant referred to her diagnosis in December of 1992, and her subsequent radiation treatments. She was a patient of the Alberta Cancer clinic in Alberta until 1998.

The Applicant testifies that after moving to Toronto, she saw Physician # 1 on January 21, 1999. She has no further contact with Physician # 1. On December 15, she was

evaluated for the rehabilitation programme at the Credit Valley Hospital. She notes that the letter from Physician # 1 was written on December 17th, 1999 as a result of the rehabilitation clinic asking for his file information.

The Applicant attended the rehabilitation center twice a week, for “...*physiotherapy, speech therapy, social work and to see the nurse...*”

The Applicant affirmed that she had only one grand mal seizure and that was while in the hospital at the time of her biopsy. The Applicant's almost daily seizures occur usually in the morning, after getting up. These seizures are not painful but affect the side of her mouth and sometimes affect her speech.

The Applicant explained that she has taken several kinds of medication but that the current medication is the best she has taken and does not make her drowsy.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor

vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or

- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to “...*suspend or cancel*” a driver’s licence for “*any ...sufficient reason...*” The Registrar originally suspended the Applicant’s driver’s licence, upon receipt of an unsolicited letter from a neurologist. Physician # 1 informed the Ministry that “*...the Applicant suffers from brain tumor and associated seizure disorder which is incompletely controlled...*”. (Exhibit # 2 Tab 1)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, at the time of the suspension.

In a letter, dated March 28, 2000, Physician # 1, recants his previous statement and asserts that “*...I believe the partial motor seizures involving the right of her face would not prevent her from safely operating a motor vehicle and certainly there is no neurological deficit at this time that would make her physically unable to maintain control of a vehicle.*” (Exhibit # 2 Tab 4)

To substantiate his position, the Applicant has also provided a letter, dated July 4, 2000, from her previous oncologist Tom Baker Cancer Centre in Alberta. Physician # 3 acknowledges the Applicant “*...developed some symptoms in the early 1990’s from a brain tumor that led to surgery followed by radiation therapy in 1993 ...followed since then ...seen by. colleague Physician # 4, an epileptologist ...she has never had an episode that was associated with impairment of her responsiveness ...she is neurologically safe to drive.*” (Exhibit # 3).

This matter is before the Tribunal as a result of a suspension pursuant to Section 14 of Regulation 340/94.

The applicable clause of Section 14 states that:

“An applicant for a holder of a driver’s licence must not,

- a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely...”*

After evaluation of the evidence in its entirety, the Tribunal accepts Physician # 1 and Physician # 3’s opinions about the ability of the Applicant to safely operate a motor

vehicle in spite of her medical condition. The Applicant's impeccable driving record further substantiates this finding.

The Tribunal finds that the Respondent has not proven that the Applicant is currently suffering from a medical condition, which is likely to significantly interfere with the ability to drive a motor vehicle as described by Regulation 340/94 section 14 (a) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision, dated March 04, 2000, of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside and that Applicant's driver's license be reinstated on condition that the Applicant file a yearly medical report from a neurologist with the Ministry of Transportation.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Roy Melvin, M.D.,
Member

RELEASED: *August 23, 2000*

031-PULD

0031/ADLS/00/003

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Solicitor for Applicant
(by teleconference call)

DATE OF
HEARING: July 31, 2000 Toronto

DECISION

A hearing was held on July 31, 2000, at Toronto, Ontario, by way of an electronic hearing to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 of the HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C., Presiding Member

RELEASED: August 1, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Solicitor for Applicant
By Teleconference

DATE OF
HEARING: July 31, 2000

DECISION
RELEASED: August 1, 2000 Toronto

REASONS FOR DECISION

A hearing was held on July 31, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 1, 2000, with reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that her appeal be decided by the Tribunal by way of an electronic hearing (telephone conference). The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 11, 2000, and was received by the Tribunal on July 13, 2000, together with the prescribed fee of \$100.00.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

AI was unable to provide the required breath sample because of a medical reason.®

Preliminary Matters

Solicitor for the Applicant requested that the Tribunal not consider the documentary evidence presented by the Respondent. It was the Applicant's solicitor's contention that evidence did not directly relate to the Applicant's medical condition and should not be allowed. As the Applicant was not present to give oral testimony and only documentary evidence in the form of sworn affidavits were presented by the Respondent, the Tribunal allowed the documentary evidence presented by both parties to be filed as exhibits and gave consideration to all of the documents presented.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal, dated July 11, 2000
- b) Exhibit # 2 Letter from Physician # 1, dated June 19, 2000
- c) Exhibit # 3 Suspension Reminder Notice, dated May 18, 2000

By the Respondent:

- a) Exhibit # 4 Ministry of Transportation submissions- 23 pages received July 26, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (HTA) states:

50.1 (1) A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

The HTA states under section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) A report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of specialty.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 (amended) provides:

A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS:

Solicitor for the Applicant was affirmed and presented evidence. Solicitor for the Applicant stated that he had only one piece of evidence and that was the medical report written by Physician # 1. The Applicant was not present and presented no evidence in the form of a sworn statement. The report from Physician # 1, according to the Solicitor for the Applicant satisfied the requirements of section 15 (1). According to the Solicitor for the Applicant, the report did indicate the name, telephone number and address and postal code of the medical practitioner. The report also contained the name, date of birth of the person who is the subject of the report but was lacking the address of the patient. The medical practitioner was aware that the report was being used in support of an appeal. The report also indicated the length of time that the patient was attended to by the medical practitioner. In this report Physician # 1 eludes to two lung function tests. One in 1991 and the second test in May 2000. From these tests, Physician # 1 has concluded that the patient had a reduction of airflow to 30% of normal for a person of her age and size. Physician # 1 stated that because of her chronic and severe lung condition, she was unable to provide enough force to activate the breathalyzer.

The Solicitor for the Applicant had nothing further to present. The Respondent provided the Tribunal with documentary evidence which the Tribunal accepted and entered as an exhibit.

The first document was a statement of Constable Officer # 1 OPP Cambridge Detachment. In this statement, Constable Officer # 1 described the events which led to the Applicant's arrest for operation of a motor vehicle while impaired. The Applicant was transported to the station where she was processed and subsequently released to her husband. According to the statement, the Applicant had noticeable red and bloodshot eyes and a strong odour of an alcoholic beverage on her breath. She denied consuming alcohol. The Applicant was turned over to P.C. Officer # 2 who provided an affidavit which was entered into evidence.

Constable Officer # 2 received the Applicant into his custody at 11:27pm on the evening of May 15, 2000. A secondary caution and breath demand was made of the Applicant, and she responded that she understood. According to the affidavit, the Applicant made six attempts to blow. After the first three attempts, a new mouth piece was provided to ensure that there was no blockage or obstruction. The Applicant was advised that if she failed to provide a proper sample, she would be charged. It was at this time that the Applicant stated that she was trying and that she had bronchitis. According to the affidavit, this was the first time that the Applicant mentioned a medical condition. After three more unsuccessful attempts, the Applicant was charged with refusal. Constable Officer # 2 stated that he asked the Applicant if she was sick to which she replied no. He asked the Applicant if she was on any medication and was informed, estrogen progesterone which she last took at noon. Constable Officer # 2 also stated that he noticed an odour of an alcoholic beverage on her breath as well he observed her eyes to be watery and bloodshot.

In an appeal of this nature, the onus is on the Applicant to substantiate her position. The evidence presented on behalf of the Applicant, does not substantiate her claim to the effect that she had a present medical condition which precluded her from providing a breath or blood sample.

The report of Physician # 1 M.D. Family Physician, fails to meet the specific requirements of section 15 (1) of Regulation 574 of the *Highway Traffic Act* in the following respects. Physician # 1 does not provide the Tribunal with any test results to substantiate the Applicant's assertion that due to her medical condition she was not able to provide a proper breath sample. There was no mention of referral to a respiratory specialist. Physician # 1 refers to the May 2000 Pulmonary function test, but he does not indicate the date of attendance at his office or the results of that examination and the reason for the visit. Physician # 1 also does not indicate if the Applicant is on medication(s) for her condition and what effect the medication if any would have had on her ability to provide a breath sample. The Tribunal has found that the report submitted by Physician # 1 has not addressed the issue of how the Applicant's condition precluded her from providing a proper sample of her breath. Accordingly, the Tribunal attaches little weight to this report.

The Tribunal accepts the evidence presented by the Respondent that both Constable Officer # 1 and Constable Officer # 2 are not trained medical personnel, they are trained observers and did not observe the Applicant to be in any kind of medical distress.

APPLICATION OF THE LAW TO FACTS:

After reviewing the foregoing facts, the Tribunal finds that the Applicant has not related her medical condition to Regulation 574 and section 50(1)(2)(b).

The evidence is that the Applicant refused to provide an adequate sample of breath for no proven medical reason. The evidence submitted suggests that the actions of the Applicant were such as to lead this Tribunal to believe that she had no intention of giving a proper sample. As indicated in the affidavit by P.C. Officer # 2, that "During these attempts, the subjects' face became flushed and her cheeks puffed but not enough air was entering the device to complete a sample." After a caution, the Applicant was able to activate the tone in the Intoxilyzer which is contrary to Physician # 1's conclusion that she would not have enough force to activate the tone, and the Applicant stopped blowing.

In the Tribunal's opinion, these are actions to prevent a suitable sample from being retrieved and not the actions of someone having difficulty providing a sample because of a medical reason. The Applicant has not indicated that she required medical attention after her release and there is no indication that she required medication(s) for her condition.

The Applicant has not discharged the onus to establish a valid medical reason for her failure to provide a breath sample when demanded under section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by the Applicant to appeal the suspension order, dated May 16, 2000, of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* (HTA) and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee D.C.
Presiding Member

RELEASED: August 23, 2000

165-ASTHMA

0165/ADLS/00/015

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: GILLES A. LAMARCHE, D.C., Presiding Member

APPEARANCES: CLAIRE ROWETT,
Representative for the Registrar of Motor Vehicles

Applicant
Counsel for Applicant
(by written submissions)

DATE OF
HEARING: August 15, 2000 Timmins

DECISION

A hearing was held on August 15, 2000, at Timmins, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Gilles A. Lamarche, D.C.
Presiding Member

RELEASED: August 16, 2000

0165/ADLS/00/015

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: GILLES A. LAMARCHE, D.C.
Presiding Member

APPEARANCES: MS. F. C. ROWETT
Representative for the Registrar of Motor Vehicles
by written submission only

Applicant
Counsel for the Applicant
by written submission only

DATE OF
HEARING: August 15, 2000

DECISION
RELEASED: August 16, 2000

REASONS FOR DECISION

A hearing was held on August 15, 2000, at Timmins, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 16, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 25, 2000, and was received by the Tribunal on July 27, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of appeal July 25, 2000
- b) Exhibit #2 Letter from Physician # 1
- c) Exhibit #3 Letter from Physician # 2
- d) Exhibit #4 Notice to registrar June 24, 2000
- e) Exhibit #5 Suspension Reminder June 26, 2000
- f) Exhibit #6 Written submission of Applicant
- g) Exhibit #7 Written submission in reply

By the Respondent:

- a) Exhibit #8 Written submission of respondent

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

On June 24, 2000, Officer # 1, of the Niagara OPP, pulled over a green BMW plate # 701 NSL, after observing it speeding and driving unsafely. Officer # 1 detected an odour of an alcoholic beverage from the interior of the vehicle and from the driver's breath.

The driver, the Applicant, produced a valid Ontario driver's licence and admitted to drinking wine. A breath demand was made of the Applicant at roadside. Officer # 1 explained and demonstrated giving a proper sample and the Applicant understood.

In paragraphs 13-21 of his affidavit, Officer # 1 describes the Applicant's failure to provide a proper sample. The Applicant was then charged and served a 90-day suspension and notice to appear.

The Applicant never informed Officer # 1 that he was unable to provide a sample due to a medical condition. The Applicant did not request medical attention, medication or any type of assistance. Officer # 1 did not have any reason to suspect the Applicant's need for medicine or medical attention and as such “did not feel a blood test was necessary”.

The reports of Physician # 2 and Physician # 1 were filed with this Tribunal.

APPLICATION OF THE LAW TO FACTS:

Section 15(1), (2) and (3) of Regulation 574 provides the required contents for a medical report to be submitted by this Tribunal. The Applicant has failed to obtain a report from Physician # 1 as required by that Regulation. Physician # 1 simply gives anecdotal/hearsay evidence that he received from the Applicant. This does not constitute a medical report as required or under Regulation 574 (amended) HTA at subsection 15 (1), (2), and (3).

The Applicant also submitted a report written by his wife, Physician # 2. This evidence contains the statement that “as asthma has a natural course of sudden exacerbation.... access to treatment and assessment as quickly as possible is of prime importance.” However, the Tribunal notes that the Applicant did not carry his medication with him especially during his “seasonal pattern, May to Sept” and cannot conclude that the Applicant's asthma was severe.

Physician # 1 and Physician # 2 submit that the Applicant suffers from asthma and this is undisputed by the Tribunal.

Physician # 1 and Physician # 2 failed to submit any objective evidence of the Applicant's asthmatic condition such as F. E. V. or P.F.V. This evidence fails to prove that at the time the breath demand was made the Applicant suffered from a medical condition as contemplated under section 50.1 of the Act.

The Applicant did not submit his own statement to outline the details or answer any questions set forth in the submission of the Respondent. Rather, his lawyer responded on his behalf by providing hearsay evidence and by attempting to attack statements of the police officer, Officer # 1.

Counsel for the Applicant also indicated that the process of obtaining evidence from professionals such as Dr. E. Mate is not objective, stating (in paragraph 4b) "Dr. Mate was specifically retained by the Ministry to contradict the Applicant's assertion."

In the Applicant's submission, it is stated that the Applicant's offer to submit a blood sample should have been accepted by the police officer, Officer # 1. Section 254 of the Criminal Code states (Synopsis cc/431) "When the police officer has reasonable and probable grounds to believe that the physical condition of the person is such that he may not be capable of providing the breath sample...a demand may be made that blood samples be taken under the supervision of a qualified physician." The evidence is that Officer # 1 was not given reasonable and probable ground to believe that a blood sample was required, he merely observed the Applicant's unwillingness to provide a breath sample.

In his submission in reply, the Applicant's Counsel also states that "The appellant clearly told the officer that he could not give a suitable breath sample." That statement is nowhere to be found in the statement of facts submitted and admitted as exhibit #6. The statement "I will give a blood sample, I am a doctor" is stated in the submission and related in Constable Officer # 1's notes, however according to section 254 of the Criminal Code, it is at the discretion of the police officer that blood samples are taken and not by a police officer but under supervision of a qualified physician. This obviously can not be done roadside.

Furthermore, in the Applicant's written submission, received July 27, 2000, in the statement of facts, it is stated "His wife drove him directly to the hospital". In the letter, received August 14, 2000, submitted by the Applicant's counsel, Barrister, point #34 "The Applicant treated his medical condition at his home, prior to attending the hospital." The Tribunal notes that the Applicant's statements are contradictory.

The Respondent submits that the Applicant's "actions throughout the breath testing process are consistent with attempting to evade giving a sample" The Respondent also submits that the Applicant did not have a health problem at the time the breath demand was made.

In his affidavit, Constable Officer # 1 states his observations while dealing with the Applicant. Although it is recognized that he is not a medical professional, the Tribunal accepts that he can recognize when he sees a person in acute respiratory distress. He does not have to be a qualified medical professional to make such an observation, and he would have been able to recognize if the Applicant was in respiratory distress. Also, if such were the case, Physician # 2 would have made the same observation and interjected as a qualified caring physician and wife, and suggested the need for urgent medical attention. In her letter, dated July 24, 2000, Physician # 2 states that "Access to treatment... quickly as possible is of prime importance to the asthmatic sufferer". This did not occur. In her report Physician # 2 states "his symptom further deteriorated en route home," but she did not feel it necessary to seek attention en route.

Section 13, Reg. 574, R.R.O 1990 as amended by Ontario Reg. 510/96 states that the Applicant has the onus of establishing, the merit of his appeal. It is the opinion of this Tribunal that the Applicant has failed to establish the merit of his appeal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated June 24, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Gilles A. Lamarche, D.C.
Presiding Member

RELEASED: August 23, 2000

0157/ADLS/00/014

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: F. CLAIRE ROWETT,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: August, 14, 2000 Toronto

DECISION

A hearing was held on August 14, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: August 15, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: F. CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: August 14, 2000

DECISION
RELEASED: August 15, 2000 Toronto

REASONS FOR DECISION

A hearing was held on August 14, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 15, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 21, 2000, and was received by the Tribunal on July 21, 2000, together with the prescribed fee of \$100.00.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters, the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated JULY 21, 2000
- b) Exhibit #2 Letter from the Applicant – dated July 20, 2000
- c) Exhibit #3 Notice of Suspension of Driver's Licence – dated June 26, 2000
- d) Exhibit #4 Applicant's submissions – 9 pages – received July 21, 2000

By the Respondent:

- a) Exhibit #5 MTO submissions – received August 4, 2000
- b) Exhibit #6 Videotape of the Breath Testing Session – received August 4, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

THE LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant's driver's licence was suspended '21/06/00' as stated in the Notice of Appeal (Exhibit # 1)

Physician #1, notes that he has been the Applicant's family physician for “8 years” except “...between 1993 – 1998”. Physician #1, prepared the “Applicant's Medical Information” form dated “17/07/00”. In the “*Details and Diagnosis of patient's present condition*”, Physician #1 refers to a “...*history of alcoholism...*”, and details the episode

which the Applicant described as having been the reason for his conduct at the time of the suspension. The Applicant told Physician #1, that *"...a female ...rubbed alcohol on his skin, causing a reaction (he was on Antabuse) i.e. confusion + disorientation therefore he was unable to take a breath test"*. Physician #1 states the Applicant *"...cancelled an appointment on 21/06/00..."* not seen until *"5 July 00"*. (Exhibit #1)

In a letter dated July 20, 2000, the Applicant requests an *"...opportunity to explain..."* and states that he *"...had a very hard drug reaction due to accidental exposure to alcohol ...I have a couple of glasses of wine during dinner ...on Disulfiram drug to completely stop taking alcohol..."* (Exhibit # 2)

A document on the drug Antabuse and its side effects was submitted by the Applicant. (Exhibit # 4)

The Respondent provided the following documents:

- Notice to Registrar.
- Driver Record.
- Vehicle history, JHMRA 186XSC803093
- Sworn and Commission notes of PC Officer #1, Toronto Police Service.
- Affidavit of PC Officer #2, Breath Technician, Toronto Police Service.
- Video Recording June 21, 2000 Toronto Police Service.

The Applicant's driver's record since 1991, shows two infractions. (Exhibit # 5)

In the form of an Affidavit, Police Constable Officer #2 attests to the events surrounding the charge and the Applicant's subsequent arrest. PC Officer #2 swore that *"...On June 21, 2000 at approximately 8:57 p.m ...was handed custody of the Applicant to administer a breath testing session ...asked if he was on any medication and he replied 'no'...the Applicant was ...swearing and being verbally abusive ...in breath testing room ...continued yelling and verbally abusive ...made no attempts to give a proper sample ...at no time did I observe any sign of a medical condition which would have prevented to giving a breath sample..."* (Exhibit # 5)

At the hearing, the Applicant alluded to personal events in his life, which he believes led to the incident.

Both, during examination-in-chief and in cross-examination, the Applicant testified, several times, that he has no recollection of the events that occurred that evening. He remembers not feeling well and pulling into a parking lot to rest. He also remembers being approached by a police officer, being handcuffed, speaking to a lawyer, and an officer making rude finger gestures to him.

The Respondent relied on the written information provided for the hearing.

A videotape of the breathalyzer session clearly shows the Applicant being abusive and expressing his refusal to provide a breath sample. The Applicant's voice is slurred.

In his closing remarks, the Applicant emphasized that he did not remember what had taken place. In his own opinion, the Applicant *"...was not in his senses at the time..."*

APPLICATION OF THE LAW TO FACTS:

At issue is, how does the medical condition of the Applicant relate to section 50.1 (2) (b), and did this medical reason cause him to fail or not comply with the breath demand. Pursuant to section 13 of Regulation 574 (Amended) the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed the "Applicant's Medical Information" prepared by the Applicant's physician for this hearing. Other than noting a history of alcoholism, there is no indication from Physician #1 that the Applicant suffers from any kind of respiratory ailment. (Exhibit #1)

In his letter to the Tribunal, and his oral testimony, the Applicant presented several explanations regarding his family life and his accidental exposure to alcohol, on the day in question, which are not relevant to the issue to be decided in this matter.

The videotape taken during the attempted breathalyzer session leaves no doubt that the Applicant refused, not only by his actions but by his words, to provide a breath sample. To succeed in this appeal, the Applicant must establish that this refusal was based on a medical reason.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of section 50.1 (2) (b) which requires the Applicant to demonstrate that his failure to provide a breath sample was due to medical reasons.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated June 21, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 23, 2000

LAZARUS and ROTH

RUSSELL LAZARUS and RHONDA ROTH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL: F. BRUCE FITZPATRICK, Vice-Chair

APPEARANCES:

ALLEN C. GERSTL, Counsel for the Applicants
LUCY MCSWEENEY, Counsel representing the Ontario New
Home Warranty Program
LAWRENCE WALLACH, Counsel representing the Added Party,
Rosedale Garden Homes Limited

DATES OF HEARING: May 10, May 11, and July 17, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) from a written decision of the Ontario New Home Warranty Program (the "Program") dated November 17, 1999.

Russell Lazarus and Rhonda Roth (the "Applicants") base their claim on the provisions of section 14(1)(a) and 14(1)(b) of the Ontario New Home Warranty Plan Act (the "Act").

The Tribunal heard evidence from the applicant Russell Lazarus on behalf of himself and his wife. Mr. Lazarus is a chartered accountant. He and his wife have owned other homes prior to purchasing the Subject Property.

Henry Smith gave evidence on behalf of the added party Rosedale Garden Homes Limited ("Rosedale"). Mr. Smith has been involved in building houses for some 27 years. He is the secretary of Rosedale and is involved in the day to day operations of the company.

Dave Henderson gave evidence on behalf of the Program. Mr. Henderson has a bachelor of technology and architectural science from Ryerson. He has been the operations manager of the Newmarket office Program for some 2 years. Prior to that he was employed by the Ontario Home Builders Association as Manager of Technical Services for 7 years. He made the decision to deny the claim in this matter.

THE FACTS:

Based on the evidence, the witnesses and the documentary evidence presented at the hearing, the Tribunal finds the following as fact.

On or about November 17, 1997, the Applicants and the added party, Rosedale entered into a written Agreement of Purchase and Sale whereby the Applicants purchased from Rosedale a new home to be constructed at premises known municipally as 504 Highcliffe Drive, Thornhill, Ontario (the "Subject Property"). At the time the Agreement of Purchase and Sale was signed, the Applicants anticipated that the home would comprise a gross floor area of 2,920 square feet.

The Agreement of Purchase and Sale permitted the builder, Rosedale, to alter the plans and specifications of the Subject Property such that the alteration did not diminish the value of the real property or substantially alter the dwelling. The Applicants had independent legal advice prior to the execution of the Agreement of Purchase and Sale. The Applicants consulted a number of persons who had previously purchased newly constructed homes from builders in order to ensure that their Agreement of Purchase and Sale contained provisions favourable to the Applicants. The Applicants read the Agreement of Purchase and Sale very carefully. The Applicants knew Rosedale had the rights pursuant to the Agreement to make modifications to the home.

The Agreement of Purchase and Sale contained a schedule which had elevations, as well as floor plans for the Subject Property. Quite clearly on the face of the schedule were the words "2920 sq. ft.". In very small print were the words:

"Materials, specifications and floor plans are subject to change without prior notice. All illustrations are artist concepts. All floor plans are approximate dimensions and actual useable floor space may vary from stated floor space."

Elsewhere in the Agreement of Purchase and Sale at Schedule A, the following provisions were contained.

"43. All plans, elevations and specifications are subject to modification from time to time by the builder according to the *Ontario Building Code* and the *National Building Code*."

"48. The purchaser acknowledges that the builder may be required to make some minor and non-substantial construction alterations to the house in compliance with the architectural control provisions of the subdivision and the purchaser agrees to accept any such changes provided the same were made at no cost to the purchaser."

When the home was built, it was 79 square feet smaller or 2.7% of the total square footage of the Subject Property. This fact was expressly agreed by the parties at the opening of the hearing.

The Applicants relied on the representation made in the elevation section of the Agreement of Purchase and Sale and the change in the size of the home was not a minor and non-substantial construction alteration to the house.

The transaction closed on September 10, 1998. The Applicants paid in the order of \$410,000.00 inclusive of GST for the home.

Prior to the closing, it became apparent to the Applicants that the home that they purchased would be smaller (ultimately as noted above it was agreed it was 79 square feet smaller) than that represented in the Agreement of Purchase Sale. Correspondence was exchanged between the solicitors for the Applicants and Rosedale prior to closing directed specifically at the discrepancy in the size of the home. The solicitors for Rosedale took the position that the difference was not material, the Agreement of Purchase and Sale gave them the right to make such modifications and that they expected the Applicants to close the transaction.

The Applicants were advised by a representative of the Program to indicate their protest on the PDI form to be tendered on closing. Rosedale refused to accept the PDI form as so indicated. The closing went ahead without the protests being indicated on the closing documents. The Applicants agreed to close, but their solicitors in a letter dated September 4, 1998 indicated that they would require the deficiency to be addressed to their satisfaction without stating specifically what that would entail.

The house was built smaller as the result of municipal side yard set back requirements. Rosedale was unaware of the necessity to alter the size of the Subject Property until the Agreement of Purchase and Sale was executed, the lot chosen and the lot "sited" by an Architect retained by Rosedale. It was only after the Applicants agreed to waive the conditions in the agreement that it "went solid" and the home was sited on the lot purchased by the Applicants.

The difference in area of the home was achieved by narrowing the footprint of the Subject Property by 11 inches. This decrease of area manifested itself by way of a more narrow front entrance foyer and 3 inches off the width of the family room, 6 inches off the width of the kitchen and 7 inches off the width of the library on the first floor and 11 inches off the width of bedroom number 2 on the second floor.

The change in area adversely affected the utility of the Subject Property for the Applicants only insofar as they were unable to place a fridge they had purchased in their new kitchen.

There was no appreciable cost benefit to Rosedale achieved by making the home smaller by 79 square feet. All the major components of the home, the heating, wiring, windows, stairs, electrical, roof, plumbing and trim all cost the same to Rosedale as if the property had been constructed 79 square feet larger.

On November 5, 1998 after having occupied the Subject Property for little over a month, the Applicants made known their concerns to the Program in a detailed and concise manner.

Following receipt of the complaints, Rosedale satisfactorily addressed all of the Applicants' concerns, save and except the dispute of the size of the Subject Property. On March 25, 1999 Rosedale made a without prejudice offer to compensate the Applicants in the amount of \$1,500.00. The Applicants did not accept this amount.

The Applicants entered into the conciliation process with the Program. A conciliation report dated June 17, 1999 was prepared. The report identified the difference in square footage as being greater than a 2% industry standard, a change which was not

considered equal or better quality and was therefore to be considered as substitution. The Program indicated that amount to be refunded by Rosedale was \$5,135.00.

On August 26, 1999 the Applicants' rejected the Program's offer and made a counter proposal.

On September 24, 1999 the Program sent a further letter to the Applicants attempting to explain its position. The Program expressly indicated that it was prepared to be of assistance to the Applicants, but not to the extent they wished. Specifically addressing the claim for compensation for reduced square footage, the Program indicated;

"This claim is beyond the scope of the Act. You will need to pursue your builder in other forums to obtain such a settlement".

The letter continued to explain the basis for the \$5,135.00 number previously advanced and indicated that the claim had been assessed pursuant to section 14(1)(a) of the Act although no such reference to the Act had been previously made in the conciliation report.

On October 2, 1999 the Applicants' wrote to request a further explanation of the Program's position and stated;

"I have to be compensated for my out of pocket and I will accept nothing less".

The Program did not respond in a manner that satisfied the Applicants and on October 17, 1999 the Applicants by letter requested a "formal ruling" in the matter.

A decision letter dated November 17, 1999 denied the Applicants' claim. The letter of appeal by the Applicants was received by the Tribunal on November 23, 1999.

ISSUE:

Are the Applicants entitled to be paid out of the guarantee fund an amount of damages pursuant to Section 14 (1)(a) or 14 (1)(b) of the Act?

THE LAW:

Section 14 of the *Ontario New Home Warranties Plan Act* provides:

Section 14(1) Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or"

.....

Certain general principles concerning the jurisdiction of the Tribunal and the general purposes of the Act are relevant to the application of the law to the facts as found by the Tribunal.

While the Act gives a person (in Section 14(1)(a)) and an owner (in Section 14(1)(b)) an entitlement to seek compensation from the guarantee fund following a hearing before this Tribunal in the event the Program denies such claims, it cannot be implied from the language of the Act, that the jurisdiction of this Tribunal is exclusive and a person or an owner is precluded from seeking a remedy from the vendor of a home in another forum, namely the Ontario Court of Justice. (*Belanger vs 686853 Ontario Inc.* 74 O.R. 2nd (114)) DCO 1990, Wright D.C.J.).

The general purposes of the Act were summarized by Judge Zalev (as he then was) in the *Ontario New Home Warranty Program v. Crown Trust Co.* (1984), 50 O.R. (2d) 588, 32 R.P.R. 214 (Co. Ct.)[affd (1985), 50 O.R. (2d) 593 (note (C.A.))], at p. 590 O.R., p. 217 R.P.R., Judge Zalev said;

“In my view the object of the statute is to provide the warranties set out in s. 13 of the Act to persons who first acquire a home from its vendor for occupancy, and to protect such persons from any unscrupulous, financially irresponsible, or technically incompetent person from whom they might purchase”.

The Applicants bear the onus of proving that their situation falls within the meaning of the relevant sections.

APPLICATION OF LAW TO THE FACTS:

The words used in Section 14(1)(a) were chosen deliberately by the legislature. Accordingly, the Tribunal is required to determine if the Applicants come within the meaning of Section 14(1)(a) having closed the transaction and become “owners” of the Subject Property and whether they have been subjected to “a failure to perform the contract” by Rosedale as the result of the admitted 79 square foot deficiency of the home.

The Applicants are clearly “persons” who at one point entered into a contract with a vendor for the provision of a home. However, the transaction at issue closed and they are now more precisely described as “owners” of the Subject Property. The use of the word “person” in Section 14(1)(a) of the Act as contrasted with the use of the word “owner” in Section 14(1)(b) to me is instructive. Section 14(1)(a) refers to “persons” (a more general term) as opposed to “owners” because the section expressly requires that the transaction has not been completed. In order for compensation to be payable pursuant to Section 14(1)(a) the transaction cannot have been completed and the person not yet have become an owner because of bankruptcy and/or the failure to perform by the vendor.

It appears that Section 14(1)(a) is not intended to apply to persons who have completed transactions for purchases of homes such that at the time a breach is alleged to have occurred they can be then most accurately described as owners. The use of the words “failure to perform the contract” in the section are also important in determining whether compensation is payable given the facts of this case.

The Applicants' solicitor argued that the words "vendor's failure to perform the contract" in Section 14(1)(a) should be interpreted as meaning precisely the same as the words "vendor's breach of contract". While the 79 square foot deficiency in this case does represent a breach of contract, the issue is whether this situation represents a failure to perform the contract in order that compensation is otherwise payable pursuant to Section 14(1)(a).

There is a material legal difference between a "breach of contract" and a "failure to perform a contract" and if the legislature had intended to mean "breach of contract" those specific words would have been used.

The Tribunal has considered the statement of Fletcher Moulton L.G. in *Wallis Son and Wells vs. Pratt* (1910 2 K.B. 1003, and [1911] A.C. 394) whose statement was adopted by the Ontario Court of Appeal in a decision *Cork vs. Greavett Boats Ltd.* [1940] O.R. 352-366. The learned Lord Justice succinctly differentiated the term "failure to perform a contract" from a "breach of contract" saying:

There are some obligations which go directly to the substance of a contract, or in other words, are so essential to its very nature that their non-performance may be fairly considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are obligations which, although they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both classes of terms are equally obligated under the contract and a breach of any one of them entitles the other party to damages, but in the case of a failure to perform a contract, the plaintiff has the alternative of treating the contract as completely broken by the non-performance, and if he takes the proper steps, can refuse to perform any of the obligations resting upon himself and sue the other party for total failure to perform the contract.

The words in Section 14(1)(a) require the breach at issue to be of the nature the Applicants would have been entitled to elect not to perform their side of the bargain and to seek rescission of the contract because of the actions of the vendor. In this case, the vendor did breach the agreement by providing 79 less square feet, but was a breach that was not of the nature that would have allowed the Applicants to refuse to perform their obligations and close the transaction. The Tribunal considers it significant that the Applicants had independent legal advice and chose to close the transaction notwithstanding the fact that they did object to the fact that the home was 79 feet smaller than that for which they contracted.

While the Tribunal finds that the lack of 79 square feet represents a breach of contract by Rosedale, it is not one which can be characterized as a failure to perform the contract by Rosedale as they did complete the home and deliver it to the Applicants on closing and the Applicants chose not to seek to rescind the agreement.

Much was made in argument by the Applicants' counsel concerning the fact that a reference to Section 14(1)(a) was made in the letter to the Applicants from the Program dated September 24, 1999. A careful reading of the letter indicates that it is an attempt by one person to explain the actions of another. In argument, and indeed in the evidence, the Program took the position that Section 14(1)(a) did not apply and the

letter was simply wrong as far as it identified Section 14(1)(a) having any applicability to the facts at issue. The statement of a representative of the Program concerning the applicability of a particular section to a certain set of facts cannot absolutely fetter the discretion of the Tribunal to review the facts and come to a different conclusion as to whether or not the particular section applies.

The Tribunal does not agree with the Applicants' contention that the September 24, 1999 letter represented an exercise of statutory decision making and that afterwards the Program was *functus officio* and therefore had no authority to make the subsequent decision that it did and which was the subject of this hearing. The Applicants themselves requested a formal decision following the letter of September 24, 1999, and again a careful reading of the letter of September 24, 1999 indicates that it is not a decision, but rather an explanation of a settlement position taken by the Program during the conciliation process.

The Tribunal finds that virtue of the August 26, 1999 letter the Applicants expressly rejected the Program's offer of payment of \$5,135.00. Consequently the offer was no longer available to be accepted by the Applicants. Under the law respecting offer and acceptance, it is not open for a person (absent some express statutory provision or scheme, such as those provided for Rule 49 offers to settle in the *Rules of Civil Procedure*) to attempt to revive, rely upon and accept an initial offer once it is specifically rejected by them unless the offering party subsequently expressly remakes the offer. In this case the Applicants specifically rejected the September 24, 1999 letter (to the extent it can be construed as a further offer) by their October 2, 1999 letter stating that they would accept nothing less than their out of pockets, which were more than the amount offered by the Program.

While it is obviously a less than satisfactory practice for the Program to be making offers to home buyers without clearly marking them as being without prejudice, the applicant cannot have it both ways. They expressly rejected an offer and cannot now come before the Tribunal and expect that a portion of an offer they rejected (the alleged admission of liability by virtue of the reference to Section 14(1)(a)) can be said to definitively bind the Program and take away the Tribunal's ability to make findings of fact and law following a hearing of evidence by the parties.

While the Tribunal finds that the lack of 79 square feet represents a breach of contract by Rosedale, it is not one which can be characterized as a failure to perform the contract by Rosedale as they did complete and deliver the home to the Applicants on closing, and the Applicants chose not to seek to rescind the agreement. In this case, the Tribunal finds that the applicant owners do not have a cause of action in damages against the vendor either resulting from the bankruptcy of the vendor or the vendors failure to perform the contract such that they come within the meaning of Section 14(1)(a) of the Act.

The facts of this case do not lead to the conclusion that compensation is payable pursuant to section 14(1)(a) of the Act. The issue now is whether or not the Applicants have made out a case such that their situation entitles them to compensation pursuant to Section 14(1)(b).

"Warranty" is a defined term in the Act. A "warranty" is defined as those set out under Section 13 of the Act or otherwise as defined in the Regulations. Section 18(1) of Regulation 892 provides a warranty that no substitutions be made in respect of those items for which the purchaser is

entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser.

The Tribunal finds that the Applicants had a right pursuant to Schedule A, and specifically paragraph 48, of the Agreement of Purchase and Sale to be consulted on any major and substantial construction alterations to the house in the event such were required to be made in compliance with the architectural control provisions of the subdivision. It is clear from the evidence that the Applicants did not make an agreement to reduce the size of their home and were not consulted in respect of Rosedale's decision to alter the size of the home in order to comply with municipal side yard set backs.

Accordingly, the Tribunal finds that the builder has breached the warranty contained in Section 18(1) of Regulation 892 by substituting a smaller home for that agreed to in the Agreement of Purchase and Sale.

Counsel for the Program referred to the reasons of Vice-Chair Dryden in a decision of this Tribunal *in the matter of Yi Lo and Pei Wen Dong* dated May 25th, 1994. In *Lo and Dong* purchasers of a condominium unit contracted for one that was 1,000 square feet. The unit delivered was 980 square feet. However it was recognized in the decision that the deficiency in area was within the 2% industry guideline. That is not admitted in the present case as, in fact, the deficiency is clearly above the guideline, and this case is distinguished from the *Lo & Dong* case on that basis.

Having found that the Applicants' owners have a cause of action against Rosedale for damages resulting from a breach of warranty, the Tribunal must determine the amount the Applicants are entitled to be paid out of the guarantee fund.

DAMAGES:

As much as the evidence in this case went on for a day and half, it was telling, as to what was not introduced as evidence by the parties. There was no market data given by the Applicants to indicate that the market value of the Subject Property was in any way diminished as a result of the lack of 79 square feet. In cross-examination the applicant stated that he had difficulty placing his refrigerator into his kitchen, but there was no other evidence given concerning the lack or loss of utility for the Subject Property as a result of the changes made by Rosedale.

In any event, evidence was presented by all parties respecting damages calculated on a cost basis. The Tribunal finds that the best evidence concerning the appropriate measure of damages on a cost basis was that presented by the witness for Rosedale. In argument, this amount was identified by the solicitor for the Applicants as being \$56.00 a square foot. Given the 2% tolerance for errors in measurement of areas of homes which is acceptable in the industry, at best, the applicant has been deprived of .7% of the home he bargained for, which again was identified in argument as 20.44 square feet x \$56.00 = \$1,144.64.

DECISION:

Accordingly, for the reasons stated above, pursuant to the authority vested in it under section 16(3) of the Act, the Tribunal directs the Program to pay to the Applicants the sum of \$1,144.00 for breach of warranty pursuant to section 14(1)(b) of the Act, such payment to be made no later than sixty (60) days after the release of this Decision and Order.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick
Vice-Chair

Released: August 28, 2000

MARCHI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
STEVEN AND DOLORES MARCHI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

STEVEN AND DOLORES MARCHI

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

KEVIN DOBLE PROPERTIES LTD.

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on May 29-June 2, 2000;

AND WHEREAS, upon consent, the matter was adjourned to August 28-September 1, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Tuesday, October 31, 2000, and to continue November 1-3, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 29, 2000

AMAN ENTERPRISES (1989) LTD.

PREHEARING

IN THE MATTER OF an application by Aman Enterprises (1989) Ltd., dated July 12, 2000 for a hearing before the Licence Appeal Tribunal pursuant to section 50(1) of the *Highway Traffic Act* appealing the 30 day Suspension and Seizure Order of the Deputy Registrar dated July 10, 2000 effective on July 17, 2000;

AND IN THE MATTER of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8 as amended;

AND IN THE MATTER of the safety records of Aman Enterprises (1989) Ltd. and Kultar S. Sanghera;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificate #113-874-580 issued to Aman Enterprises (1989) Ltd.;

AND IN THE MATTER of the plate portion of permits for and number plates for all commercial motor vehicles and trailers registered in the name of Aman Enterprises (1989) Ltd. and Kultar S. Sanghera.

TRIBUNAL: Marjorie L. Hiley, Vice-Chair

APPEARANCES: Murray Forbes, Counsel for the Respondent (in person)

Sandy Power, Agent for the Applicant (via teleconference)

**DATE OF
PRE-HEARING:** August 28, 2000

ORDER AND SUMMARY OF DISCUSSION

A Prehearing Conference between the parties was held on August 28, 2000 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Prehearing Conference, dated April 10, 2000.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing dates have been set for October 23, 2000, October 24, 2000 and October 25, 2000 at 1 St. Clair Avenue West, 12th Floor.
2. It was determined that the filing dates with the Tribunal of submissions and documents to be used in the hearing by both parties will occur **on or before Friday October 13, 2000. The Respondent is to forward copies of its materials and its list of witnesses with a summary of their evidence to the Applicant on or before September 15, 2000.**

The Applicant is to forward copies of its materials and its list of witnesses with a summary of their evidence to the Respondent on or before September 29, 2000.

The Respondent is to forward all additional materials and/or list of witnesses with a summary of their evidence to the Applicant on or before October 6, 2000.

Both parties will file five copies with the Tribunal and deliver one copy to all parties. It was confirmed that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will provide the Applicant with the following:

- CVOR publication excerpts
- CVSA standards and out of service criteria documents
- MTO NSC truck publication
- Accident, police report, CVIR and CVSA Templates
- Any other such materials to be provided in response

4. The Respondent will present testimony and evidence from at least one witness: Ms. Margaret Mooney, head of Sanctions and Control, or one of her employees. She will go through the material that was before the Registrar at the time of his decision to impose the sanction. The Respondent may call other witnesses in response to issues that may be raised by the Applicant.

The evidence to be used by the Respondent will include:

- Wheel separation incident of March, 1998
- Ministry analysis of the Applicant's record
- Show cause meeting analyst's notes and materials
- Copies of Applicant's show cause meeting submissions
- Safety net reports with summaries
- Copies of correspondence between the carrier and the Registrar
- Copies of Order and Notice of Appeal with supporting documents
- Copies of Commercial Vehicle Inspection Reports

- Updated CVOR abstract with analysis showing the Applicant's record as of Order date
- Formal documents, correspondence
- Notice of Appeal
- Police accident reports
- Application for change of fleet size
- Documents on British Columbia and United States investigations of the company
- International fuel tank records (I.F.T.)
- Incorporating documents of the company
- Other relevant documents

5. The Applicant is likely to present testimony and evidence from Sandy Powar, Safety Manager and Vena Rhal, Accountant. There could be other witnesses as well. The Applicant is to present its final list of witnesses and a summary of their evidence to the Respondent by September 29, 2000.

The evidence to be presented by the Applicant will include:

- May 2000 U.S. Department of Transport audit
- Written hiring practices of company
- Driver's handbook of company
- Warning letters to drivers; letters on fines given to drivers and other correspondence relating to the implementation of the safety procedures of the company

6. It was outlined at the Prehearing Conference that:

The Registrar has issued a Suspension and Seizure Order, dated July 10, 2000, pursuant to section 47 of the *Highway Traffic Act*, as of the 17th day of July, 2000 for Aman Enterprises (1989) Ltd.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley, Vice-Chair

RELEASED: August 29, 2000

PREHEARING

IN THE MATTER OF an application by R&S Transportation Inc./Harj-Min Carriers Inc. dated June 27, 2000 requesting an appeal before the Licence Appeal Tribunal pursuant to Section 50(1) of the Highway Traffic Act, to consider the appeal of the Suspension and Seizure Order of the Deputy Registrar dated June 26, 2000 to be effective on July 4, 2000.

AND IN THE MATTER of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8 as amended;

AND IN THE MATTER of the safety records of R&S Transportation Inc./Harj-Min Carriers Inc.;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificate #126-488-670 issued to R & S Transportation Inc. and certificate #133-189-137 issued to Harj-Min Carriers Inc.;

AND IN THE MATTER of the plate portion of permits for and number plates for all commercial motor vehicles and trailers registered in the name of R. S Transportation Inc./Harj-Min Carriers Inc.

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: MURRAY FORBES, Counsel for the Respondent

SHELLY TROUPE, Agent for the Applicant

**DATE OF
PRE-HEARING:** August 29, 2000

ADJOURNMENT ORDER

WHEREAS a pre-hearing was scheduled to be held on August 29, 2000 in Toronto in the above matter;

AND WHEREAS at the commencement of the pre-hearing before the Tribunal the agent for the Applicant made a Motion for Adjournment;

AND WHEREAS the Tribunal heard submissions from the Applicant's agent that she had been notified by the Applicant's President the day before the commencement of the pre-hearing conference that he would not be able to attend due to a sudden death in his family;

AND WHEREAS the Tribunal heard submissions from both parties and considered the motion to adjourn, and requested that the Applicant file with the Tribunal on or before August 30, 2000 a letter on behalf of the Applicant detailing the nature of the reason for requesting the adjournment and confirming that the Applicant is aware of the agreed re-scheduled date of September 11, 2000 at 1:30 p.m.;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned to a date to be set by the Tribunal; and
- (2) this pre-hearing conference is adjourned to take place at 1:30 p.m. on Monday, September 11, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *August 29, 2000*

1090498 ONTARIO INC

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JOE HEWITT
Presiding member

APPEARANCES: F.C. ROWETT
Representative for the Registrar of Motor Vehicles

DALIP DHILLON, Agent for the Applicant

DATE OF HEARING: August 25, 2000

DECISION RELEASED: August 30, 2000 Kitchener

REASONS FOR DECISION

A hearing was held on August 25, 2000, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	1090498 Ontario Inc. (the “Applicant”)
Motor Vehicle:	1990 Dodge Van, plate # AATR 971 (the “vehicle”)
Date of Appeal:	August 11, 1000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on August 25, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

1. Owner was aware that MIRKO JOSIMOVIE lost his driver licence around x-mas of 1999. In the beginning of April, 2000 he produced a valid licence, owner was not aware and neither told by MIRKO JOSIMOVIE that he lost his driver licence again.
2. As result of the impound of this vehicle the loss is upon the owner and is not on MIRKO JOSIMOVIE who was driving while his driver's licence was under suspension.
3. The impact of loss is immediate to this owner, because it result in lost sales because deliveries and pick up can't be made due to the non-availability of the vehicle.

Mr. Dalip Dhillon, the representative of the Applicant, testified that Mr. Mirko Josimovie was a part time contract carpet installer that the company used from time to time. In December of 1999, Mr. Josimovie lost his driver's licence for an impaired driving charge while using the company van. The company was called by the police to pick up the van and were told of Mr. Josimovie's charge.

In April of 2000, Mr. Josimovie produced a driver's licence, and the company hired him again. Mr. Dalip Dhillon or Mrs. Mandeep Dhillon never asked Mr. Josimovie to produce a drivers licence again when they hired him in August. The company assumed Mr. Josimovie's licence was still valid. The company does not conduct driver abstracts on people that use its vehicle.

Mr. Dhillon stated that the loss and hardship is on the company and not on Mr. Josimovie. That the company has lost sales because they did not have a truck for deliveries or installations. The company has made no attempt to rent a vehicle during the impoundment. The company is in no threat of bankruptcy. The company does four to five carpet installations per month.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mirko Josimovie;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under

the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 7, 2001.

The Respondent did not introduce any witnesses. The evidence of the Registrar consisted mainly of the documented evidence herein before listed.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

FACTS FOUND PROVEN

- 1) The Applicant is the owner of the motor vehicle that was the subject of the impoundment order.
- 2) At the time of the impoundment order, the Applicant's vehicle was driven by Mirko Josimovie.
- 3) At the time of the impoundment of the Applicant's motor vehicle, Mirko Josimovie's driver's licence was under suspension due to a conviction under the Criminal Code of Canada for driving with more than 80 mg of alcohol in blood.
- 4) The loss of income to the company has not been significant or lasting, and the company has not looked into or used alternatives to the impounded vehicle.

ONUS OF PROOF

The onus of proof, based on the balance of probabilities, rests upon the Applicant.

Did the owner exercise due diligence respecting the driver's licence of the driver of the impounded vehicle?

The Applicant did not ask or inspect the driver's licence of Mirko Josimovie on or after April of 2000, knowing that he had an impaired driving charge in December of 1999. The Applicant showed no measure of prudence in his inquiries that would normally be expected in these circumstances.

The Tribunal therefore cannot conclude that the Applicant exercised due diligence within the meaning of section 50.2 (3)(c) of the Act.

EXCEPTIONAL HARDSHIP

The Applicant remains in business with no immediate threat, significant loss or lasting effect from this impoundment.

While the Applicant's profit may be reduced as a result of this impoundment, there is no possibility of bankruptcy.

Section 22(4) of Regulation 574 requires that no alternative to the impounded vehicle is available to the Applicant. The Applicant has not inquired into vehicle alternatives. The use of this vehicle in the Applicant's business is, in any event, limited to four to five days per month.

In consideration of all the evidence presented, the Tribunal finds that the Applicant has not demonstrated exceptional hardship under section 22 of Ontario Regulation 632/98 amending Ontario Regulation 574 under the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joe Hewitt, Presiding Member

RELEASED: *August 30, 2000*

FRANCIS MOVERS LTD.

FRANCIS MOVERS LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY
THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Presiding Member

APPEARANCES: No one appearing for the Applicant

KIM GROSSKURTH, Agent, representing the Registrar of
Motor Vehicles

DATE OF
HEARING: August 31, 2000 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended, Francis Movers Ltd. (the "Applicant"), appealed a decision of the Registrar of Motor Vehicles (the "Registrar") set out in the Order to Impound, dated August 14, 2000;

WHEREAS the Tribunal set a hearing for August 31, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., which did not proceed;

AND WHEREAS the Notice of Hearing, dated August 16, 2000, was delivered by facsimile [(416) 286-7078] to the Applicant on August 16, 2000 the receipt of which was acknowledged by the Applicant;

AND WHEREAS the Applicant's agent was not present to commence the hearing at 9:30 a.m. on August 31, 2000. When contacted by the Tribunal's staff during its recess, the Applicant's agent advised that he will be faxing a letter of withdrawal to the Tribunal, which letter was received at approximately 9:55 a.m. on August 31, 2000;

AND WHEREAS Kim Grosskurth, representing the Registrar of Motor Vehicles was present at the hearing on August 31, 2000;

AND WHEREAS ON READING the Applicant's Notice of Appeal, Owner's Position, Ministry of Transportation's submissions as well as Exhibits 1 and 2, no one appearing for the Applicant although properly served as appears from proof of service filed, this Tribunal finds that due to delay, non-attendance and failure to proceed on the part of the Applicant, the Applicant has abandoned these proceedings;

THIS TRIBUNAL ORDERS that the appeal by the Applicant is dismissed and pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, the Tribunal confirms the Registrar's Order to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano
Member

Released: *August 31, 2000*

PREHEARING

SAM SHERMAN

APPEAL FROM A DECISION OF THE COMPLAINTS
COMMITTEE OF THE FUNERAL BOARD OF SERVICES

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

DANNY LESKIW, Agent representing Sam Sherman

NICOLAS TIBOLLO, Counsel for Carol Saucier

BERNIE LEBLANC, Counsel representing the Registrar, *Funeral Directors and Establishments Act*

DATE OF

PREHEARING: August 1, 2000

Toronto

ORDER

Following attendances on August 1, 2000 at a prehearing before this Tribunal of Danny Leskiw, agent representing Sam Sherman (the "Applicant"), Nicolas Tibollo, counsel for Carol Saucier and Bernie LeBlanc, counsel on behalf of the Registrar, *Funeral Directors and Establishments Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at **9:30 a.m.**, on Wednesday, **August 30, 2000** at the **Tribunal's premises at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario:**

1. The parties recorded that there had been no resolution of any of the issues in this matter.
2. The parties to the hearing are Sam Sherman, Carol Saucier and the Registrar, *Funeral Directors and Establishments Act*.
3. The issues to be dealt with at the hearing are the complaint and/or complaints made by Sam Sherman in his letter to the Board of Funeral Services, dated December 4, 1999, relative to his wife's funeral.
4. Sam Sherman proposes to call as witnesses at the hearing the following parties:
 - Sam Sherman
 - Robert Sherman
 - Neilia Sherman
 - Brian Waterman

Carol Saucier proposes to give evidence at the hearing on her own behalf. In addition, Carol Saucier may call Larisa Meerova and possibly one or two other witnesses to testify on her own behalf.

5. Danny Leskiw, agent for Sam Sherman, produced and made available to Carol Saucier and the Registrar the following documents which Sam Sherman intends to use at the hearing of this matter:

- List of prospective witnesses
- Attachment marked "A"
- Attachment marked "B"
- Attachment marked "C"
- Attachment marked "D"
- Attachment marked "E"
- Attachment marked "F"
- Attachment marked "G"
- Attachment marked "H"
- Attachment marked "I"
- Attachment marked "J"
- Attachment marked "K"
- Attachment marked "L"

6. Carol Saucier undertook to comply with rule 6.3 of the Rules of Practice of this Tribunal.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: August 2, 2000

McGONEGAL

BONNIE McGONEGAL

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: KENNETH KOPROWSKI
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

BONNIE McGONEGAL, Applicant
unrepresented

DATE OF HEARING: August 29, 2000

DECISION RELEASED: August 31, 2000 Fort Frances

REASONS FOR DECISION

A hearing was held on August 29, 2000, at Fort Frances, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Bonnie McGonegal (the "Applicant")
Motor Vehicle: 1986 Plymouth Voyager, plate # AEWC 188 (the "vehicle")
Date of Appeal: August 2, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on August 29, 2000 and proceeded as a written hearing.

There was one preliminary matter.

On the 24th day of August, 2000, the date on which this decision was to have been written originally, I received, by facsimile transmission, in the mid-afternoon, a further 27 pages of supplementary materials and submissions by the Applicant, which the Applicant had filed with the Tribunal only earlier that day, one day after it was due.

I have allowed this late filing by the Applicant. The reason is that, under Rule 2.7 of the Rules of Practice of the Licence Appeal Tribunal, this Tribunal may waive any of the Rules at any time. Such discretion should not be exercised capriciously, nor without regard to the facts of the particular circumstances at hand. It is inherent in the concept of fairness to all parties, to this or any hearing, that this Tribunal should wish to be apprised of all relevant facts and materials in order to arrive at an informed decision. The Applicant is a lay person, to whom all reasonable courtesy and fairness should be extended to permit disclosure of such facts and materials.

Using the identical reasoning, I also allowed the filing, by facsimile transmission to me on August 29, 2000, of further material from the Respondent; namely, its Reply to the Supplementary materials and submissions of the Applicant.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Dear Sir or Madam

I am asking for this appeal as we live 10 miles in the country outside a small town called Perth. Our area has no bus service and taxi fare to town is \$15.00. My husband is ill and requires medical attention quite often. We are on disability from the Ontario government and unable to replace our van because of financial stress. A 30.00 taxi fare to town and back each week for groceries or doctor appointments leaves quite handicapped as far as finances go and the impound fee would leave us unable to reclaim our vehicle or replace it. A trip to a specialist in Ottawa would be impossible as it is the nearest city and it is 100 kilometres away and taxi fare would be unbelievable.

I hope this will help in making your decision. If a doctor's letter or a more detailed financial statement would help I will be glad to send you any added information you may require by way of priority post.

By way of exhibit 4, the further submissions of the Applicant, the Applicant states as follows:

- (a) not having the impounded vehicle, and if family members help with her and her husband's transportation to town, the Applicant must leave at 7:30 a.m. when the family members go to work, and must return at 4:30 or 5:00 p.m. when they return from work. As for the neighbours, most are working, or have only one car, where the working person takes the vehicle.
- (b) the Applicant has hitch-hiked to town before for medicines, but her husband is unable to walk great distances.
- (c) Although a Para-Med service could drive her husband around, in town, it does not provide transportation from their house to the town itself.
- (d) Taxi fare to Perth from the Applicant's residence costs \$15.00.
- (e) The Applicant's husband suffers from chronic liver disease, and such things as allergies and chronic bronchitis. He has attended at the Emergency Department at Perth and Smiths Falls Hospital on numerous occasions, as confirmed by 5 pages of hospital records, filed by the Applicant as part of Exhibit 4, covering the period January 19, 1995, to September 29, 1999.
- (f) Although the Applicant has 8 other vehicles registered to her name, they are all at the wrecker's junkyard and are unroadworthy.
- (g) The Applicant's monthly income is in the amount of \$1,293.85, being Social Assistance from the Ministry of Community and Social Services. Her bank balance, as at August 8, 2000, is shown to be \$5.66. This, according to the Applicant, makes it difficult to afford taxi fares or to hire anyone privately to drive her or her husband where and when they must go.

(h) No financial help is forthcoming from Bradley McGonegal, the suspended driver, because he is unemployed and is on social assistance himself.

(i) A payment of \$557.91 is due to Hydro One Networks on September 1, 2000, as confirmed by a letter dated August 15, 2000, from Hydro One Networks to the Applicant, and filed as part of exhibit 4. Failing this payment, hydro service to the Applicant's residence will be interrupted.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Bradley Carl McGonegal;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 9, 2002.

In response to Exhibit 1, the Notice of Appeal from the Applicant, the Respondent denies that the Applicant had shown exceptional hardship in Exhibit 1 and, correctly, continuously recites a lack of details provided by the Applicant in Exhibit 1. These details were subsequently provided by the Applicant's later filing of Exhibit 4.

Nevertheless, by way of Reply, Exhibit 5, the Respondent argues as follows:

(a) the Applicant's hardships are more consistent with inconvenience, which is something that this Tribunal cannot consider in reaching a decision in this matter. Further, the Applicant fails to state how often it is necessary to go into town at all.

(b) the last visit to Perth and Smiths Falls hospital by the Applicant's husband was September 29, 1999, but has had no "emergencies" during the impound period. Therefore, his medical condition is not life threatening, and being without a vehicle does not pose a threat to his health and safety.

(c) no visits to the hospital were life threatening and certainly not due to a chronic life threatening medical condition. In any event, in an emergency, the Applicant could use the 911 service at the hospital. The Respondent states that the hospital has this service, although there is no evidence of this before this Tribunal.

(d) the bankbook and statement of monthly expenses show that the Applicant has not incurred any financial loss as a result of the impound. The Applicant, further, does

not state how often she must use the taxi to go to town, and has found an alternative with family members. However, as I read the Applicant's evidence, this argument of the respondent ignores the point that I read that the Applicant was making in revealing her financial circumstances; namely, there is exceptional hardship involved in paying for such cab services, regardless of how often it is used.

(e) the amount of \$557.91 owing to Hydro One Networks and the threat of hydro being cut off is not a result of the vehicle being impounded. However, again, this seems to ignore the point that I read that the Applicant was making; namely, there is exceptional hardship arising from their total financial circumstances which the impoundment only exacerbates.

(f) the fact that the Applicant is distressed with worry is not an exceptional hardship as defined by Regulation 632/98 of the *Highway Traffic Act*.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Contrary to what the Respondent has stated in its Reply, Regulation 632/98 does not "define" exceptional hardship. The Regulation outlines factors which are to be considered in concluding whether an Applicant has proved "exceptional hardship", but the actual definition is as given earlier in these reasons. A hardship, to be exceptional, must be "of the nature of or forming an exception; unusual." In turn, "hardship" is defined as: "1. The quality of being hard to bear; hardness; severity. 2. **hardness of fate or circumstances**; severe toil or suffering; extreme privation." (emphasis is mine).

Any conclusion about whether a person's circumstances amount to "exceptional hardship" must be a matter of the facts in each particular case. No one definition can hope to cover every set of circumstances that one may come across.

In this case, I have no hesitation in finding that the Applicant has proved exceptional hardship.

The circumstances of the Applicant involve more than an inconvenience. How can it be a mere inconvenience not to be able to attend to a person's medical needs immediately as and when they may arise? How is it mere inconvenience to have to hitch-hike 20 miles, round trip, to and from the nearest town or to have to wait all day in town for a ride to return home at the end of the driver's work day? I do not find that these circumstances are mere inconveniences.

No viable, reasonable alternative is available to the Applicant to meet her needs and those of her husband on a regular, consistent basis. Therefore, I find that there is a threat, hovering over their heads continuously, to the health or safety of her husband, who is a person "ordinarily transported by the motor vehicle."

The Applicant and her husband are ill positioned, by virtue of the amount of their Social Assistance payments, to weather any financial loss, which would, therefore, be, to them, immediate, significant and lasting. The impact of the loss would be upon the Applicant's husband, the person ordinarily transported by the impounded vehicle, and not upon Bradley McGonegal, the suspended driver.

In effect, as regards Regulation 574 RRO 1990, as amended by O.R. 632/98, I find that:

- (1) the criteria in s. 22(1)(a) have been satisfied.
- (2) we are, here, considering more than an inconvenience, which is a matter which this Tribunal would not be able to consider, by virtue of s. 22(2)(a).
- (3) because I find that there is no viable alternative to the impounded vehicle, I must, and do, find, in accordance with s. 22(3), and based on the evidence outlined in these reasons, that the criteria outlined therein have also been satisfied.
- (4) no reasonable option or mitigation of any threat or loss to the person is available to the Applicant on the facts of this case, in accordance with the matters I must consider under s. 22(4).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski, Presiding Member

RELEASED: *August 31, 2000*

URBAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ZOLTAN BOB URBAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 31st, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ZOLTAN BOB URBAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Zoltan Bob Urban, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 24, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Zoltan Bob Urban
1241 Creekside Drive
Oakville ON L6H 4Y8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Zoltan Bob Urban, (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law, his registration is automatically revoked.
3. The Applicant agrees that his explanation of the circumstances of the convictions is accurate and if the Registrar discovers that the material facts of the convictions is substantially different from what the Applicant disclosed, his registration is automatically revoked.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without prior written consent from the Registrar.
5. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
6. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
7. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

8. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
9. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked
10. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

(Signature) Zoltan Bob Urban

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

SEMINARA

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
EUGENE PAUL SEMINARA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 31st, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

EUGENE PAUL SEMINARA

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Eugene Paul Seminara, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 23rd, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Eugene Paul Seminara
C/o Mills and Hadwin LTd
3080 Dufferin Street
Toronto ON M6A 2S6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, David Boyce (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Commercial Registration Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is criminally charged in the future, to immediately notify the Registrar, Motor Vehicle Dealers Act, in writing, of the charges laid against him.
2. The Applicant agrees, if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant agrees that should he be convicted of an offence under any law, his registration will automatically be revoked.
4. The Applicant agrees to give full disclosure on all future applications.
5. The Applicant agrees if the Registrar, MVDA, becomes aware that the circumstances surrounding his convictions are different from his disclosure, his registration is automatically revoked.
6. The Applicant agrees not to transfer his registration as a salesperson under the Motor Vehicle Dealers Act to another dealer. Should he wish to transfer his Registration, he shall submit a new application for registration to the Registrar.
7. The Applicant agrees to register for, and to successfully complete the certification course within 60 days of this order. Failure to do so will result in an automatic revocation of the applicant's licence.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

10. The Applicant hereby agrees that should he breach any of the terms and conditions set out in this document, in whole or in part, the Registrar is directed to, and shall carry out the proposal to revoke his registration, and his registration will be automatically be revoked.
11. The Applicant hereby consents to an order of the Commercial Registration Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Commercial Registration Appeal Tribunal.
13. The Applicant hereby acknowledges that his employer has seen and understands the particulars outlined in the Registrar's proposal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Nepean, this day of 1999.

(Signature) David Boyce

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

LALONDE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NORMAN LALONDE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: May 11th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NORMAN LALONDE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Norman Lalonde, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 4th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Norman Lalonde
21957 C4 S Glen TP BX28
North Lancaster, Ontario, K0C 1Z0

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Norman Lalonde hereafter the ("Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) I agree, if I am charged in the future, under any law, to immediately notify the Registrar, MVDA, in writing of the charges or convictions against me. Upon any future convictions the Applicant's registration will be automatically revoked.
- 2) I agree, if I am charged in the future, under any law, to immediately notify my employer of the charges or convictions against me.
- 3) I agree not to transfer my registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 4) I acknowledge that my registration will not prevent the Registrar from taking administrative action, including a proposal to revoke my registration, arising from matters that may have occurred or may occur in the future related to my financial circumstances and honesty and integrity.
- 5) I acknowledge that my registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 6) I acknowledge that the disclosure provided by me to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of my disclosure in entering into these terms and conditions.
- 7) I agree to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. I further acknowledge that enrolment in the course entitles me to a sixty (60) day conditional registration period that allows for my successful completion of the course (including passing the exam).
- 8) The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.
- 9) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.

- 10) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership
- 11) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- 12) The Applicant agrees to provide, as soon as possible, copies of any and all judgments rendered against the Applicant as well as good and sufficient evidence that said judgments have been paid or that satisfactory payment arrangements have been reached with the Applicant's creditors.
- 13) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.
- 14) The Applicant acknowledges that, if, the Registrar has evidence that the Applicant has failed to comply with any of the requirements noted above, the Applicant's registration as a motor vehicle salesperson will be revoked and the Applicant will immediately return all registration certificates to the Registrar.
- 15) I hereby withdraw my appeal to the Licence Appeal Tribunal.
- 16) I acknowledge that I have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

Witness

(Signature) Salesperson, Norman Lalonde

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton, Registrar.
Date:

THARRENOS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
VASILIOS BILL THARRENOS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 17th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

VASILIOS BILL THARRENOS

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Vasilios Bill Tharrenos, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 23rd, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

And to: Licence Appeal Tribunal
12th Floor
1 St Clair Ave West
Toronto, ON

Vasilios Tharrenos

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, Vasilios Tharrenos hereby consents to the following terms and conditions to his registration as a salesperson under the Motor Vehicle Dealers Act:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions;

1. Vasilios Tharrenos agrees not to make application for a transfer of my salesperson registration to another dealer/employer without first obtaining the written consent of the Registrar;
2. Vasilios Tharrenos agrees to forthwith advise the Registrar in writing if any charges are laid against him and further agrees to advise the employer in writing and provide proof of same to the Registrar. Vasilios Tharrenos further agree to advise the Registrar and employer, in writing, of the disposition of the charges.
3. Vasilios Tharrenos agrees not to be a partner, shareholder, officer, director or manager of a motor vehicle dealership, without the prior written consent of the Registrar.
4. Vasilios Tharrenos agrees that his registration will be revoked if he is convicted of an offence under any law.
5. Vasilios Tharrenos agrees not to be an owner, partner, shareholder, officer, director or manager of a motor vehicle dealership;
6. Vasilios Tharrenos agrees not to be the final signatory on any sales contracts on behalf of the dealer.
7. Vasilios Tharrenos agrees that he is under a positive obligation to disclose all material facts about the vehicles he sells.
8. Vasilios Tharrenos will complete and pass the certification course within 60 days of the date of this order.
9. Vasilios Tharrenos hereby acknowledges that the Registrar may take further administrative action, including a proposal revoke registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position, other than matters which were the subject of the previous proposal to revoke registration.
10. Vasilios Tharrenos hereby acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution , arising from any matters that have occurred or may occur related the sale of motor vehicles that may have occurred in the past or may occur in the future.
11. In the event that Vasilios Tharrenos breaches any of the Terms and Conditions set out herein, Vasilios Tharrenos agrees that the Registrar is authorized and directed to carry out the proposal and shall revoke his registration.

12. Vasilios Tharrenos hereby consents to an order which may include the Terms and Conditions set out herein.
13. Vasilios Tharrenos hereby withdraws his appeal to the Licence Appeal Tribunal.
14. Vasilios Tharrenos acknowledge that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out herein.

Signed in the City of Toronto, this day of , 2000.

Witness

Vasilios Tharrenos

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton, Registrar

SANTOS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
VICTOR SANTOS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: March 15th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

VICTOR SANTOS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Victor Santos, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 23rd, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Victor Santos
769 Fletcher Valley Cres
Mississauga ON L5J 2X4

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Victor Santos (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law to immediately notify the Registrar, Motor Vehicle Dealers Act, in writing, of the charges laid against him.
2. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant agrees, if he is convicted under any law, that his registration will automatically be revoked.
4. The Applicant agrees to make full and complete disclosure on all future applications.
5. The Applicant agrees that the particulars of each conviction are accurate. Should the Registrar discover that the material circumstances surrounding each conviction differs substantially from the disclosure given, the Applicant's registration will be revoked.
6. The Applicant agrees to enrol into and successfully complete the certification course within 60 days of the issuance of this order.
7. The Applicant agrees not to go on test drives until his driver's licence is reinstated.
8. The Applicant agrees not to transfer his registration as a salesperson under the Motor Vehicle Dealers Act to another dealer. Should he wish to transfer his Registration, he shall submit a new application for registration to the Registrar.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.

11. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall be revoked.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Mississauga, this day of March 2000.

(Signature) Victor Santos

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

LONG

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
WILLIAM GEORGE LONG

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 9th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WILLIAM GEORGE LONG

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by William George Long, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: August 23rd, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
1 St. Clair Ave West
Toronto ON
M4V 1k6

FROM: William George Long
252 Norfolk Street
2nd Floor
Port Dover, Ontario, N0A 1N4

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, William George Long (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, MVDA, in writing of the charges or convictions against me. Upon any future convictions the Applicant's registration will be automatically revoked.
2. The Applicant agrees to give immediate disclosure to the Registrar of the disposition of the current pending charges. Failure to do so will result in the automatic revocation of his registration.
3. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer, and the Registrar, in writing, of the charges against him.
4. The Applicant agrees to give full and complete disclosure on all future applications.
5. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
6. The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
7. The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
8. The Applicant acknowledges that the disclosure provided by him to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of my disclosure in entering into these terms and conditions.
9. The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment.

The Applicant further acknowledges that enrolment in the course entitles him to a sixty (60) day conditional registration period that allows for his successful completion of the course (including passing the exam).

10. The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.

11. The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.

12. The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership.

13. The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.

14. The Applicant agrees to provide, as soon as possible, copies of any and all judgments rendered against the Applicant as well as good and sufficient evidence that said judgments have been paid or that satisfactory payment arrangements have been reached with the Applicant's creditors.

15. The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.

16. The Applicant acknowledges that, if, the Registrar has evidence that the Applicant has failed to comply with any of the requirements noted above, the Applicant's registration as a motor vehicle salesperson will be revoked and the Applicant will immediately return all registration certificates to the Registrar.

17. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

18. The Applicant acknowledge that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document. Signed in the City of, thisf00.

Witness (Signature),

William GeorgeLong

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*

Carl Compton, Registrar

0187/ADLS/00/016

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: August 24, 2000 Peterborough

DECISION

A hearing was held on August 24, 2000, at Peterborough, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *August 25, 2000*

0187/ADLS/00/016

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: August 24, 2000

DECISION
RELEASED: August 25, 2000 Peterborough

REASONS FOR DECISION

A hearing was held on August 24, 2000, at Peterborough, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on August 25, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated July 31, 2000, and was received by the Tribunal on August 9, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

“I was unable to provide the required breath sample because of a medical reason.”

Preliminary Matters

There were no preliminary matters, the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated July 31, 2000
- b) Exhibit #2 Notice of Suspension of Driver’s Licence – dated July 5, 2000
- c) Exhibit #3 Notice to Registrar – dated July 3, 2000
- d) Exhibit #4 Discharge Summary Sheet & Care Plan – dated May 23, 2000
- e) Exhibit #6 Shoppers Drug Mart Prescription Information – 7 pages
- received August 24, 2000
- f) Exhibit #7 Letter of apology, dated June 20, 2000 – received August 24, 2000

By the Respondent:

- a) Exhibit #5 MTO Submissions – 18 pages – received August 18, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (“HTA”) states:

50.1 (1) “A person whose driver’s licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
 - (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
 - (f) whether the medical practitioner is a specialist and, if so, the field of speciality.
- (2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant's driver's licence was suspended “*July 04 2000*” as indicated in the Applicant's Notice of Appeal (Exhibit # 1)

Page 2 of the Notice of Appeal, dated August 2, 2000, was prepared by Physician # 1, the Applicant's physician for one month. Physician # 1 wrote: “*May 17/2000 - fractured rib - still healing at time of x - ray ...pneumothorax - resolved on x ray May 30/00 -.*” (Exhibit # 1)

A Discharge Summary Sheet, dated "May 23/00," details instructions for the Applicant to follow at home. (Exhibit # 4)

The Respondent provided the following Documents:

1. Notice to Registrar.
2. Driving Record
3. Vehicle Record
4. Crown Brief Synopsis

The Crown Synopsis states that the Applicant refused to provide a breath sample. (Exhibit # 5)

At the hearing, the Applicant testified that he believed he was incoherent and irrational due to a reaction to the strong medication he was on at the time. The Applicant fell off a chair and fractured some ribs, some months ago. On the day he was accosted by the police, he had taken several painkillers.

During his testimony, the Applicant produced a summary list of all the medications he was taking, as well as Shopper's Drug Mart information sheets for said medications. These documents were entered on consent as Exhibits 6. The Respondent had no objections but did request that the Tribunal note that documents were presented on the day of the hearing.

During cross-examination, the Applicant produced a letter which was entered as Exhibit 7. This letter is dated "June 20, 2000" and appears to be a letter of apology to Constable Officer # 1.

Both, during examination-in-chief and in cross-examination, the Applicant declared he has no recollection of the events that occurred that evening. He remembers not feeling well. The reason that he refused to blow into the breathalyzer was that he knew he would not be able to, due to the pain he was feeling.

The Applicant called Witness #1 as a witness. Witness #1 confirmed the amount of alcohol shared by the two men on the evening in question.

The Respondent relied on the written information provided for the hearing, and on the testimony of Constable Officer # 1 of the Peterborough Lakefield Police Service.

Constable Officer # 1 has been a police officer since 1989; a breathalyzer technician since 1990 and an Intoxilyzer technician since 1996.

Constable Officer # 1 swore that the Applicant did not appear to be in any physical pain. In response to questions posed by Constable Officer # 1, the Applicant stated that he had HIV, and that his injury was in "...*knowing you*..." At no time did the Applicant request medical assistance.

When asked to provide a breath sample, the Applicant refused. Constable Officer # 1 declared that he asked the Applicant three times to stand and provide a breath sample, and the Applicant refused.

APPLICATION OF THE LAW TO FACTS:

At issue is, how does the medical condition of the Applicant relate to section 50.1(2)(b), and did this medical reason cause him to fail or not comply with the breath demand. The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed the "Applicant's Medical Information" prepared by the Applicant's physician for this hearing. Physician # 1 noted: *'May 17/2000 - fractured rib - still healing at time of x - ray ...pneumothorax - resolved on x ray May 30/00 -.'* (Exhibit # 1)

Pertinent law, i.e. Subsection 48.3 establishes the criteria for the suspension of a driver's licence:

(1) *Where a police officer is satisfied that a person driving or having care, charge or control of a motor vehicle meets one of the criteria set out in subsection (3)...*

(3) *Criteria for the purpose of subsection (1)...*

(2) *The person failed or refused to provide a breath or blood sample...*

The Applicant may have had several reasons for not being able to provide a breath sample, some of which might even be medical. Yet, the facts are clear and simple, by his own admission he refused to provide a breath sample. Further, at the time the Applicant offered no reasonable explanation as to why he was refusing to do so.

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of section 50.1(2)(b) which requires the Applicant to demonstrate that his failure to provide a breath sample was due to medical reasons.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated July 4, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: August 30, 2000

LATHER

JOHN AND GLADYS LATHER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREL ISRAEL, Vice-Chair

APPEARANCES:

GEORGE S. CHRIS, representing the Applicants
NETANUS RUTHERFORS, Counsel, representing the Ontario New
Home Warranty Program
JAMES E. ALLIN, Counsel, representing Sparks Built Homes Ltd.,
Added Party

DATE OF
PRE-HEARING: August 23, 2000

Toronto

CONSENT ORDER

Following attendances on August 23, 2000 at a pre-hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of George S. Chris, Counsel, representing John and Gladys Lather (the "Applicants") and Netanus Rutherford, Counsel, representing the Ontario New Home Warranty Program (the "Program"), and James E. Allin, Counsel, representing Sparks Built Homes Ltd., (the "Added Party");

AND PURSUANT to the pre-hearing on August 23, 2000, the parties have concluded a settlement in terms of which the Applicants have withdrawn their appeal.

NOW THEREFORE this Tribunal orders, on the consent of the parties, that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: August 24, 2000

SILVERMAN

PREHEARING

PETER A. SILVERMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

LARRY J. LEVINE, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
MICHAEL T. TAMBLYN, Counsel, representing Residences of
Russell Hill Inc., Added Party

DATE OF

PREHEARING: September 5, 2000

Toronto

ORDER

Following attendances on September 5, 2000 at a pre-hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of Larry J. Levine, Counsel, representing Peter A. Silverman (the "Applicant") and Netanus Rutherford, Counsel, representing the Ontario New Home Warranty Program (the "Program"), and Michael T. Tamblyn, Counsel, representing Residences of Russell Hill Inc., (the "Added Party");

The Tribunal makes the following Order:

- 1) The pre-hearing of this matter is further adjourned on consent of all parties to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, October 26, 2000.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: September 5, 2000

WEISS

THOMAS JOSEPH WEISS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

THOMAS JOSEPH WEISS, appearing on his own behalf
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: June 22, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a notice of proposal dated March 8, 2000, issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Act") to refuse the registration of Thomas Joseph Weiss (the "Applicant") as a motor vehicle salesperson under the provisions of the Act.

REGISTRAR'S POSITION

The Registrar's Notice of Proposal refers to the Applicant applying for registration as a motor vehicle salesperson by application dated March 3, 2000 (the "Application"), wherein he proposes to work for AAA Auto Wholesale o/a Daewoo London. The past conduct of the Applicant which the Registrar found to be inconsistent with the intention and objectives of the Act is as follows:

1. In response to Question 6 of the Application which asks if the Applicant had been involved in personal bankruptcy proceedings, the Applicant answered "yes" to this question. The Applicant filed for an assignment in bankruptcy in or about April 1995 and was discharged in or about January 1996.
2. In response to Question 9 which asks if the Applicant has ever been found guilty or convicted of an offence under any law, the Applicant answered "yes" to this question and disclosed a conviction in January 1995 on a charge of fraud.

3. A criminal history check conducted by the Registrar indicated that the Applicant had convictions on two charges of fraud over \$1,000.00.

THE EVIDENCE:

Amanda LeeDempsey, was called to give evidence on behalf of the Registrar and identified herself as a manager for the Ontario Motor Vehicle Industry Council ("OMVIC"). She testified with respect to OMVIC's role in administering the Act and the application of section 5 to registrations and renewals of registrations under the Act.

Ms. Dempsey referred to the Notice of Proposal to Refuse Registration dated March 8, 2000, appearing at Tab 1 of the Book of Disclosure provided by the Registrar which is Exhibit 3 in these proceedings and confirmed that the refusal is based upon the previous convictions and bankruptcy of the Applicant.

Ms. Dempsey reviewed the Application which appears at Tab 2 of Exhibit 3 and specifically Question 6 regarding personal bankruptcy proceedings which the Applicant had answered "yes" and Question 9 with respect to convictions, which again, the Applicant had answered "yes". Ms. Dempsey indicated that the procedure generally followed was to look at an Applicant's history, do a criminal check and occasionally a credit check was conducted as well.

In the present situation, a criminal record check was obtained and appears at Tab 3 of Exhibit 3 and discloses that the Applicant was charged, on or about February 22, 1995 in London, Ontario with two counts of fraud over \$1,000.00 and received a sentence of 18 months on each charge to be served concurrently. It was the witness's testimony that convictions such as these failed all tests with respect to the acceptability of past conduct.

Ms. Dempsey testified that the convictions registered against the Applicant indicated that there had been a breach of trust, dishonesty and unlawful conduct. Ms. Dempsey indicated that it would be negligence on the part of the Registrar to ignore such convictions. The witness confirmed that the Notice of Taxation of Trustee's Accounts and Discharge of Trustee appearing at Tab 4 of Exhibit 3 was provided with the Application and that page 3 of that document stated that the Applicant received an automatic discharge on January 27, 1996 and reveals the amounts involved in the bankruptcy.

The witness stated that the Registrar maintained his position that the Application of the Applicant should be refused.

The Applicant gave evidence on his own behalf and stated that he believed that the filing for personal bankruptcy was an act of financial responsibility and that as a result of his convictions and incarceration; he could not meet his financial obligations, and he felt that filing for bankruptcy was part of his rehabilitation.

The Applicant indicated that he was still with his wife and family living in London, Ontario.

The Applicant testified that his time with the Citizen Group of companies (the "Citizen Group"), which were the companies by whom he was employed at the time the fraud

charges were laid, shows that he endeavored to act responsibly as he was endeavoring to recoup money misappropriated by others. During what the Applicant referred to as the "Citizen fiasco", he did not have signing authority.

The Applicant testified that when he became aware of the misuse of funds within the Citizen Group, he ceased soliciting funds and looked for ways in which the moneys could be recouped. At that time, there were three properties owned by the Citizen Group and it was the Applicant's intention to sell these properties in order to recover moneys necessary to repay investors. The Applicant testified that the properties were ultimately liquidated however, unbeknownst to him at the outset, there were mortgages, tax arrears, sewer charges, etc., which reduced the amounts received from the sale of these properties substantially.

It was the Applicant's evidence that during the period from when he learned that funds had been misused by the companies until the matter was reported to the police, he tried to find ways to return moneys to investors. He had hoped that a significant commission of about \$800,000.00, which was payable to Citizen Insurance Agency, a company within the Citizen Group, as a result of underwriting a large policy, would be received and would be applied to return moneys to investors. However, the moneys had not come in by the time the matter was reported to the police. Other efforts to recoup moneys were unsuccessful.

The Applicant acknowledged that people did lose money as a result of the collapse of the Citizen Group and that he pleaded guilty to the charges and did go to jail. He stated emphatically that he would never repeat such offences.

Reference was made to the letter from the Ministry of Correctional Services dated April 18, 2000 which is Exhibit 6 in this hearing signed by J. Tom de Gryp, probation and parole officer which states that the Applicant was under parole supervision from August 22, 1995 to August 21, 1996 and that during the term of supervision, he took his responsibilities seriously, found gainful employment and provided for his family. When asked about the period after August 1996, the Applicant advised that after that date, there was no requirement for his activities to be monitored.

With respect to his bankruptcy, the Applicant stated that he had been leasing two vehicles from Municipal Leasing which he returned and anticipated that he would be sued for the balance. He felt therefore, that the responsible thing to do was to file for bankruptcy as he did not intend to defend a claim made by the leasing company.

The Applicant testified that he joined the Citizen Group in 1990 and became aware in July 1991 that funds had been misappropriated. He stayed until October 1992 when the matter was reported. The Applicant admitted that he did not notify the authorities of the financial trouble within the Citizen Group.

The Applicant repeated that once he became aware of the activities within the companies, he did not continue to solicit money. He also stated that the salespeople did not report to him. The Applicant testified that he had worked in the insurance side and that the Citizen Insurance Agency was part of the Citizen Group. The Applicant stated that his annual compensation from the Citizens group was approximately \$45,000.00 in each of the years 1991 and 1992.

When asked about the convictions for fraud, the Applicant stated that he had pleaded guilty primarily because the criminal lawyer he retained wanted a substantial further retainer to continue which the Applicant could not afford.

The Applicant stated that he did not intent to commit any crime and reiterated that he would never do so again. The Applicant stated that he had not previously worked as an automobile salesperson but had worked in trailer sales and was aware of the forms used. When asked, the Applicant acknowledged that salespeople do, on occasion, commit fraud.

The Applicant stated that he had many heated arguments with the two principals of the Citizen Group with respect to reporting the financial activities of the corporations to the authorities. He repeatedly urged them to report what was going on, however, he was continually told that there were ways that the moneys could be repaid. The matters came to a conclusion when one of the principals committed suicide. The misappropriation of funds within the Citizen Group was reported to the authorities the following week.

The Applicant was referred to his personal history prepared by Donald C. Root dated October 25, 1993, which appears at Tab 7 of Exhibit 3 with particular reference to page 3 thereof where it is indicated that the Applicant joined the Citizen Group in October 1990 and became a partner in the parent organization in January 1991 and received 12% of the shares of that company. The Applicant stated that the 12% was a gift that he had never signed for those shares and indeed his signature had been forged. The Applicant acknowledged that Vernon Robertson, the surviving principal of the Citizen Group, was never charged with forgery.

The Applicant reiterated that he only stayed with the Citizen Group after he became aware of what was going on as he believed that he could help direct money back to the investors.

It was his evidence that some money was returned to the investors and estimated that approximately \$1,000,000.00 was received after July 1991 which moneys were received from partial payments on mortgages held by the Citizen Group.

The Applicant stated that it was his believe that the losses suffered were less because he continued with the Citizens Group after July 1991, the date he learned of the financial mismanagement of the companies.

It was the Applicant's evidence that by October 1992 it was clear that there was no chance to recover the moneys however, to his knowledge, a receiver was not appointed as the authorities took over the corporations. The Applicant did not know what action was taken to collect the substantial commission payable to the insurance agency within the Citizen Group.

The Applicant stated that the misappropriated moneys were used to pay the operating expenses of the companies within the group because the Citizen Group had grown faster than expected.

Donald Root was called to give evidence on behalf of the Applicant. Mr. Root is a retired probation and parole officer with 31 years experience in the field of corrections

and holds a masters degree in applied criminology. Mr. Root is also a half brother of the Applicant.

Counsel for the Registrar objected to Mr. Root being called by the Applicant as an expert witness as the Applicant had failed to give timely notice to OMVIC and the report of Mr. Root received by OMVIC was incomplete. Mr. Root therefore gave testimony as a character witness only.

Mr. Root made reference to the personal history contained at Tab 7 of Exhibit 3 and particularly page 6 thereof and stated that he believed that the Applicant was "endeavouring to redeem himself."

When cross-examined, Mr. Root stated that in creating the personal history, he had drawn from his childhood relationship with the Applicant as his half-brother and that some of the information came as a result of discussions with the Applicant. Mr. Root stated that he knew nothing about fraud with respect to the 12% shares that are referred to on pages 3 and 6 of the personal history at Tab 7.

At the conclusion of the cross-examination, Mr. Root, by way of reply, indicated that the personal history was prepared in about September 1993. Mr. Root stated that he had for several years been a member of the legal aid area committee and was recently interviewed for an appointment as a justice of the peace. Mr. Root indicated to the Tribunal that, although he was the Applicant's half-brother and may appear to be biased, he had a particular appreciation for the criminal justice system and he took the actions of his half-brother very seriously and wished the Tribunal to take the witness' background into consideration when evaluating his comments regarding the Applicant.

FACTS FOUND PROVEN:

The following facts are found by this Tribunal to have been proven:

1. Prior to joining the Citizen Group in 1990, the Applicant had worked in banking and financial institutions for approximately 16 years.
2. The Applicant joined the Citizen Group in October 1990.
3. In or about July 1991, the Applicant became aware that moneys had been misappropriated within the Citizen Group.
4. The Applicant did not report the misuse of funds within the companies but did take steps to try to recoup moneys to reimburse investors.
5. The Applicant did not actively participate in the misappropriation of funds.
6. The Applicant was charged with two counts of fraud in October 1992 and pleaded guilty and served a total of 18 months incarceration.
7. As a result of his incarceration, there were certain debts which he could not satisfy and therefore he voluntarily placed himself into personal bankruptcy from which he has now been discharged.

THE LAW:

The authority granted to the Registrar is provided in subsection 5(1)(b) of the Act which states:

5. (1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

.....

The Registrar has the onus of proof to satisfy the Tribunal that the Registrar has reasonable grounds to believe that the registration of Thomas Joseph Weiss should be refused.

In order for the Tribunal to carry out its responsibilities pursuant to the Act, the Tribunal must review the decision of the Registrar by examining the allegations of the Registrar with respect to the activities of the Applicant and to consider such allegations in light of the evidence given by the Registrar and the Applicant with respect to those allegations to determine whether the past conduct of the Applicant provided the Registrar with reasonable grounds for the belief that the Applicant will not carry on business as required by section 5(1)(b) of the Act. It is the Registrar's belief which is at issue in these proceedings not that of the Tribunal.

ISSUE:

The issue to be determined is whether the convictions on two charges of fraud and the personal bankruptcy of the Applicant provides, in the present circumstances, the Registrar with reasonable grounds to believe that the Applicant will not carry on business in accordance with law and with integrity and honesty nor be expected to be financially responsible in the conduct of business.

There can be no doubt that when the Registrar becomes aware that an applicant had been convicted of fraud, particular care must be taken to ascertain if such conduct is of the type that would lead the Registrar to conclude that such an applicant should not be registered under the Act.

However, the mere fact of a conviction or convictions such of those of which the Applicant has been convicted can not, automatically, provide reasonable grounds for the conclusion that the Applicant must be refused registration.

In the present circumstances, the two convictions for fraud involved the misappropriation of funds by others at the Citizen Group and, the Applicant's bankruptcy was directly related to his imprisonment pursuant to the those convictions.

The past conduct of the Applicant which gave rise to the Registrar's proposal to refuse registration arise from one set of facts.

Counsel for the Registrar referred the Tribunal to the case of Clermont and the Registrar of Motor Vehicle Dealers and Salesmen, 1974 O.J. No. 1028 (Divisional Court), wherein Madam Justice Van Camp speaking on behalf of the Court:

"The past conduct referred to in s. 5(1) of the Act may in certain circumstances consist of one isolated mistake, if it is of such a nature and in circumstances that there are reasonable grounds for belief that the person applying to be registered would not carrying on business in accordance with law and with integrity and honesty."

Is the past conduct of the Applicant, which gave rise to his convictions, which consist of an isolated mistake, of such a nature and in circumstances that provide the Registrar with reasonable grounds for the belief that the Applicant would not carrying on business in accordance with the law and integrity and honesty?

DECISION:

As a result of the review of the nature and the circumstances of these offences, the Tribunal does not agree that the Registrar had reasonable grounds for his conclusion to the refuse the registration of the Applicant for the following reasons:

1. There is no suggestion that during the 16 year period the Applicant worked in the financial industry prior to joining the Citizen Group, the Applicant acted dishonestly or contrary to the law. Indeed while at the Bank of Montreal, he received commendation for his work.
2. It was after joining the Citizen Group in October 1990 that the Applicant learned that moneys were missing from two companies within the Group, and the evidence before this Tribunal is that the funds were misappropriated by others without the Applicant's knowledge and that the moneys had begun to disappear prior to the Applicant joining the Citizen Group.
3. The Applicant played no active role in the actual misappropriation of funds and notice is taken that in the charges filed against the Applicant, which appear as Exhibit 4 in these proceedings, the police charged that the unlawful acts of which the Applicant was accused commenced on the 1st day of March 1990 approximately seven months prior to the Applicant joining the Citizen Group.
4. Although one may speculate as to whether the Applicant, had he been able to afford a full defence, would, given the circumstances involved with these charges, have been convicted, the Applicant acknowledged his involvement and pleaded guilty to the charges.
5. Since his release, the Applicant has conducted himself in a responsible fashion notwithstanding that during the period of his parole, the Applicant and his family suffered a personal loss with the death of their eldest daughter.

6. The statement of the probation and parole officer who supervised the Applicant from August 22, 1995 to August 21, 1996, which is Exhibit 6 in these proceedings, clearly states that the Applicant "took his responsibilities seriously, found gainful employment and provided for his family." The probation and parole officer proceeds to state that in comparison to offenders throughout the Province, the Applicant "demonstrated sincere remorse and was considered a low risk to reoffend." The statement of the parole officer concludes with reference to the family tragedy referred to above which "could have had more serious consequences than it did if Mr. Weiss had not taken a positive prospective at that time."
7. It is reasonable for someone who had been involved in the financial service industry to conclude, as the Applicant did, that, as he no longer had an income due to his incarceration, the reasonable and practical method of dealing with creditors was to declare personal bankruptcy and the trustee's statement appearing at Tab 4 of Exhibit 3 indicates that, in relative terms, the amounts claimed by unsecured creditors were not substantial.

The Registrar has not satisfied the Tribunal that the Registrar has reasonable grounds to believe that the registration of the Applicant should be refused. The Tribunal's view may have been different had the Applicant played an active role in the misappropriation of funds however, the only evidence before the Tribunal is that the Applicant's role was a passive role and this passivity was explained by the Applicant in his belief that moneys could be retrieved in order to repay the defrauded parties.

The Tribunal does not agree that the bankruptcy of the Applicant in the present circumstances indicates a lack of financial responsibility.

ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealer Act*, the Tribunal directs the Registrar to refrain from carry out the Registrar's proposal dated March 8, 2000 to refuse the registration of Thomas Joseph Weiss as a motor vehicle salesperson under the Act.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: September 6, 2000

PERSAUD, ISHA, OPERATOR OF ACADEMY PRESCHOOL DAY NURSERY

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APPEAL FROM A PROPOSAL OF THE DIRECTOR
UNDER THE *DAY NURSERIES ACT*

TO REFUSE TO RENEW LICENCE

TRIBUNAL: HUGH HANSON, Presiding Member
CECILIA TAYLOR, Member of the panel
STEPHEN BLACKBURN, Member of the panel

APPEARANCES:

CHARLES ROACH & KANJI WIGNARAJAH, Counsel for the Applicant
KIM TWOHIG, SUSAN FREEBORN & HEATHER COLE, Counsel for the
Director

DATES OF HEARING: February 15 & 16, 2000 & March 6, 7, 8, 20, 21,
22 & 23, 2000 & May 1, 2, 3, 4 & 5, 2000 &
June 19, 2000

Burlington
Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This hearing arises from a Director's Notice of Intention dated 29 December 1999 to refuse to renew a licence under the *Day Nurseries Act* (DNA) held by Isha (Ruby) Persaud, operator of Academy Preschool day nursery. An appeal was lodged with the Child and Family Services Review Board. The hearing of this appeal was opened on 15 February 2000. Because of the large number of witnesses to be called and prior commitments of some of the participants, all parties agreed to waive the 90 day time limit established in the DNA, pursuant to s.4 of the *Statutory Powers Procedure Act*. After the fifteenth day of testimony on 19 June 2000, the hearing was adjourned pending receipt of written submissions.

The proclamation of the *Licence Appeal Tribunal Act* (the "Act") part way through the proceedings transferred jurisdiction in this matter from the Child and Family Services Review Board to the new tribunal. The panel members became members of the Licence Appeal Tribunal pursuant to the new Act for purposes of the hearing.

The Director's Notice contains some 35 allegations of non-compliance with the DNA and Regulation, many of which contain sub-points.

The following witnesses were called by the Director:

Bonnie Corey	the Director
Karen Carrigan	Program Advisor
Mary Ballantyne	Program Advisor
Susan Stephen	former Program Advisor
Wayne Alldridge	co-op student
Janet Plens	teacher
Julie Jennison	parent
Karen Crabbe	former Academy employee
Kathleen Crabbe	former Academy employee
Kimberly Burns	former Academy supervisor
Freida Hone	former Academy supervisor
Sandra Edwards	parent

The following witnesses were called by the Appellant:

Danielle Panchyshyn	parent
Karen Gray	parent
Anita Wein	parent
Debbie Chedore	parent
Misty Buckley	parent
Julie Pryor	parent
Melanie Garcin	parent
Michael Clarkson	parent
Cameron Carnegie	parent
Zorina Ali-Swallow	parent
Debbie Blades	parent
Patricia LeBlanc	parent
John Persaud	employee at Academy
Tina Ellwanger	supervisor at Academy
Isha Persaud	Appellant

A total of 103 exhibits were entered by the parties. The panel ruled that information pertaining to Academy Preschool's licensing history prior to September 1995 would not be admitted. It was on 1 September 1995 that a new enforcement policy for the DNA became effective.

THE ISSUE:

The Tribunal is empowered to issue an order directing the Director to carry out her proposal, to refrain from carrying out her proposal and to take such action as it considers the Director ought to take in accordance with the DNA and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Director. The issue before the Tribunal is to determine which of these courses of action to take.

PRELIMINARY ISSUES:

Suspension of hearing

As a preliminary issue, counsel for the Applicant moved that the hearing be suspended and that the Board order the Director to conduct another inspection. It was alleged,

among other things, that reports to come before the panel arose from violations of the Applicant's fundamental rights and that there was malicious intent on the part of the Ministry personnel who conducted the inspections. Counsel was unable to identify legal authority for the action requested. After careful consideration, the panel concluded that it would assess the validity of the evidence as it was presented and give it weight as deemed appropriate. The motion was denied.

Standard of proof

It is Academy Preschool's submission (7) that there are two standards of proof pertinent to this hearing:

1. balance of probabilities for administrative and competency issues
2. beyond reasonable doubt for all personal allegations of moral turpitude.

The submission contains no citations of law to support this contention.

The Director's reply submissions refute the contention and provide ample legal precedent to support her position that the standard of proof in civil matters is a balance of probabilities. The Tribunal takes particular note of Sopinka and Lederman, *The Law of Evidence in Canada*, Toronto, pp. 156, 157. A balance of probabilities is the standard of proof that is applied by the Tribunal.

THE LAW:

Section 12 of the *Child and Family Services Act* (the "Act"), states as follows;

Section 12(1) Subject to section 13, a Director may refuse to issue a licence where in the Director's opinion,

- (a) the applicant or any employee of the applicant or, where the applicant is a corporation, its officers, directors or employees is or are not competent to establish, operate or maintain a day nursery or a private-home day care agency, as the case may be, in a responsible manner in accordance with this Act and the regulations;
- (b) the past conduct of the applicant or any employee of the applicant or, where the applicant is a corporation, of its officers, directors or employees, affords reasonable grounds for belief that the day nursery or the private-home day care agency, as the case may be, will not be established, operated or maintained in accordance with this Act and the regulations; or
- (c) the building or buildings or accommodation in which the applicant proposes to establish, operate or maintain the day nursery or provide private-home day care, as the case may be, does not comply with the requirements of this Act and the regulations.

Section 12(2) Subject to section 13, a Director may refuse to renew or may revoke a licence issued to a day nursery or a private-home day care agency, where in the Director's opinion,

- (a) the licensee or any employee of the licensee, or where the licensee is a corporation, any officer, director or employee thereof, has contravened or has knowingly permitted any person under the control or direction of or associated with the licensee, officer, director or employee, as the case may be, to contravene,
 - (i) any provisions of this Act or the regulations or of any other Act or the regulations thereunder applying to the establishment, operation or maintenance of the day nursery or the provision of private-home day care, as the case may be, or
 - (ii) any term or condition of the licence;
 - (b) the building or buildings or accommodation in which the day nursery is established, operated or maintained or the private-home day care is provided, does not comply with the requirements of this Act and the regulations;
 - (c) the day nursery is established, operated or maintained or the private-home day care is provided in a manner that is prejudicial to the health, safety or welfare of the children cared for in the day nursery or in the place or places where private-home day care is provided;
 - (d) any person has made a false statement in the application for the licence or renewal thereof, or in any report, document or other information required to be furnished by this Act or the regulations or by any other Act or regulation that applies to the day nursery or private-home day care agency, as the case may be; or
 - (e) a change in the officers or directors of the applicant would, if the applicant were applying for the licence in the first instance, afford grounds for refusing to issue a licence under clause 1(b).
- R.S.O. 1990, c.D.2,s. 12.

Section 13 of the *Child and Family Services Act* (the "Act"), states as follows;

Section 13(1) Where a Director proposes under section 12 to refuse to issue a licence or to refuse to renew or to revoke a licence issued under that section, the Director shall cause notice to be served of the Director's proposal together with written reasons therefor, on the applicant or the licensee, as the case may be.

Section 13(2) A notice under subsection (1) shall inform the applicant or licensee, as the case may be, that the applicant or licensee is entitled to a

hearing by the Tribunal if the applicant or licensee mails or delivers, within fifteen days, after the notice is served on the applicant or licensee, notice in writing to the Director and the Tribunal, requiring a hearing and the applicant or licensee, as the case may be, may so require such a hearing.

Section 13(3) Where an applicant or licensee does not require a hearing by the Tribunal in accordance with subsection (2), the Director may carry out the proposal stated in the Director's notice under the subsection (1) without a hearing.

Section 13(4) Where an applicant or licensee requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, at the hearing, may by order direct the Director to carry out the Director's proposal or refrain from carrying out the Director's proposal and to take such action as the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and for such purposes, the Tribunal may substitute its opinion for that of the Director.

Section 13(5) Sections 199, 201 and 202 of Part IX of the *Child and Family Services Act* apply with necessary modifications to proceedings before the Tribunal, to the powers of the Tribunal under this Act and to appeals therefrom.

Section 13(6) Where, within the time prescribed therefor or, if no time is prescribed, before expiration of a licence, a licensee has applied for renewal of a licence and paid the prescribed fee, the licence shall be deemed to continue,

(a) until the renewal is granted; or

(b) where the licensee is served with notice that the Director proposes to refuse to grant the renewal, until the time for requiring a hearing has expired and, where a hearing is required, until the Tribunal has made its decision. R.S.O. 1990, c. D.2, s. 13.

THE EVIDENCE:

Documentary evidence and credible testimony give an account of events that led up to the Director's decision not to renew the licence.

History

Mrs. Persaud (commonly known as and called Ruby) has been in the daycare field for some thirty years. She is the owner-operator of Academy Preschool located at 3049 Guelph Line, Burlington, Ontario. Despite her long experience, she has never obtained Early Childhood Education (ECE) certification.

1995

On 1 September 1995 the new enforcement policy had a significant impact on daycare operators: it placed the onus for compliance with the DNA and regulations on the operators. It also shortened the amount of time allowed to remedy any non-compliances that had been identified. The Ministry of Community and Social Services (the "Ministry") provided training opportunities for operators and provided them with printed material, including samples of the new licensing checklist, the summary forms, descriptions of how they would be used, and samples of how they would be filled in.

1996

On 4 June 1996 Susan Stephen conducted a licensing inspection of Academy Preschool. The Day Nursery Licensing Checklist arising from that inspection (Exhibit 53.2) identifies eleven instances of non-compliance. Ms. Stephen made a follow-up visit on 24 June 1996 and found that all areas previously identified as non-compliances had been brought into compliance. The licence was renewed on that date.

On 27 September 1996 Ms. Hone, then supervisor at Academy, complained to the Ministry about the licence not being posted and ratios not being met. Ms. Stephen visited the centre on 1 October to investigate and found two instances of non-compliance (Exhibit 54.3). On a follow-up visit on 8 October, Ms. Stephen found that the specific issues identified had been dealt with appropriately, but found four more instances of non-compliance (Exhibit 55).

On 11 December 1996, the Ministry received a complaint from a mother who claimed to have witnessed Mrs. Persaud screaming at the children and that the centre was understaffed. The mother claimed that her 4 year old child says that Ruby is always screaming (Exhibit 56.1). Ms. Stephen again visited the centre on 17 December and did not see evidence of the issues mentioned in the complaint. She did, however, notice a number of other non-compliances and left instructions for thirteen actions to be taken. On a follow-up visit on 23 December, the appropriate actions had been taken.

1997

On 21 February 1997, Ms. Stephen received a complaint from a mother that a ceiling tile fell in the toddlers' room during rest time (Exhibit 57). She and Mary Ballantyne visited the centre on 25 February and saw that the ceiling had been repaired. When they arrived, however, they saw 17 children in the playground but no staff were visible. After two or three minutes staff appeared and said they had been taking equipment from the shed.

Ms. Stephen's next visits were made on 3 and 4 June 1997 to investigate a number of complaints that had been received from staff and from parents with children at the centre (Exhibit 58), and to conduct a licensing inspection. The complaints covered a variety of issues including, among other things, inappropriate treatment of staff and children, failure to maintain ratios, mouse droppings on cots, and overcrowding of sleep rooms. The Checklist resulting from that inspection (Exhibit 59.2) identifies 28 areas of non-compliance. Ms. Stephen testified that typically a licensing file would contain a checklist and one or two summary forms [identifying non-compliances]. In this case there were twelve pages of summary forms (Exhibit 59.1), the most Ms. Stephen could recall ever having used for an inspection.

On 8 June 1997, a meeting was held with Ms. Stephen, her supervisor, Mrs. Persaud, and Karen Chan from the Regional Municipality of Halton. Following this meeting a licence was issued expiring on 30 November 1997 with a number of conditions attached (Exhibit 9). A letter accompanying the licence indicated that the Ministry would be monitoring the centre for compliance during the term of the licence.

In early June 1997, the Ministry received a number of complaints about the centre including, among other things, Mrs. Persaud yelling, force feeding of children, transportation problems, and rodents being present (Exhibit 60). Ms. Stephen visited the centre on 10 June to follow up the complaints. Instructions were given the operator to amend the policy/program statement and to develop a contract for parents requiring transportation (Exhibit 61). She made a subsequent visit on 19 June and left instructions for revision of the playground plan. A further visit on 27 June resulted in instructions to make changes in the centre's policy manual.

Ms. Stephen made monitoring visits to the centre on 12 August, 2 September, 22 September, 4 November and 3 December 1997. On the first of these visits there were seven items that required action by the operator (Exhibit 62). On the second visit there were five (Exhibit 63), on the third there was one (Exhibit 64), on the fourth there was none, and on the final visit there was one (Exhibit 65). Ms. Stephen attributes the improved performance to the efforts of a new supervisor at the centre, Ms. Kim Burns.

1998

On 6 January 1998, Ms. Stephen made a licensing inspection of Academy Preschool. The Summary sheets from that inspection show six areas on non-compliance, of which several related to record keeping (Exhibit 66). All these items had been brought into compliance by the 20 January follow-up visit. The licence issued after the inspection contains a number of conditions, including one that reads: "operator shall ensure that kitchen is inaccessible to children at all times." (Exhibit 8) Ms. Stephen had in 1997 seen a child in the kitchen when there were hazardous products stored under the sink and there was no lock on the cupboard. Ms. Stephen can recall no occasion when she needed to visit the centre during the remainder of 1998.

1999

Ms. Stephen made a licensing inspection of Academy Preschool on 14 January 1999. The Checklist resulting from this visit records fourteen instances of non-compliance (Exhibit 5). Her follow-up visit on 2 February found all items to have been brought into compliance. That was the last visit Ms. Stephen made to the centre, as she left Ministry employ later that month.

Karen Calligan was assigned to be the program advisor for Academy Preschool. Her first contact with the centre was in connection with a Serious Occurrence Report sent to the Ministry by Mrs. Persaud dated 24 March 1999 (Exhibit 25). A child had been found unconscious in the playground. Staff called 911 and paramedics tended the child and pronounced her fine. Mrs. Persaud nevertheless had insisted that the child be taken to the hospital and the parents informed. Ms. Calligan and a colleague visited the centre on 9 April and were satisfied that appropriate action had been taken.

On 7 December 1999, the Ministry received a telephoned complaint from Karen Crabbe making a number of allegations against Mrs. Persaud and the way the centre was operated (Exhibit 27). The complaint was given to Ms. Calligan, who phoned the complainant on 8 December. She spoke to Kathleen Crabbe, Karen's sister. Both sisters were on staff of Academy Preschool. In a phone conversation on the evening of 8 December, Kathleen told Ms. Calligan that the two sisters and a third teacher, Laurie Laking, had resigned that day. Kathleen had also phoned in a complaint containing many allegations (Exhibit 28).

On December 8 another complaint was received, this time from a parent of a child enrolled in the centre (Exhibit 29). This complaint alleged, among other things, inappropriate treatment of children who cannot sleep, unprofessional attitude of the owner towards staff, and sarcastic treatment of a child.

Ms. Calligan visited the centre on the morning of 9 December. She was unsure whether to make it a licensing visit as well as one dealing with complaints. She called her supervisor from the centre and was told to make it a complaint investigation and to do the licensing at some later date. She then relayed this information to Mrs. Persaud. Because Mrs. Persaud was involved in program activities with the children, there was no opportunity for a substantial discussion with her until the afternoon.

From the notes she made as she went along (Exhibit 30), Ms. Calligan prepared a five-page Summary (Exhibit 18) in which she recorded twelve actions that were to be taken, setting 21 December as the date for completion. She reviewed the Summary with Mrs. Persaud, who undertook to see that all was done. Ms. Calligan testified that "I found Mrs. Persaud to be extremely cooperative on December 9th. . . . in terms of her cooperation with me it was absolutely fine." She left a copy of the Summary with Mrs. Persaud, who had signed each page.

Ms. Calligan also testified that while she was at the centre that day, Wayne, a co-op student, approached her and said that he wanted a change of placement because he was concerned about what was happening there. He also told her that she had seen Mrs. Persaud ". . . force a child, trying to put a toy into the child's mouth." This was said in Ruby's presence.

As a follow up to the visit, Ms. Calligan called the Children's Aid Society (CAS) to report that a complaint had been made about the treatment of children and to the Health Department in connection with the complaints about cat feces and rodents.

The following day, 10 December, Mrs. Persaud called Ms. Calligan for advice about what to tell parents concerning the three resignations.

Ms. Calligan was made aware of another complaint, this one received on 9 December from Laurie Laking (Exhibit 31). Ms. Calligan treated it as having been covered by the 9 December visit, since it contained no new allegations.

Other complaints about Academy Preschool arrived at the Ministry. A handwritten note (Exhibit 32) is a follow-up to exhibit 29. Exhibit 33 is a handwritten, six-page letter faxed on 10 December from the three teachers who quit making 33 specific allegations. In a follow-up phone conversation with Kathleen Crabbe it was alleged that the centre had "received calls from concerned citizens who had seen the Academy Preschool car driving down the street with children standing in the back seat who were clearly not

buckled into place.” Ms. Crabbe also said that a twelve year old had told her that two children were dropped off on the other side of the street from the school, requiring them to cross the road on their own.

A Health Department report dated 10 December (Exhibit 34) mentions the bathroom floor, mouse droppings and holes around the exterior of the building that need attention. Exhibit 35 is a Serious Occurrence report sent to the Ministry by Ms. Persaud outlining a complaint by a parent. Exhibit 36 is a report dictated by Wayne Alldridge, a co-op student who had been placed at Academy Preschool, to Ms. Calligan on 14 December. It contains reports of seven incidents that Wayne had observed and some other comments and observations. Exhibit 37 is a Serious Occurrence report date 15 December indicating a parent’s concern about information given to parents regarding the staff quitting. Ms. Calligan followed up these issues on her next visit to the centre on 17 December.

17 December

On 17 December 1999, Ms. Calligan and Mary Ballantyne, another program advisor, visited Academy Preschool to conduct a licensing inspection.

Ms. Calligan testified that when she asked John Persaud, who was about to drive some children to school, for his list of children and destinations, Mr. Persaud became angry. Her testimony is as follows: “. . . at that point he screamed at me in front of the children in a very fierce sounding voice, ‘I know where they going. Do you think because I’m black I’m stupid? I don’t need a list’ and then he said something about ‘you assholes keep coming around here’ and all of it was screamed in the presence of the children with a child sitting right beside him.” Mr. Persaud’s account of the incident is somewhat different, and he claimed that he did not scream but only spoke loudly enough to be heard.

At the end of the visit, the two Program advisors (Calligan and Ballantyne) reviewed some of their findings with Mrs. Persaud and Tina Ellwanger, the supervisor. Ms. Ballantyne had to leave half way through that discussion. Ms. Calligan testified that neither Mrs. Persaud nor Ms. Ellwanger indicated that they thought that any of the areas of non-compliance that were discussed were in their view unfair or unreasonable. Ms. Calligan told them that she would be returning in the coming days to go through the checklist in full. The findings of the program advisors were consolidated the next working day, Monday, 20 December, into ten pages of Summary (Exhibit 19) and the Checklist (Exhibit 20).

The two exhibits mentioned immediately above show that there were a total of 48 sections of the DNA where non-compliances were cited and 64 indicators of those 48 sections. Indicators are observable non-compliances noted during the inspection. Ms. Calligan testified that in an average inspection there could be two or three sections where non-compliances are observed, “. . . perhaps something around documentation where they were missing a health card on a child or an incomplete address on a doctor’s address.”

Ms. Calligan testified that she and Ms. Ballantyne met with their supervisor, Bonnie Corey, because of their concern about the number of non-compliances and “. . . what I observed to be blatant irresponsibility and disregard for the requirements under the legislation and disregard for safety practices and disregard for following their own

policies and procedures.” Consideration was given to what action they should take, and consultation was held with legal services. No decision was made at this time as to what action would be taken.

On 20 December, the two program advisors met with someone from the CAS to share information and tell each other what action they were contemplating. They told the CAS representative that they were taking the situation very seriously but no decision had been taken. That same day, Ms. Calligan placed calls to the Health Department to report allegations about mouse droppings, cat feces and hazardous products under the sink in the kitchen, and to the Fire Department with concerns about storage in the furnace room and the hot heaters in the toddlers’ room.

21 December

On 21 December, Ms. Calligan and Ms. Ballantyne returned to Academy Preschool to have a full discussion of the results of the licensing inspection. While there, Ms. Calligan noted four further non-compliances (Exhibit 21).

Mrs. Persaud refused to meet with the program advisors and told Ms. Ellwanger to deal with them. The program advisors reviewed the Checklist with the supervisor. When told that the Ministry was in the process of deciding whether to propose not to renew the licence or to issue a stop order, Ms. Ellwanger said that this should be told to Mrs. Persaud personally. Mrs. Persaud agreed to meet with the two and when told of the choices being considered, according to the site visit notes (Exhibit 45): “Ruby said that the Ministry would be up against a good fight from her. She said that she has never had problems before and has operated for 30 years. Staff complain when they are not happy with her and are trying to get back at her.”

Subsequent events

On 23 December, the Ministry received faxes from Academy Preschool (Exhibit 76). One indicated that the behaviour management policy had been reviewed with two staff, a matter that had previously been noted as a non-compliance. The second is a Serious Occurrence report concerning a child who had allegedly been dropped off at school by Mr. Persaud, left unattended, and had been unable to gain entrance to the school. This report indicates that the CAS was satisfied that the child was not left unattended. The lack of a report to the Ministry about this incident, which happened on 6 October, had been noted as a non-compliance. Compliance date for the matters dealt with in these faxes had been 21 December.

During the week before Christmas, according to the testimony of Ms. Corey, the decision was taken to refuse to renew the Academy Preschool licence.

A document headed “Log Entries Policies & Procedures” (Exhibit 77) was faxed to the Ministry from Academy Preschool on 29 December. It had been required from the 9 December visit and was due by 21 December.

On 29 December, Ms. Calligan and another program advisor delivered the notice of intent to the centre and gave it to Mrs. Persaud, and told her what it was and that she had the right to appeal. Mrs. Persaud said thank you and the two advisors left. That same day Ms. Calligan called the Fire and Health Departments to inform them of the action the Ministry was taking. In addition, Ms. Corey sent a letter to the parents of

children enrolled in Academy Preschool telling them of her decision to refuse to renew the licence, that an appeal could be made, and that inquiries should be directed to Mary Ballantyne (Exhibit 14).

On 30 December, three letters from parents complaining of the program advisors' manner on 17 December (Exhibits 15, 16 & 17) were faxed to the Ministry from the centre, along with other material (Exhibit 23). Ms. Corey discussed these matters with the advisors, but after receiving legal advice, did not respond to the authors. Ms. Corey was satisfied that Ministry staff had followed appropriate procedures and policies in carrying out their inspections.

2000

Academy Preschool held a meeting on 6 January to which parents were invited to discuss the Notice and the allegations it contains. Later in the month, the Ministry received letters from parents in support of Academy Preschool (Exhibits 83, 84, 85 & 86).

Parents who called Ms. Ballantyne as suggested in Ms. Corey's letter were told that there was no immediate threat to the health, safety and welfare of the children at the center and that there was no issue of abuse.

CREDIBILITY OF WITNESSES AND WEIGHT OF EVIDENCE:

The Tribunal found the great majority of the testimony it received to be credible. The Ministry officials testified as fully as memory allowed, and freely admitted when recollection was unclear. The former supervisors at Academy, Ms. Burns and Ms. Hone, were similarly forthright in their evidence. Because of evidence of animosity on the part of the Crabbe sisters towards Mrs. Persaud, particular attention was given to the plausibility of their testimony. Much of their testimony was corroborated by Wayne Alldridge, a seventeen-year-old highschool student at the relevant time. Wayne gave the Tribunal no reason to doubt that he was being as truthful as he could. Ms. Plens, Wayne's teacher, had no axe to grind in this matter and no reason to shade her evidence. With one exception, the parents who testified were credible as far as their testimony went. The exception dealt with an incident that other testimony covered in more satisfactory ways. Ms. Ellwanger, although feeling caught in the middle, provided the evidence asked of her.

Both Mr. and Mrs. Persaud were difficult for counsel to pin down in certain areas, and their testimony has been assessed in light of the consequences to them of the outcome of the hearing. Mr. Persaud appeared at times evasive, and Mrs. Persaud seemed almost offhand and dismissive of the proceedings. Where their testimony is in conflict with that of Ministry officials, the latter has usually been preferred.

While the Tribunal fully believes the parents who testified to their satisfaction with the service provided by Academy Preschool, it cannot place much weight on their ability to assess whether the centre is in compliance with the DNA and Regulation, or on how important they think certain requirements are.

THE ALLEGATIONS:

The Notice of Intention (Exhibit 2) cites a number of allegations of non-compliances with the DNA and Regulation. An examination of these issues follows. The Notice states:

A. It is alleged that contrary to s. 12(2)(a)(i) you have contravened or have knowingly permitted persons under your control or direction or associated with you to contravene the provisions of the Day Nurseries Act and the Regulation thereunder applying to the establishment, operation and maintenance of the day nursery in that:

1. You failed to comply with directions from the Medical Officer of Health contrary to ss. 4(1)(b), 25(2) and 31 of the Regulation to the Day Nursery Act including but not limited to:

(a) On December 17, 1999, there were no daily recordings of fridge temperatures as stipulated by the Ministry of Health's inspection report.

Exhibit 92, dated 5 January 2000 indicates that the taking of these temperatures is good practice but not mandatory. Ms. Calligan testified that recording fridge temperatures is "pretty standard" and that most operators do it. Thus, while it is not strictly a non-compliance, it is an indication that Mrs. Persaud has not taken all possible steps to ensure the health and safety of the children in her care.

2. You failed to properly store hazardous products so that they are not accessible to children contrary to s.5(3) of the Regulation . . .

(a) On December 17, 1999, spray disinfectant and other cleaning supplies were stored in an unlocked cupboard underneath the kitchen sink. The kitchen had no door or gate to restrict entrance by children.

The issue of children's access to the kitchen and the products kept there had been raised in previous inspections and was a condition on the licences issued in 1997, 1998 and 1999 (Exhibits 7, 8 & 9). Mrs. Persaud had a Stop sign posted and a tape placed at the entrance to the kitchen to tell children that the kitchen was out of bounds. This, however, did not prevent children from gaining access to it, as the testimony of Wayne Alldridge indicates.

Hazardous products were removed from the unlocked cupboard under the kitchen sink during the inspection on 17 December 1999. They were found there once again on 21 December although no physical barrier had been installed. The Tribunal finds that this is a clear non-compliance, showing a disregard for the regulations, the advice of program advisors, and the safety of children.

3. You failed to provide a staff rest area contrary to s.5(4) of the Regulation . . .

(a) On December 17, 1999, the previous staff area was being used as a children's quiet room.

Kim Burns testified that when she arrived at Academy Preschool the staff room was unusable because it was filled with boxes. After it was cleaned up it was later used as a children's quiet room. This remained the practice at the time of the 17 December inspection. Mrs. Persaud testified that it is used as a quiet room. Ms. Stephen's 14

January 1999 inspection report recommended placing adult furniture in this room so that it not lose its function as a staff rest area. The 17 December inspection required that adult furniture be placed in the room. Without adult furniture, the room cannot be reasonably designated as a staff rest area as called for in the Regulation. Ms. Ellwanger testified that there was an adult chair in the room. The Tribunal finds that this allegation of non-compliance has not been clearly demonstrated.

4. *You failed to maintain a temperature for the nursery at 20 degrees Celsius contrary to s.12 of the Regulation. . .*

(a) *On December 17, 1999, the back room of the nursery registered 65 degrees Fahrenheit.*

There is testimony from Ms. Calligan, Ms. Ballentyne and Ms. Stephen that during inspections in 1997 and 1999 the temperature was below what is required even though the heaters were on and hot enough to be dangerous to touch. The Tribunal finds that this is a non-compliance.

5. *You failed to ensure proper bedding was provided to each child during rest periods contrary to s.15.3 of the Regulation . . .*

(a) *On December 17, 1999, sheets did not fit children's cots resulting in children sleeping on vinyl.*

There is ample testimony to support this allegation. Mrs. Persaud testified that if the advisor's observation was correct it was the staff's fault for not putting the sheets on properly. The Tribunal finds that this is a non-compliance

6. *You failed to provide suitable cots for children eighteen months or older contrary to ss.15.5, 15.6 of the Regulation . . .*

(a) *On December 17, 1999, cots for toddlers were torn and warped.*

Mrs. Persaud testified that this allegation was untrue, but she bought new cots anyway. That action is inconsistent with a belief that the allegation is unfounded. The Tribunal finds that this is a non-compliance.

7. *You failed to ensure that equipment and furnishings used in the day nursery were maintained in a safe and clean condition and kept in a good state of repair contrary to s.16 of the Regulation . . .*

(a) *On December 17, 1999:*

- (i) *cover over baseboard heaters extremely hot to touch with a child on cot sleeping directly beside hot heater;*
- (ii) *blue disinfectant bottle not labelled;*
- (iii) *toddler car seat not tethered to car as per safety standard;*
- (iv) *at 9:20 am, driver for the day nursery arrived at nursery with a child not in a car seat (toddler age child);*
- (v) *ladder propped up against wall in cloak room;*
- (vi) *no lock on door leading to storage room near stairs which could result in children being trapped inside storage room;*

- (vii) *furnace room used for storage with materials too close for safety standards to furnace;*
 - (viii) *cold air returns covered in dust;*
 - (ix) *cobwebs on ceilings;*
 - (x) *hole in ceiling in quiet room;*
 - (xi) *window sill dusty and broken in back room;*
 - (xii) *yellow paint on small table peeling;*
 - (xiii) *light switch in back room broken and hazardous;*
 - (xiv) *playground swings not complying with safety standards with minimal clearances.*
- (b) *On December 17 and December 21, 1999:*
- (i) *the heater in back room extremely hot to touch;*
 - (ii) *three children's chairs backed against room heaters also hot to touch;*
 - (iii) *cleaners and hazardous products under sink and accessible to children.*
- (c) *A broken highchair is used to feed children.*

The hot baseboard heaters had been brought to Mrs. Persaud's attention prior to the 17 December inspection. Although in her testimony Mrs. Persaud said that the fireman explained that they were hot enough to burn bare skin, she still thought the allegation is unfair. The wire covers over the heaters were installed pursuant to Ms. Stephen's requirement: "Ensure heating units are inaccessible to children. Investigate options for 'covering' units. Gain approval of fire dept." in January 1999. Grills were placed over the heaters with Fire Department approval. Although an electrician said the heaters were CSA approved (Exhibit 46), he recommended getting rid of the wire covers. Whether or not the covers were installed at the instigation of the Ministry, the fact remains that the heaters continued to present a safety risk because of their extreme heat. The operator had an obligation to overcome this danger to children. The Tribunal finds this to be an ongoing and a dangerous non-compliance.

Mrs. Persaud agreed that allegations (a)(v)(vii)(viii)(ix)(x)(xi)(xii)(xiii) were true. She was not aware, but did not deny that allegations (a)(ii) and (b)(ii) were true. There was uncontradicted testimony from Ms. Calligan, Ms. Ballantyne, Ms. Ellwanger and Ms. Stephen that disinfectant bottles were not labeled. This matter had been brought to Mrs. Persaud's attention in January 1999, but had not been corrected by December. The Tribunal finds this to be non-compliances.

Whether or not the clearances of the swings in the playground present a danger could easily be determined if the operator followed the requirement to have a CSA inspection. The onus is surely on the operator to ensure that all equipment is safe, regardless of the legal status of CSA standards.

Although Mrs. Persaud denied that most of the other allegations under this head were true, there was credible evidence to support them and, on the balance of probabilities, they are found by the Tribunal to be non-compliances.

8. *You failed to ensure that the outdoor play space for toddlers be approved by the Director as a licensed space contrary to s.21(1) of the Regulation . . .*

No licence for the toddler playground was found in Ministry or Academy Preschool files. Staff had been concerned that the playground was not licensed and stopped using it, according to the testimony of Ms. Burns and Kathleen Crabbe. Nevertheless, on 17 December Ms. Calligan saw toddlers using this space. Ms. Stephen did not note a non-compliance in this respect in January 1999. Nevertheless, the December 1999 inspection could find no evidence at all of the area ever having been licensed. On the balance of probabilities the Tribunal finds that this space was not licensed and that its use is a non-compliance.

9. *You failed to ensure the necessary medical and emergency information for each child at the day nursery was readily accessible to staff members contrary to s.29 of the Regulation . . .*

There is credible evidence that certain information was missing from several cards, including doctor's address, home telephone numbers, and OHIP numbers. Ms. Ballantyne noticed that two epi-pens were left in the kitchen when they should have been with the children or supervising staff in the playground. The Tribunal finds this is a non-compliance.

10. *You failed to ensure that a daily written record is maintained that includes a summary of any incident affecting the health, safety or well-being of the staff or any child enrolled in a day nursery contrary to s.30 of the Regulation . . .*

- (a) *The nursery's driver dropped a child off at school and the child was forced to wait some 15 minutes because the school doors were locked resulting in the parent of the child contacting CAS to complain, no notation of this incident appeared in the daily log.*

Ms. Calligan testified that she saw a notation of this incident in the more detailed log in the office and made a note of it in her Summary (Exhibit 18). Although she said that the notations were sketchy, the Tribunal finds that this allegation of non-compliance has not been established.

11. *You failed to ensure recommendations or instructions of a medical officer of health with respect to any matter that may affect the health or well-being of a child enrolled at the day nursery were carried out contrary to s.31 of the Regulation . . .*

- (a) *On December 17, 1999, children did not wash their hands before snack.*

There is no evidence that washing hands before a snack is a recommendation or instruction from a medical officer of health. A Health Department inspection on 10 December 1999 found mouse droppings in a storage cabinet. The report of that inspection said that the area should be cleaned and sanitized and that measures should be taken to cork these openings and get rid of harborage areas where mice can hide. There is no evidence that these steps were not taken. The Tribunal finds that this allegation of non-compliance has not been established.

12. *You failed to ensure that the policies and procedures with respect to sanitary practices and procedures were followed in the day nursery contrary to s.32 of the Regulation . . .*

(a) *Sheets returned to cots soiled and smelling of a foul odor.*

(b) *Face cloths washed with diaper change cloths.*

Although Mrs. Persaud denied these allegations were true, the Crabbe sisters testified that they had witnessed them. It is in the operator's interest to deny the allegation. It seems unlikely that the sisters would fabricate such distasteful evidence. On the balance of probabilities, the Tribunal finds that this has been established as a non-compliance.

13. *You failed to ensure that before a child is admitted to a day nursery operated by the operator the child is immunized as recommended by the local medical officer of health contrary to s.33 of the Regulation . . .*

(a) *Grandchild of operator attends nursery without following proper procedures for enrollment and attendance at nursery.*

Mrs. Persaud denied that her unimmunized granddaughter was ever admitted to the nursery. She said "If they bring her down on their lunch or break that's their choice but she was never part of the children, the child/teacher ratio or in the day care." There is credible evidence, from a former staff, the co-op student, and a parent, that the child was frequently present in the nursery. Ms. Ballantyne saw her there on 21 December.

The Concise Oxford Dictionary defines "admit" to mean "Allow (person, etc.) entrance or access to (place, class, privileges, etc.)." Clearly, the child has been admitted to the nursery even though she could not be enrolled. The Tribunal finds that this is a non-compliance.

14. *You failed to ensure that a child separated from other children because of an illness had his/her parent contacted to take the child home and where that was not possible for the parent and where it appeared the child required immediate medical attention that the child be examined by a legally qualified medical practitioner or a registered nurse contrary to s.34(3) of the Regulation . . .*

(a) *A child, who as a result of a fall, bruised his face and caused a nose bleed did not have his parent called or a legally qualified medical practitioner, on the advice of the operator.*

The Director's submissions give a definition of "illness" that does not comprehend the injury cited in the allegation. The Tribunal finds that this allegation is not established.

15. *You failed to have appropriate written policies and procedures with respect to serious occurrences at the nursery contrary to s.35(a) of the Regulation . . .*

(a) *On December 9, 1999, no definition of serious injury or the procedures to handle such an occurrence were in the nursery's policies.*

Exhibit 90 contains the nursery's policy concerning serious occurrences. It was not available to advisors on December 9 or 17, and there is no evidence that the Ministry was made aware of it prior to the hearing. The policy, which was reportedly developed with the assistance of Ms. Stephen, was found to be unacceptable by Ms. Calligan. It certainly does not cover the range of events itemized in the Ministry Serious Occurrence Reporting Procedures (Exhibit 101). By specifically excluding any injury that does not require a second medical attention, the nursery's policy defies common sense. The Tribunal finds that this allegation has been established as a non-compliance.

16. You failed to notify a program adviser of a serious occurrence contrary to s.35(b) of the Regulation . . .

(a) A child was left at Bruce T. Lindley school by the nursery's driver. The child could not get back into the school and waited outside alone for 15 minutes. School staff found the child crying outside. The parent of the child called CAS but this incident was not reported to the Ministry or its staff.

(b) A child's ankle cut by a knife became infected. The injury allegedly occurred by the fault of a staff member yet was not reported to the Ministry.

There is contradictory testimony about item (a), the incident at the school. It is impossible to determine with any confidence whether the child's plight was caused by any negligence on the part of the nursery driver. Since the CAS were contacted about it, it would seem reasonable that the operator should have notified the Ministry. In Mrs. Persaud's judgement, however, the incident was not serious enough to require such action.

Item (b) is much clearer cut. The Ministry Serious Occurrence Reporting Procedures specifically require reporting "Any injury to a client caused by the Service Provider." The Tribunal finds that the failure to report this injury is a non-compliance.

17. You failed to ensure that adequate policies and procedures were being followed in the administration of drugs and medications contrary to s.37(1)(a)(ii), (b)(ii), (d) and (e) of the Regulation . . .

(a) On April 26, 1999, medication noted on an Administration Form had not been signed to indicate it was given to the noted child.

(b) On December 17, 1999,

(i) four Administration of Medication forms were on file yet only one medication matched the forms

(ii) fourteen medications were in the medicine box with no Administration Forms

(iii) two medications in the box were not labelled with a child's name.

(c) On December 21, 1999, two medications in the medicine box were without current authorization signed by a parent.

(d) Notations to administer Tylenol to a child appear on the Administration Form one day but have not been signed by staff as administered.

- (e) A medication form indicates a start and end date for administering medicine to a child but is then followed up in the form with a notation to administer "as necessary."*

The consequences of giving medication improperly or giving it to the wrong child could be severe indeed. Mrs. Persaud admitted that five of these allegations were true, a number which the Tribunal finds sufficient to constitute a serious non-compliance.

- 18. You failed to ensure that where food or drink was supplied by a parent the containers were labelled with the appropriate child's name and was safely stored to prevent contamination contrary to s.39 of the Regulation . . .*

- (a) On December 17, 1999, four baby bottles were in the fridge but only one bottle was labelled with a child's name and one bottle of milk and one toddler cup of milk were stored for the morning in non-refrigerated cubbies.*

There is credible testimony from Ms. Calligan, Ms. Ballantyne, Ms. Stephen, and Sandra Edwards to support this allegation. Mrs. Persaud denied that the allegation was true, but then said that it was the fault of parents or staff if bottles were not labeled and the fault of the staff if bottles were not stored properly. Passing off blame to others does not absolve the operator of the responsibility to comply with the Regulation. The Tribunal finds that this is a non-compliance.

- 19. You failed to ensure that adequate nutrition was provided to the children contrary to ss.40(1), (2) of the Regulation . . .*

There was testimony from former staff saying that there was little variety in the food provided, with the same menu used every week. Ms. Ballantyne testified that lunch on the day of her inspection was cheese sandwiches that appeared burnt and hard for children to eat, along with potato chips, which are not recommended. The Crabbe sisters testified that there was lots of rice but often not enough vegetables. Mrs. Persaud makes milk by combining an unmeasured amount of skim milk powder with an unmeasured amount of water. There is also testimony from parents that their children's eating habits improved as a result of being at the nursery. A review of parent testimony failed to find any adverse comments on the food served at the centre. Neither party produced menus to assist the Tribunal in assessing this allegation, nor was the nursery cook called to testify. While the children's food may not always have been the best, there is insufficient evidence to conclude that this allegation has been proven.

- 20. You failed to ensure that accurate menus were posted in the day nursery contrary to s.41 of the Regulation . . .*

Although Mrs. Persaud denied this allegation, there is credible testimony that the posted menu was not always followed. This was observed by Ms. Ballantyne on 17 December 1999, and had been noted by Ms. Stephen in her 3 & 4 June 1997 inspection. The Tribunal finds that this is a non-compliance.

- 21. You permitted behaviour and action towards children contrary to s.45 of the Regulation . . .*

- (a) On numerous occasions, children are force fed.*

- (b) Children are forced to sleep for long periods (beyond two hours) and not given alternatives for nap time if they cannot sleep.*

- (c) Children yelled at if they do not sleep on appointed cots at nap time.*
- (d) The operator ridicules behaviour of children who cry or "act out" and demeans those children in front of other children.*
- (e) The operator forced a toddler to dress himself and left him in the bathroom alone and crying after he had soiled himself.*
- (f) Operator tried by force to detain a misbehaving child and refused to take action when that same child began beating another child.*
- (g) Operator tried to stick a toy in a child's mouth as punishment for using bad language.*

- (a) There is testimony that Mrs. Persaud doesn't allow children to leave the table until they have eaten. Ms. Stephen testified that a parent complained that Mrs. Persaud screamed at a child and forced her to eat carrots. Karen Crabbe testified: "If a child didn't want to eat or whatever and Ruby felt that they needed to eat or whatever and wouldn't allow them to leave the table or you know, tried to make them eat or whatever Kim would stand up to her and say you know this isn't allowed or you know you can't do this . . ." She also testified about a child who did not like oranges: "Ruby talked to his mother. The mother said the child does not like oranges and doesn't eat them at home. Well, they were having morning snack and she [Ruby] had given Scott an orange and the child didn't want to eat it, so Ruby wouldn't let him leave the table. So she left and went to circle time and did her circle and this child was still sitting at the table crying with his orange." Mrs. Persaud said that she did not force feed children but did insist that at least they try a mouthful or two. Ms. Stephen on 10 June 1997 had required that words in the centre's policy statement be altered to eliminate that part that would require children to take even small amounts of food that they do not want or cannot eat. It is clear that while force feeding may not be a regular practice at the centre, Mrs. Persaud does adopt inappropriate behaviour in regard to children eating. The Tribunal finds that this is a non-compliance.
- (b) The Regulation requires that children who attend the day nursery for six hours per day or more be provided a rest period of up to two hours, but that a child who is still awake or who awakens after one hour is allowed to get up and engage in quiet activities (Regulation 262, s.53(5)(a) & (c)). In 1996 Ms. Stephen found a non-compliance because Mrs. Persaud left children in a darkened room after one hour and would not permit them to engage in suitable alternative activities. The testimony of the Crabbe sisters and Wayne Alldridge indicated that the practice is continuing. Mrs. Jennison said that her daughter was required to nap for two hours although she was not a sleeper and was at the nursery for less than six hours each day. The Tribunal finds that this is a non-compliance.
- (c) Wayne Alldridge testified that he had many times seen Mrs. Persaud get angry with children when they got up from their cots during nap time. The Tribunal finds that this is a non-compliance.
- (d) There was testimony from Wayne Alldridge, the Crabbe sisters and Ms. Hone that Mrs. Persaud frequently yelled at children (Ms. Hone said that it was yelling, not just talking loudly). Ms. Hone testified that Mrs. Persaud told staff that some mothers looked like whores, made fun of people on subsidy, and called a little girl who dressed up in a dress an idiot. The Crabbe sisters testified that Mrs. Persaud told other children that a particular child was an animal and belonged in a cage. Mrs. Persaud denied this allegation, but the testimony supporting it is consistent and relates to different time periods. Ms. Hone was not at the centre when the other

three were there and she had never met or spoken to them. The Tribunal finds that this is non-compliance.

- (e) The Crabbe sisters testified to this allegation. Mrs. Persaud denied it. Given the number of incidents in the Crabbes' testimony that are substantiated by other witnesses, it is unlikely that they would have manufactured this unusual event. On the balance of probabilities, this allegation is substantiated and the Tribunal finds that this is non-compliance.
- (f) The Crabbe sisters testified to this incident (herein the Christian incident). Tellingly, Wayne Alldridge testified: "Ruby had mentioned later on to my teacher; I only heard it second-hand from my teacher, that her excuse was that she was drained physically and could no longer restrain the child and that is why she let him go and just sat there and let him beat another child." Ms. Plens testified that Mrs. Persaud asked her to come see her and wanted to know what Wayne might have told her (Ms. Plens) about the incident. Although Mrs. Persaud denied the allegation, there is enough substantiating evidence to conclude that it did occur. The Tribunal finds that this is a non-compliance.
- (g) This incident was observed by Wayne Alldridge, who saw all of it, and by the Crabbe sisters, who saw parts of it. Wayne reported it to his teacher, Ms. Plens. Ruby asked Ms. Plens for a letter saying that she (Ms. Plens) knew nothing about it. Ms. Plens refused. Wayne testified that Mrs. Persaud tried to get him to write a letter setting out her version of the incident. He refused because it would force him to be untruthful. Ms. Plens had no reason to be other than truthful in her testimony. Mrs. Persaud would not have wanted letters concerning the incident if it did not happen and did not reflect badly on her behaviour. Given the amount of credible testimony supporting the allegation, the Tribunal finds this to be a non-compliance.

22. You failed to ensure that written policies and procedures with respect to discipline, punishment and isolation measures to be used in the day nursery are reviewed by employees and students contrary to ss. 46(3)(a), (b) of the Regulation . . .

(a) On December 17, 1999, the behaviour management policies and procedures were not signed by an employee and a student working at the day nursery.

Mrs. Persaud testified that this allegation is true. It is a non-compliance.

23. You failed to ensure that written policies and procedures as well as measures to deal with behaviour management were monitored and reviewed by yourself as well as your employees contrary to s.47.1(2)(b), 47.2 and 47.3(1), (3) of the Regulation . .

(a) On December 17, 1999, the driver for the nursery was approached by a Ministry Policy adviser and asked for a list of children and the respective schools required for accurate transporting. The driver became irate with this request and screamed at the Ministry employee (and in front of four children), "I know where they go, do you think because I'm black I'm stupid? You assholes keep coming around here because you think we are stupid because we're black."

Ms. Stephen testified that in 1997 Mrs. Persaud was directed and then reminded to put behaviour management policies in place, that in January 1999 there was no staff review of these policies, especially by John Persaud, and that the policies were not being

followed. Mr. Persaud's version of the incident in 23(a) varies somewhat from that of Ms. Calligan, although he admitted to using foul language. He said that the children could not hear this. The incident upset Ms. Calligan and she made careful notes of it shortly after it happened. While she had no interest in fabricating her account, Mr. Persaud has reason to question it. On the balance of probabilities, the Tribunal finds that Ms. Calligan's version is true and that this allegation is substantiated as a non-compliance.

24. You failed to ensure that up to date records were available for inspection by a program adviser and were kept on the premises with respect to each child enrolled at the day nursery contrary to s.48 of the Regulation . . .

(a) On December 17, 1999:

- (i) one child's application form and health assessment were absent;*
- (ii) arrival and departure times for children were missing;*
- (iii) attendance records were not complete.*

(b) The operator removes children for outings without proper authorization from parents.

Mrs. Persaud admitted that allegation 24(a)(iii) was true. Incomplete medical records are dealt with under allegation 9. Although Mrs. Persaud denies (i) and (ii) there is no apparent reason why the advisors would make an incorrect observation. Nevertheless, by 21 December item 24(i) had been brought into compliance. With regard to 24(b), Mrs. Persaud testified that she gets a general authorization that is on the enrollment form, and Exhibit 100 appears to be the form in question. She said she posts signs about outings or telephones parents for permission. The references to testimony in the Director's submissions indicate that Mrs. Persaud does take children from the centre for various purposes, but they do not substantiate the allegation that children are taken from the centre without parental permission. The Tribunal finds that this allegation has not been substantiated.

25. You failed to ensure there is a written statement that outlines program philosophy and method of operation for specialized services contrary to s.52(2)(d)(vii) of the Regulation . . .

(a) transportation to and from school of nursery attendees has no clearly defined procedures and no accountability mechanisms for children in transition from driver to the school.

Mrs. Persaud admitted that this allegation is true, and the Tribunal finds this to be a non-compliance.

26. You failed to provide sufficient employees required for the care and guidance of the children enrolled in accordance with the ratios set out in column 2 of the schedule 3 or 4, contrary to s.55 of the Regulation . . .

(a) On December 17, 1999:

- (i) 18 children (between 21/2 and 5 years old) were in the upstairs room with only 2 staff members present;*

- (ii) *supervisor inappropriately counted as program staff when supposed to be given time off program to carry-out supervisory duties.*

Mrs. Persaud admitted that allegation 26(a)(ii) is true and that sometimes ratios were not met. In the Tribunal's view it would be unfair to fault the centre for not having appropriate staff so soon after three teachers, half the staff, had resigned without notice. Nevertheless, there is abundant testimony, from Ms. Stephen, the Crabbe sisters, Ms. Ballantyne, Ms. Hone, and Wayne Alldridge, that compliance with ratios is a recurrent problem for Academy Preschool. There was testimony from Ms. Calligan and Ms. Ballantyne that Mrs. Persaud's interpretation of ratio requirements is incorrect. Repeatedly not meeting ratios is a serious non-compliance, an allegation that the Tribunal finds is substantiated.

27. You failed to ensure that every child in attendance at the day nursery was supervised by an adult at all times contrary to s.57 of the Regulation . . .

(a) On December 17, 1999:

- (i) four children observed in cloak room with no supervision;*
- (ii) operator ignored children despite having responsibility for supervising children;*
- (iii) two junior children were in washroom with staff while other seven children remained in the back room unsupervised;*
- (iv) nine children left unsupervised in the play room [incorrectly called (iii)];*
- (v) staff on maternity leave without proper notice given to Ministry [incorrectly numbered (iv)].*

(b) On December 21, 1999, a child was left alone in the quiet room asleep while staff and other children were in the large room.

Although Mrs. Persaud denied all items in this allegation except (a)(v), which she admitted to be true, there is no reason to suspect that Ms. Calligan or Ms. Ballantyne made inaccurate observations or fabricated them. Mrs. Persaud did not deny the observations or provide an explanation when the program advisors reviewed the Summary Sheet with her or when she signed it. Ms. Ellwanger denied that 29(b) was a non-compliance because the door to the quiet room was open. Ms. Hone and Mrs. Edwards testified that teachers did cleaning during times when they were supposed to be supervising children. There is enough credible evidence to substantiate this allegation, and the Tribunal finds this to be a non-compliance.

28. You failed to employ the appropriate staff contrary to s.59 of the Regulation . . .

(a) On December 17, 1999, there were no qualified staff in the upstairs preschool room.

Mrs. Persaud said instance (a) of this allegation was true. Some allowance should be made for the fact that this observation was made nine days after three qualified staff had resigned without notice. Nevertheless, one would have hoped that the operator would have a list of people she could call on at short notice to fill in, even on a temporary basis, when needed. There are mitigating circumstances, but the Tribunal finds this is a non-compliance.

The Regulation requires a Director's approval for someone to be the supervisor of a day nursery. Mrs. Persaud had not sought such approval for Ms. Ellwanger. Her testimony was that only someone without the necessary qualifications (ECE qualification or equivalent and two years experience) need apply for approval. Yet Mrs. Persaud had gone through the same situation during the inspection of 3 & 4 June 1997 where she was required to get approval for a new supervisor (Exhibit 59). This appears to be a deliberate disregard for legal requirements and the Tribunal finds it to be a non-compliance.

29. You failed to ensure that each person employed at the day nursery had a health assessment and immunization contrary to s.62 of the Regulation . . .

Mrs. Persaud admitted that this allegation was true in respect of her son-in-law, who was employed at the centre. The Tribunal finds this to be a non-compliance.

B. It is alleged that contrary to the provisions of section 12(2)(e) of the Day Nurseries Act, the day nursery is operated and maintained in a manner prejudicial to the health, safety and welfare of the children cared for in the day nursery for the reasons already set out in the Notice and further it is alleged that:

1. The operator transports children in an unsafe manner (i.e. no seatbelts, inadequate insurance, and no authorization by parents).

Ms. Calligan testified that Mr. Persaud told her that he transports toddlers in an untethered car seat. This is contrary to CSA standards (Exhibit 79). The testimony about seat belts is sketchy and inconclusive. There is insufficient evidence to make a finding about insurance. Parental consent for outings is dealt with above.

2. Children left alone during pick-ups and drop-offs to and from nursery.

The incident about the child who could not get into the school is dealt with above. Mr. Persaud dropped two children off by the fence of a school and left. With two children there, they were not alone, although unsupervised. Ms. Hone's testimony related to events some years ago and does not indicate a recent problem. Several parents testified that they were satisfied with the transportation provided for their children. There is insufficient evidence to support this allegation.

3. Children are not picked up by nursery driver even when pre-arranged.

There is testimony from five witnesses giving instances where children were not picked up. Again, there was testimony from parents satisfied with the service. Better organization should have prevented the many miscues.

Consideration of these three transportation allegations does not lead the Tribunal to the conclusion that the transportation service provided by the centre seriously prejudices the health, safety and welfare of the children. It leads to the conclusion that a more rigorous and disciplined program to ensure efficiency should have been made.

4. Operator has heated disagreements with staff in front of parents and children.

There is testimony from four witnesses to substantiate this allegation. Mrs. Persaud denied it. On the balance of probabilities, the Tribunal finds that such incidents have

occurred. While this may indicate unprofessional behaviour, unless it was very frequent it is unlikely to seriously jeopardize the well-being of children. The Tribunal does not find the evidence in this regard substantiates the allegation.

5. Operator has threatened staff if they disclose information (about the safety of children) regarding the nursery to authorities.

There is testimony from Karen Crabbe that Mrs. Persaud told staff whenever there was controversy she could fire them just as easily as she hired them. Ms. Hone testified that Mrs. Persaud would say to staff if challenged about her directions, policies or behaviour: "If you don't like it, there's the door." Wayne Alldridge testified that Mrs. Persaud said that she would fire him if he spoke to anyone about the Christian incident. Mrs. Persaud told him that he was young and stupid and to "stay out of it." Mrs. Persaud testified that the allegation was false, and Ms. Ellwanger testified that she had never heard threats to any staff.

The overall impression from the whole body of testimony is that Mrs. Persaud has a somewhat volatile personality and is quite capable of giving in to angry outbursts. On the balance of probabilities, therefore, the Tribunal finds that threats have been made to staff that would have constrained them from reporting matters that affect the health, safety and welfare of children at the centre.

6. Operator sleeps during periods she is supposed to be supervising the children.

There is credible testimony from Ms. Burns and the Crabbe sisters of Mrs. Persaud sleeping on the floor of the sleep room when she was supposed to be supervising the children there. Mrs. Persaud denied that the allegation was true, but there is no reason to doubt the explicit testimony of Ms. Burns, who had nothing to gain from falsifying her evidence. On the evidence, the Tribunal finds this allegation to be substantiated.

POINTS OF CONTENTION:

The written submissions of the parties raise certain points that merit consideration here.

Fairness of investigation of complaints

Academy contends that the Director did not act fairly in investigating the complaints received about the day nursery. Among other things it is contended that complaints were not discussed with the operator and the operator was not told of the purpose of the 9 December visit, that Ms. Calligan never asked to inspect daily logs, complaints concerning Ms. Calligan's conduct on 17 December were not investigated, and that the Director did not take into account the bias of the resigned staff who made complaints.

The evidence shows that Mrs. Persaud was told of the purpose of the 9 December visit, Ms. Calligan did ask for and saw the daily logs and made a note of it in her Summary, and Ms. Corey did question the program advisors about what happened on 17 December. It also shows that the Director took many things into account in making her decision, of which the complaints of the resigned staff were only a part. The Director and Ministry witnesses all testified that normal Ministry procedures were followed in the investigation of the complaints about the centre.

In respect to the timing of the 9 December visit, the Ministry would have been negligent if no visit were made when the centre was clearly in difficulty, three staff having just resigned. Ms. Calligan testified that she made every allowance for the circumstances in which Academy found itself that day. At the time Mrs. Persaud did not object to the visit and undertook to ensure that all Ms. Calligan's requirements would be fulfilled.

Even had there been unfairness in the Ministry's investigation, the Director's decision was not a final one, as the Director's submissions point out. The final decision is the Tribunal's, and the hearing offered an opportunity to have all complaints fully aired and examined.

Amount of time allowed for compliance

Academy argues that insufficient time was allowed—one business day—to comply with the issues resulting from the 17 December inspection.

The evidence shows that a number of non-compliances found on 21 December were ones that have been pointed out on 9 December, issues that Mrs. Persaud had convinced Ms. Calligan would be corrected. She had a copy of the Summary Sheet prepared during that visit and so was fully aware of the areas of non-compliance.

Mrs. Persaud knew that the licensing visit would be conducted shortly after the December 9th visit, and this gave her the advantage of being forewarned so she could ensure she was in compliance on December 17th when the inspection was conducted. Although no Summary Sheet was left on the day, non-compliances found were discussed with Mrs. Persaud and Ms. Ellwanger.

The allowance of ten days to comply is the maximum that may be given. The onus is on the operator to be in compliance at all times, and there is no evidence that the advisors acted improperly in setting compliance dates.

Date of Director's decision

Academy submits that the decision either to propose not to renew or to issue a stop order was made before 21 December, the date many issues were to be brought into compliance. It is submitted that this conduct of the Director was unfair, partial and inequitable and not in accordance with her duty to act fairly.

The evidence shows that, indeed, before 21 December the Director was considering which of these two possible courses of action she should take. She was discussing it with the two program advisors and was taking legal advice.

The decision is one that only the Director can take, and one that she testified she does not take lightly. It is clear from the evidence that she thought that whether or not compliance was achieved by 21 December, she had sufficient reason to close down the centre.

The responsibility of the Tribunal is to determine whether the Director acted within the requirements of the DNA. The Tribunal's responsibility is to assess the evidence before it and to determine what action it will order the Director to take.

Possible use of options to non-renewal

Academy contends that the Director did not consider such options as issuing a conditional licence or instituting monitoring for compliance.

A careful perusal of the testimony has found no evidence that Ms. Corey, who was familiar with the DNA and regulations, failed to consider the options available to her.

Characteristics of the allegations in the Notice

Academy contends that the allegations in the Notice are unduly repetitive, inaccurate, non-factual. The Tribunal's findings regarding the allegations are given above.

Motivation of personal animus

Academy contends that the Director was motivated by personal animus towards Mrs. Persaud. There is nothing in the evidence to support this contention. Ms. Corey testified that she had never met nor spoken to Mrs. Persaud. There is no basis for animus.

Testimony indicates that Ms. Calligan came away from the 9 December visit with a good feeling. Mrs. Persaud testified that she did not think Ms. Calligan was being over-zealous. Again, there was no basis for animus.

Costs

Academy asks to be awarded costs. Costs can only be awarded where a tribunal's rules make provision for such an award. The Tribunal's Rules make no such provision, so no costs can be awarded.

ANALYSIS:

The evidence shows an extended history of Academy failing to comply with the DNA and regulations. Compliance, once achieved after an inspection, is soon lost. Through monitoring, and the diligence of Ms. Burns as supervisor, compliance was achieved for some time, although conditions continued to be attached to the licences issued. Evidence shows that those conditions were not always complied with.

The Tribunal has found that the great majority of the allegations of non-compliance have been established to its satisfaction. Some of the instances of non-compliance noticed in the 17 December inspection are relatively minor, others have the possibility of seriously jeopardizing the health, safety and welfare of the children at the centre. The number of non-compliances is unprecedented in the program advisor's experience. A number are issues that have been noted in previous inspections.

With thirty years experience in the day care field, one would expect Mrs. Persaud to be familiar with all the relevant rules and regulations. Nonetheless she proposed interpretations of the serious occurrence requirements, ratio requirements, and the procedures for approving supervisors that are clearly wrong. Her attitude in answering questions about the allegations was sometimes dismissive and indicated less than high regard for the need for continuous compliance.

It may well be that no child at Academy has met with tragedy as a result of the care offered there. Nevertheless, the provisions of the DNA and regulations that are cited in the allegations all have the overriding purpose of ensuring the health, safety and welfare of children in day nurseries.

It is the Tribunal's finding that Mrs. Persaud has not in the past and would not in the future operate Academy Preschool in compliance with the DNA and regulations. Whether this is the result of inability or of deliberate disregard for the requirements is immaterial. Operators who are in habitual and serious non-compliance should not be permitted to continue to operate day nurseries.

The Tribunal concludes that the licence of Academy Preschool should not be renewed. The Tribunal is aware of the effect that this decision will have on the operator, staff and parents of children at the centre. Accordingly it calls for a period of one month after the date of decision to allow for alternative arrangements to be made.

DECISION:

Pursuant to the authority vested in it by section 13(4) of the *Day Nurseries Act*, the Tribunal orders the Director to carry out her proposal not to renew the licence of Academy Preschool, such proposal to be effective 30 days from the date of the release of this order.

LICENCE APPEAL TRIBUNAL

Hugh R. Hanson,
Presiding Member

Cecilia Taylor,
Panel Member

Stephen Blackburn,
Panel Member

Released: September 7, 2000

McFADDEN

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
TERRY McFADDEN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION
- Proposal dated: June 13th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TERRY McFADDEN

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on September 13, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal *peremptory* adjourns the pre-hearing *against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, September 29, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 8th, 2000

VIS-VEERMAN

TRUUS M. VIS-VEERMAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTY PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DOUGLAS MACKINTOSH, Vice-Chair

APPEARANCES: TRUUS M. VIS-VERMAN, representing herself
TERRI HILBORN, Counsel, representing Ontario New Home
Warranty Program
MONTGOMERY KING, Agent, representing Lakeside
Condominiums Southampton Inc., Added Party

DATE OF
HEARING: August 29, 2000 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by the Applicant Truus Vis-Veerman. The appeal is from a decision letter dated February 10, 2000 from the Ontario New Home Warranty Program ("the Program") denying her claim for warranty on her home.

At the outset of this hearing, the Program made a motion to have the appeal dismissed as the Program had not received the required notification within the time limit prescribed by the Ontario New Home Warranties Plan Act ("the Act"). For the purpose of the motion, the Program assumed, only for simplicity, that the longest notification period provided in the Act pertained, namely five years for major structural defects.

BACKGROUND:

At the end of July 1993, the Applicant took possession of a house she purchased for \$59,000 from a numbered company. The house was designated as unit 137, 383 McNabb Street, in the town of Southampton. It was part of a 32 unit condominium. She was the second occupant as the house was originally rented to another person.

At the time she took possession of the house the Applicant had just separated from her husband and had numerous problems with her health and with custody proceedings over her 14 year old son. Her problems were compounded when, at the end of April 1994, the crawl space under her house flooded with 4 ft of water floating bits of furniture and boxes around in it.

THE FACTS:

The evidence presented consisted of documents entered as exhibits by consent of both parties. In addition, two witness gave evidence, the Applicant and a witness from the Program. The date of registration of the condominium's declaration was October 10, 1990. The date of the certificate of completion and possession was December 23, 1990.

The Applicant, who was unrepresented, had difficulty understanding the technical issue of the motion being argued. The applicable sections of the Act were read out to her step by step, but unfortunately this did not help.

The Applicant testified that at the end of April 1994, when she discovered the flooding, she was unaware of the warranty program. She only became so much later. At the time of the flooding, she complained to the builder without success, and that has since led to court proceedings between them.

The evidence is clear. The first notice of a problem in the Applicant's house came in a letter from a member of the Board of the Condominium Corporation received by the Program on February 14, 1996. This is more than five years both from the day of the condominium's registration and declaration (October 10, 1990) and from the start of the warranty and first occupancy of the unit (December 23, 1990). The Applicant herself had made no earlier contact and did not write to the Program with her complaint until October 15, 1997.

THE LAW:

The applicable sections of the Act are as follows;

Section 13(1) Every vendor of a home warrants to the owner,

.....

(b) that the home is free of major structural defects as defined by the regulations; and

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Section 14 (1) Where,

.....

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purpose of section13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

Section 16. Where a home was enrolled after the 31st day of December, 1990, the claim for damages because of a major structural defect may be made within seven years of the date specified in the certificate of completion and possession.

DECISION:

The motion by the Program has to be granted. Notice of the complaint on the Applicant's house was not received within the maximum five-year limitation period then allowed for major structural defects. Both the Program and the Tribunal are therefore without jurisdiction to deal with the Applicant's complaint. This has been dealt with in previous Tribunal decisions, such as, Chewerda CRAT 1997. The time limits provided in the Act are absolute.

Accordingly, for these reasons and pursuant to the authority vested in it by section 16(3) of the Ontario New Home Warranty Plan Act, the Tribunal directs the Program to disallow the Applicants claim.

LICENCE APPEAL TRIBUNAL

Douglas Mackintosh
Vice-Chair

Released: September 8, 2000

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
KAROLY SARKADI AND KAMILLA SARAMO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

KAROLY SARKADI AND KAMILLA SARAMO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1220608 ONTARIO LTD.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter
on September 6 and 7, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing
peremptory against the Applicants to commence at the Tribunals Chambers, 1 St. Clair
Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Thursday, November 23,
2000, and to continue November 24, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 11, 2000

0188/MED/00/020

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROSS BENNETT, M.D., Member

APPEARANCES: F. Claire Rowett
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: August 30, 2000 Whitby

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

By the Applicant:

a) Exhibit #1 Notice of Appeal – dated August 5, 2000

By the Respondent:

a) Exhibit #2 Ministry of Transportation submissions – tabs 1 – 9
- received August 17, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal and Applicant with a file summary with respect to this matter.

FACTS:

The Applicant is appealing the suspension of driving privileges effective "99 08 16" as per Exhibit # 1.

In the Appeal Form the Applicant claims that:

"I have broken no laws, and I am a safe driver. I'd like to know why my licence was suspended on the word of one doctor who did nothing in treatment." (Exhibit # 1)

The Applicant came to the attention of the Ministry as a result of an unsolicited letter, dated "January 20, 1999". Physician # 1, a psychiatrist with the Oshawa Clinic, informs the Ministry that the Applicant *"...has been abusing alcohol for the last couple of weeks and have serious concerns that his abuse of alcohol could be affecting his ability to drive a vehicle safely..."* (Exhibit # 2 Tab 1)

Physician # 1 attached to his letter, a Medical Condition Report, dated "January 20, 99", stating that the Applicant *"...who has been suffering panic disorders was abusing alcohol for the last two weeks. Pt is not on any medication ...concerns that his abuse of alcohol may make it dangerous to operate a motor vehicle."* (Exhibit # 2 Tab 1 A)

MINISTRY OF TRANSPORTATION ASSESSMENT FORM- authorized for release by the Applicant on "Feb 08/99" was prepared by Physician # 2 on "15/Feb/98" (?). Physician # 2, who has been the Applicant's physician since 1984, reports as follows:

The sections on "Personal Health History" and "Medical Consequences Related to Alcohol Use" are blank.

"PHYSICAL ASSESSMENT AND LABORATORY EVALUATION" shows *"Blood Pressure - ABNORMAL 150/100; LIVER - NEUROLOGICAL - MCV -GGT "* are checked off under the column for "NORMAL"

Under TREATMENT, the physician notes that the Applicant attended the *"...Detox 12 yrs ago; 3 weeks Pinewood Treatment Centre; relapse - uncontrollable panic attacks ...2 yrs member of A.A. But it didn't address root problem"*

"ABSTINENCE" is the "RECOMMEND GOAL FOR ALCOHOL CONSUMPTION" (Exhibit # 2 Tab 2)

MINISTRY OF TRANSPORTATION ASSESSMENT FORM- prepared on "10/06/99", by Physician # 2 who has been the Applicant's physician since 1984, Physician # 2 reports as follows:

"YES" is checked under "Personal Health History" for "Psychiatric Disorders... Days absent from work within past two years "5 days"

Under "Medical Consequences Related to Alcohol Use," "YES" is checked off for "Blackouts" with an explanation "*NOT IN LAST 10 YEARS*"

"PHYSICAL ASSESSMENT AND LABORATORY EVALUATION" shows "*Blood Pressure - NORMAL 130/80; LIVER - NORMAL; NEUROLOGICAL - NORMAL; GGT 29; MCV - 92*"

Under TREATMENT, the physician notes that the Applicant attended the "*Pinewood Treatment Centre - OSHAWA; 2 ½ yrs member of A.A.; Relapse to control panic cronic anxiety disorder; yes - belongs to discussion group*"

"ABSTINENCE" is the "RECOMMENDED GOAL FOR ALCOHOL CONSUMPTION"; "*12 years abstinence - 2 short set backs to control anxiety; currently on medication to do the same*" (Exhibit # 2 Tab 4)

A MEDICAL ADVISORY COMMITTEE CASE STUDY, dated August 6, 1999, upheld suspension pending "*detailed assessment from a physician specializing in addictions medicine which confirms successful completion of a treatment program, total abstinence from alcohol for a period of one year...*" (Exhibit # 2 Tab 5)

An ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS, dated "*June 27 2000*", completed by Review Officer Alana Best provides the following: "*...recommendation and comments: ...recommend that the Applicant provide an up-to-date report from Physician # 2, family physician. Since the Applicant does not believe that he needs treatment or relapse prevention, he was further advised to ask Physician # 2 to provide his opinion with respect to these requirements in his report. The lab tests provided today did not include and MCV reading.*" (Exhibit # 2 Tab 7)

The ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS details the Applicant's view of the situation as interpreted by Ms Best. (Exhibit # 2 Tab 7). The Applicant believes, as he has been told by Physician # 2, that he is suffering from an hereditary disorder. The Applicant's relapses were due to his anxiety returning, but he does not drink and drive. (Exhibit # 2 Tab 7)

Exhibit # 2 Tab 9, is a Ministry of Transportation driving Record for the Applicant since 1968, showing no offences. The Applicant is appealing the suspension of his driver's licence effective "*99 12 10*" as per Exhibit # 1.

The Respondent, at the hearing, relied on the text of the written summations presented to the Tribunal, as well as on the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 9.

The Respondent referred to: The Physician's Guide to Driver Examination and National Safety Code - Medical Standards for Drivers, as well as described the composition of the Ministry of Transportation Advisory Committee.

The Respondent argued that "*Based on medical information on file the Applicant is suffering from two medical conditions which will impair his ability to drive (as required by Reg. 340/94 14 (a) and/or (b)). The Canadian Medical Association reports that chronic alcohol abuse and panic attacks are a serious medical disability, individually. In this case the Applicant suffers from both and has admitted to using one disorder to resolve*

problems with the other". (CMA 13.2, 15.1. The Canadian Council of Motor Transport Administrators supports this position and comments that person habitually dependent on alcohol should not drive any class of motor vehicle until evidence of alcoholism is no longer a problem. (NSC 11.2, 12.1, 13.2)

The Applicant testified that in his younger years he drank with his buddies. Then, after getting married and acquiring more responsibilities he changed his habits.

The Applicant testified that his major problem is the anxiety attacks he has been having since his mid twenties. The symptoms of these attacks resembled a heart attack. The initial "...shakes and shivers", left him totally debilitated for hours. According to the Applicant, the attacks had the effect of making him phobic. At the time, the Applicant felt that although alcohol did not give him a high, it alleviated the symptoms of the anxiety attacks. Recognizing he was drinking too much, the Applicant asked for help and voluntarily admitted himself to Pinewood. He also became a member of A.A.

The Applicant confirmed that over the years, after reading several books and watching programmes on self-help, he learned to control his condition to an extent.

A couple of years ago, he sought the assistance of a psychiatrist to help him with the anxiety attacks. Physician # 1 changed his medication and continued treating the Applicant for over a year. The Applicant felt the new medication was not having the desired effects and that his condition was not improving. At this time he turned to drink again. He would drink "...4 to 6 oz ...after work in the evening..."

The Applicant confronted Physician # 1 with his belief that treatment was not helping, and believes this is the reason Physician # 1 reported him.

The Applicant testified that he works on an assembly line and has not missed time from work due alcohol. Further, the Applicant affirmed that he would not drink and drive.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to “...suspend or cancel” a driver's licence for “any ...sufficient reason...” The Applicant came to the attention of the Registrar as a result of an unsolicited letter from a psychiatrist, Physician # 1, informing the Ministry that the Applicant “...has been abusing alcohol for the last couple of weeks and have serious concerns that his abuse of alcohol could be affecting his ability to drive a vehicle safely...” (Exhibit # 2 Tab 1)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, at the time of the suspension.

The Respondent suggests that both clauses of Regulation 390/94, Section 14, i.e. (a) and (b) are applicable in this case. The Tribunal will rule, on each clause separately.

Regulation 390/94, section 14 (a) states that:

"An applicant for a holder of a driver's licence must not,

- a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely..."*

The Applicant has been diagnosed as suffering from "*uncontrollable panic attacks...*", by Physician # 2. Under the column "Personal Health History" for "Psychiatric Disorders" MINISTRY OF TRANSPORTATION ASSESSMENT FORM, Physician # 2 also checked "YES". (Exhibit # 2 Tab 4)

It is evident that the Applicant suffers from an enfeebling condition. Nonetheless, the Tribunal accepts the testimony of the Applicant, and is satisfied, that he has attempted to gain insight into his condition, and now recognizes and tries to curb the symptoms. More importantly, the Tribunal finds no evidence to substantiate that the Applicant's condition will *"...significantly interfere with his ability to drive a motor vehicle"*.(Exhibit # 2. Tab 4)

The Tribunal will now proceed to review the evidence adduced with respect to section 14 (b) of Regulation 340/94.

The Respondent eloquently expounded the policies considered by the Ministry of Transportation Medical Advisory Committee and contained in the; "Physician's Guide to Driver's Examination; the National Safety Code; the Canadian Medical Association (CMA 13.2, 15.1.): the Canadian Council of Motor Transport Administrators (NSC 11.2, 12.1, 13.2). The Tribunal notes that these policies are to be used as guidelines and are not legislation.

The pertinent legislation in this matter is section 14 (b) of Regulation 340/94 of the Highway Traffic Act which reads:

"An applicant for or a holder of a driver's licence must not,

- b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."*

Neither MINISTRY OF TRANSPORTATION ASSESSMENT FORM- prepared by Physician # 2 is checked as "YES" under the "Addictions". In fact Physician # 2 is quite explicit in his clarification *"2 yrs member of A.A. But it didn't address root problem"*. (Exhibit # 2 Tab 2)

The "PHYSICAL ASSESSMENT AND LABORATORY EVALUATION" portion of the MINISTRY OF TRANSPORTATION ASSESSMENT FORM specifies that Applicant's *"...GGT 29; MCV - 92..."*, both well within "NORMAL" range.(Exhibit # 2 Tab 4)

There are two components to section 14 (b):

- 1. addiction to the use of alcohol or drug*
- 2. extent of interference with ability to drive a motor vehicle safely.*

The Applicant testified that he believes that he was an alcoholic and as such sought treatment twelve years ago. Today, the Applicant confirmed that he is able to drink "...four to six ounces..." and stop. The Ministry determined that the Applicant is still addicted to alcohol. The Dictionary defines "*addiction*" as a "*strong habit that is difficult to break...*". The Tribunal is not entirely satisfied that the Applicant meets the criteria for addiction.

The second component is the extent of interference where addiction is established (which the Tribunal has not found in the evidence). Were the intent of the legislators to have been strictly moralistic in scope, the regulation might have stated that "*An applicant for or a holder of a driver's licence must not, be addicted to the use of alcohol or drug*". This is not the case. Under the Regulation, the addiction must be to the extent that it is likely to significantly interfere with the ability to drive a motor vehicle in order to be of consequence.

There is no evidence in this hearing to suggest that the Applicant's consumption of alcohol, whether or not an addiction, has in any way affected the Applicant's ability to drive. The Tribunal notes that the Applicant's record is in fact spotless. Exhibit # 2 Tab 1)

Under section 47 of the *Highway Traffic Act*, the Registrar must establish sufficient reason to suspend the Applicant's driver's licence. Therefore, the onus is on the Respondent to prove the merits of the Ministry's case in suspending the Applicant's licence under Regulation 340/94 section 14(a) and (b) of the HTA.

In reviewing all the evidence presented at the hearing, the Tribunal finds that the Respondent has not proven that the Applicant is currently suffering from a mental or emotional condition or an alcohol addiction which is likely to significantly interfere with his ability to drive a motor vehicle described by Regulation 340/94 sections 14(a) and (b), respectively, of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated August 16, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Ross Bennett, M.D.,
Presiding Member

RELEASED: September 11, 2000

MOSKOVITCH

ISRAEL AND SHEILA MOSKOVITCH

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

JOSEPH COSENTINO, Counsel, representing the Applicants
No one appearing for the Ontario New Home Warranty Program
No one appearing for Grand Metropolitan Developments Ltd.,
Added Party

DATE OF
HEARING: September 11, 2000 Toronto

ORDER

WHEREAS the Applicants appealed the Program's decision to this Tribunal which appeal was due to be heard in Toronto on September 11, 2000;

AND WHEREAS immediately prior to the hearing, the Ontario New Home Warranty Program faxed to the Tribunal a proposed Minutes of Settlement between the parties;

AND WHEREAS at the commencement of the hearing on September 11, 2000, Counsel for the Applicants requested an adjournment of the hearing to finalize settlement of the matter between the parties;

NOW THEREFORE this Tribunal Orders:

- 1) The parties are no later than 1:00 p.m., on Wednesday, September 13, 2000, to submit to the Tribunal Minutes of Settlement signed and dated by all parties;
- 2) Failing the Tribunal's receipt of such Minutes of Settlement, the parties will appear on Thursday, September 14, 2000, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, to proceed with the hearing of this matter.

LICENCE APPEAL TRIBUNAL
William McIntosh
Vice-Chair

Released: September 11, 2000

SHAQIQ, MOHAMMAD AMIN o/a EAST & WEST USED CAR SALES

MOHAMMAD AMIN SHAQIQ O/A EAST & WEST USED CAR SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE THE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

MOHAMMAD AMIN SHAQIQ, representing himself.
MITCHELL GOLDBLOOM, Counsel representing the Registrar
under the *Motor Vehicle Dealers Act*

DATE OF
HEARING: September 8, 2000 Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the Motor vehicle Dealers Act ("the Registrar", and the "Act" respectively). The Notice of Proposal dated March 23, 2000 proposed to revoke the registration of Mohammad Amin Shaqiq o/a East & West Used Car Sales under the Act.

BACKGROUND:

The Registrar under the Act proposed to revoke the registration of Mohammad Amin Shaqiq o/a East & West Used Car Sales. The grounds relied upon by the Registrar for the Proposal are set out below:

1. The past conduct of Mohammad Amin Shaqiq, the Registrant, affords reasonable grounds for belief that the Registrant's undertakings will not be carried out in accordance with law, and with integrity and honesty, TO WIT;

On December 2, 1999 the Registrant was found to be offering two vehicles for sale with false odometer readings, and when the inspector requested further information from the Registrant on December 2, 1999, and further on January 5, 2000 the Registrant did not respond. Further the Registrar received complaints from consumers that the Registrant was selling vehicles from a location other than his registered premises.

THE LAW:

Section 3 of the Motor Vehicle Dealers Act (the 'Act'), states as follows,

- (1) No person shall,
 - (a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or
 - (b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act

Section 5 of the Motor Vehicle Dealers Act (the 'Act'), states as follows;

- 5(1) An applicant is entitled to registration by the Registrar except where,
 - (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
 - (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or
 - (c) the applicant is a corporation and
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
 - (d) the applicant is carrying on activities that are or will be, if the applicant is registered, in contravention of this Act or the regulations.
- (2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

- (1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion, the applicant is disentitled to registration under section 5.
- (2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5, if the registrant were an

applicant, or where the registrant is in breach of a term or condition of the registration.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application, but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Applicant heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

Re-Herman Motor Sales Inc. at al. and Registrar of Motor Vehicle Dealers and Salesman 113 D.L.R. (3d) 370, High Court of Justice Divisional Court, July 2 1980

The issue in this case was whether the past conduct of the officers and directors of the motor vehicle dealership provided reasonable grounds to believe the business would not be carried out in accordance with law and with integrity and honesty in the future. The case involved evidence of past good behavior and exemplary business conduct, however, the dealer had pleaded guilty to a charge of fraud relating to instances of odometer tampering. It was found by the Tribunal that the evidence justified the revocation of the dealer's licence as odometer readings are of great importance as the basis for assessing the value of most vehicles. The court found on page 3 of the decision that:

"to tamper or interfere with odometer readings must be considered seriously and must constitute a grave breach of the duty of the dealer."

Although the consequences for the applicant were severe, the penalty was found to be appropriate. The court also found that reliance could be placed on past behavior to predict future behavior as provided for in statute.

Ontario (Registrar of Motor Vehicle Dealers and Salesman) v Clermont (1974) O.J. No. 1028 Ontario Supreme Court-High Court of Justice

In this matter, the issue of past conduct was dealt with in the context of a single mistake which although willful did not cause actual harm to the public. The act being dealt with involved improprieties in the trust account by the motor vehicle dealer. The Tribunal found that the one isolated mistake was of such a nature that it provided reasonable grounds to believe that the person would not carry on business with integrity, honesty, and in accordance with law in the future.

ISSUES:

The issue in this case is whether the Registrar was wrong in his decision to revoke the Applicant's licence under the Act on the basis of the Applicant's conduct respecting the allegations of changing the odometers, failing to comply with the requests by the Registrar for information, engaging in selling motor vehicles from a location other than his business premises.

WITNESS FOR THE REGISTRAR:

Matthew McKenzie and Laura Gordon testified on behalf of the Registrar.

Matthew McKenzie testified that he was employed as inspector by the Ontario Motor Vehicle Industry Council from September 1997 until February 2000 and presently holds the position of marketing manager at Freeway Ford Sales Ltd.

On December 2, 1999 he attended at the business premises of the Registrant to complete a standard inspection of a new dealer. He requested records from the dealer to ensure compliance with the Motor Vehicle Dealers Act and was provided with the material requested. When he obtained 4 or 5 random bills of sale for vehicles purchased at auction, he inspected the vehicles on the lot to ensure that the V.I.N. numbers matched, and he discovered that on two vehicles the odometer readings were lower than listed on the Bills of Sale. A 1992 grey Honda Civic had an odometer reading on the Bill of Sale from the auction of 254,137 kms but an odometer reading at time of the inspection of 154,268 kms. A 1992 green Honda Civic had an odometer reading of 220,565 kms on the Bill of Sale from the auction, but an odometer reading of 160,849 km at time of the inspection. When the witness discovered this problem he spoke to the Applicant and received a response. Based on this, he filled out his Inspection Findings report (Ex. 4, Tab 4), and wrote that: "the dealer acknowledges that he has admitted to tampering with the odometers of the two preceding vehicles and has stated that there are on unknown quantity of other vehicles involved." He testified that the Applicant became excited at this time, and ask for his help. He made a list of information that he required wanted from the Applicant, and advised him that he could not provide help, but it would be the best interests of the Applicant to cooperate with him. The Applicant provided him with copies of the Bills of Sale from the auction for the two cars in question, which he then photo copied and returned. Prior to leaving the premises, Mr. McKenzie read over the report to the Applicant, and they both signed it. Mr. McKenzie did not receive the required information from the Applicant by the December 12, 1999 deadline, and as a result two letters were sent out requesting that the Applicant contact him. The first letter was dated January 5, 2000 and a second letter was dated January 28, 2000. The deadline of February 10, 2000 was given in these letters but there was no contact. After the completion of the Applicant's testimony,

Mr. McKenzie was recalled and clarified what he was told by the Applicant concerning the alleged odometer tampering. At this time, the witness stated that the Applicant admitted that he "changed" the odometers.

The next witness for the Registrar was Laura Gordon who is the Director of Compliance for the Ontario Motor Vehicle Industry Council ("OMVIC") which is a group established in 1997 as a nonprofit organization to administer the Motor Vehicle Dealers Act. Its four areas of responsibility are to mediate disputes, carry out inspections of motor vehicle dealers, enforce compliance, and deal with registrations.

Mr. Gordon testified that under the *Motor Vehicle Dealers Act*, a person is entitled to registration unless the Registrar has reasonable grounds to believe that the person cannot be financially responsible or on the basis of past conduct will not carry on business with honesty, integrity, and in accordance with the law. The Motor Vehicle Dealers Act is consumer protection legislation and was established to protect vulnerable consumers from the improper conduct of motor vehicle dealers. Mr. Gordon explained that it is essential that odometer readings be correct or that the customer be advised of the distance traveled by the car, as that information goes directly to the issue of price, safety, and future maintenance costs, among other things.

Ms. Gordon also testified that she received information that two vehicles were transferred into the dealership's name after the 6 day period contrary to section 11 of the Highway Traffic Act. A green Suzuki Swift was purchased on April 5, 2000 by the Applicant at an auction on behalf of East and West Used Car Sales and was finally transferred into the dealer's name on July 28, 2000. A blue Suzuki Swift was purchased by the Applicant on behalf of East and West Used Car Sales which was never transferred into the company name. The witness also confirmed that there had been a Consent Order (Ex. 4, Tab 13) made prior to the hearing in which it was agreed that further documentation would be provided, but this was not done.

Ms. Gordon also referred to information which came to her attention of a complaint made to an inspector or a mediator. This complaint referred to the Applicant selling a car off his premises. When she contacted the Applicant, he told her that the customer had purchased the car, returned it for him to resell, and he arranged a sale to another customer. The address of the transaction was not the business premises of the Applicant. Ms Gordon was concerned that a customer dealing with a person whom the customer believes to be a private vendor will have different expectations than if they are dealing with a motor vehicle dealer.

WITNESS FOR THE APPLICANT:

The Applicant testified on his own behalf. With regard to the two Suzuki vehicles, the Applicant testified that his dealer's licence had expired on April 1, 2000 which was a Saturday, and he did not pay his renewable fee until Monday April 3, 2000. At this point his dealer's licence had expired, and was not capable of being renewed as the notice of proposal was pending. As a result, the auto auction advised him that he could not have the two Suzuki vehicles registered in his business name, and the cars stayed at the auction premises.

He testified that the vehicles were resold, and he paid the fee for both buying and selling at the auction. His evidence was that he did not come into possession of either car.

On the issue of the odometers, the Applicant testified that the odometer readings at the time of the inspection differed from the readings shown on the Bills of Sale when the cars were purchased at auction. His explanation was that the odometers had to be replaced, and the cars had not been sold yet, so they were simply sitting on his lot with different odometer readings from the Bills of Sale. In his opinion, this was not improper as they had not been sold, and it would be his policy to tell the purchasers that the odometer readings were not accurate. He testified that other cars had been sold in the same way, and he did notify the purchasers. However, no Bills of Sale were produced for any such transactions to show that purchasers had been effectively put on notice. He also said that he could not find the mechanic who installed the odometers for him because the mechanic had moved. There was no paperwork for the purchase or installation of the odometers. Mr. Shaiq testified that he was driving the grey Civic automobile and had reinstalled the old odometer, but for the green Civic, the odometer had been thrown away, and the vehicle was sold on June 29, 2000. A Bill of Sale was produced showing 'distance traveled' of 222,105 km. (Ex. 8) He did not explain how this vehicle was sold by East and West Used Car Sales on that date if the dealer's number was lost on April 1, 2000. His evidence was that the used odometers were purchased for cash as it was cheaper, and they were installed by the same mechanic who had been at a garage near his sales lot, and had moved. Unfortunately he also did not know the mechanic's name.

In reference to his dealings with the OMVIC inspector, the Applicant testified that he did ask Mr. McKenzie to help him, as he was an old man with a family, and was an honest man. He then explained how he is responsible for the rent on the dealership lot, his wife has health problems due to an injury, and his daughter is attending the University of Toronto with the result he is in a bad financial situation.

In cross-examination, the Applicant said that he had told the OMVIC inspector, Mr. McKenzie that the odometers were changed, and had meant that they were replaced. He agreed that the 'Inspection Findings' were read to him by the inspector although he repeatedly said that it was too hard to read for himself, and on the first few attempts did not answer the question of whether it was read to him. He also did not clearly answer the question of whether he understood what was meant by the word 'tampering' used in the report. Mr. Shaiq stated that he told the inspector that the customers who were sold the cars with the replaced odometers were told about the problem, but Mr. McKenzie did not write it down.

The witness agreed that he received the letters from Mr. McKenzie, but did not answer them and did not provide any Bills of Sale or other documents showing that purchasers had been advised of the odometer problem. Further, he confirmed that he had no record whatsoever of the odometer replacements. He complained that he had no business transactions since April 2000 due to the termination of his licence, but when confronted with apparent vehicle sales, went on to discuss the sales, which appeared to be an attempt to liquidate his stock through private sales. He stated that he needed the money. His evidence was that two or three cars were sold this way, and he had received information from someone in authority that it was legal to do this. The Applicant explained that there were still cars on the lot, the office was locked, and the telephone number rang through to his home telephone. When he was faced with the fact that Ministry records showed a number of vehicles transferred into his name, he answered by saying that these were vehicles purchased by his business prior to the termination of his licence, and by also saying that he did not know how they were

transferred into his name. He speculated that somehow when he sold a vehicle to someone, a transfer was done but did not explain how that would affect the transfer of multiple vehicles into his name. He explained the sales of two vehicles on the basis that they were purchased at auction after the termination of his licence but before he was aware of it, that the auction was not able to transfer the cars into his business name so he arranged for them to sell the cars for him, and that the vehicles were transferred into his name for purposes to complete.

As to selling a vehicle off his premises, the Applicant stated that he did not sell the car off his premises, but had sold it to Mr. Abdul Rahim of 86 Cornwall Dr, Ajax, Ontario, "as is" and that after two days Mr. Rahim decided to sell it back to him, and asked him to write another Bill of Sale for a new purchaser. At that time, the Applicant's registration number was not operative, and he sold the car as O.M.V.I.C. told him he could do.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that the odometers on the two cars viewed by the inspector and at least three cars referred to by the Applicant were sold or held out for sale with odometer readings different from the time of purchase at auction by the Applicant. There is consistent evidence from Mr. McKenzie and the Applicant that the word "change" was used by the Applicant.

The Tribunal does not accept the evidence of the Applicant that the odometers were replaced and the readings were thereby lowered. Even if this were the case, there would still remain the issue of whether the proper procedure was used by the Applicant upon the replacement of the odometers. There is no evidence to support the Applicant's claim that the purchasers of the vehicles which had the odometers replaced were notified that the odometers did not give a true reading. No Bills of Sale were produced for any car other than one of the two found by the inspector, and that does not show that the purchaser was notified of an incorrect odometer reading.

There is no document produced by the Applicant showing purchasers were advised of these changes. There is no record of the purchase or installation of used odometers. The Applicant testified that the units were purchased for cash. There is no record of payment for a mechanic to install them and no records from the mechanic to support the assertions. The mechanic has disappeared and cannot locate him. Despite his repeated dealings with this mechanic, the Applicant is unable to remember the name of the person or the garage. His evidence on this very critical issue is found to be not credible.

This Tribunal finds that the Applicant has not proven that there were replacement odometers, that there was a mechanic, or that the cars were taken to a garage for this service to be performed. Further, the Tribunal finds that the Applicant has not proven that any purchasers of the other vehicles with the lower odometer readings were notified of any change in the reading caused by the alleged replacement.

On the issue of the two Suzuki automobiles, the Tribunal finds that the evidence of the Applicant could be accurate although there is no supporting evidence and his testimony throughout has not been very credible. The Tribunal finds that this evidence is not reliable but little turns on it, as the issue of the odometers was sufficient for the decision of the Registrar.

With regard to the allegation of vehicles being transferred into the Applicant's name on July 11, 2000 there is outright denial by the Applicant that this ever happened. He tried to explain that it could be the fault of an unnamed purchaser who caused a vehicle to be registered in his name, but did not explain how this could occur. He also became confused or evasive when these questions were asked and appeared to interpret them to mean new vehicles transferred into his name, rather than vehicles which were owned by his company prior to the inactivity of his dealer's number. When he finally understood this distinction, he explained away the sales of these vehicles on the basis that he needed the money but did not explain how the vehicles were transferred into his name or sold by him. This confirms the vehicles were in fact transferred into his name after the inactivity of his company. These sales appear to be very consistent with the vehicles being parked on his lot, telephone calls being re-routed to his home, and his existing stock being sold by him. This shows a pattern of behavior of carrying on business not in accordance with the law. On its own, this might not be sufficient for the revocation of the licence, but it is supportive of the improper behavior related to the odometers.

It is also found that there was no explanation for why he failed to respond to the correspondence from the Inspector.

APPLICATION OF LAW TO FACTS:

The Act provides that the Registrar may revoke the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty. The Tribunal finds, as set out above, that the conduct of the Applicant in relation to the motor vehicle odometers, supported by the unexplained transfers to the Applicant's name after the termination of his licence, the private sales, and the failure to respond to correspondence are all indicative of past and continuing conduct that is not meet the statutory requirements of honesty, integrity, and carrying on business in accordance with the law. This may be used as an indicator of future behavior. The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds for his belief that the Applicant would not carry on business in accordance with integrity honesty and with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was not in error.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the Motor Vehicle Dealers Act, the Tribunal directs the Registrar to carry out his proposal to revoke the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: September 12, 2000

EASTERBROOK, WAYNE O/A EASTERBROOK SALES AND LEASING

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
WAYNE EASTERBROOK O/A EASTERBROOK SALES AND LEASING

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 24th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

WAYNE EASTERBROOK O/A EASTERBROOK
SALES AND LEASING

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Wayne Easterbrook o/a Easterbrook Sales and Leasing, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 1st, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Commercial Registration Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Wayne Easterbrook
O/a Easterbrook Sales and Leasing
45 Lewis Road
Guelph ON N1H 1E9

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Wayne Easterbrook o/a Easterbrook Sales and Leasing (hereafter the "Dealer ") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Commercial Registration Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Dealer will file all future returns commencing with the November 30, 1999 return by the due date, with full negotiable payment as required by the Ministry of Finance.
2. The Dealer will pay to the Minister of Finance in monthly instalments of \$1000.00 starting November 20, 1999.
3. The Dealer will pay interest at the current rate of 9% or as adjusted by the Minister of Finance on a semi-annual basis.
4. The Dealer will pay all amounts owing to the Minister of Finance in respect of future audit assessments when due.
5. The Dealer will ensure that all retail sales tax collections are accurately reported and remitted to the Minister of Finance when due.
6. All payments made by the Dealer in accordance with this Consent Order will be made by way of certified cheque or money order.
7. The Minister of Finance will withdraw demands and suspend any current collection action provided that these Terms and Conditions are met.
8. The Dealer understands that, in the event of default in making payment instalments as described in the paragraph two, the balance of the liability outstanding at that date of default shall become due and payable in full without further notice.
9. The Dealer understands that if any of the of the terms and conditions are broken, in whole or in part, the Minister of Finance may take immediate legal action in the form of garnishments or seizure and sale of assets.
10. The Dealer understands that should he breach any of the terms and conditions set out in the document in whole or in part, the Registrar is directed to, and shall carry out the Proposal to Revoke, and the Dealer's registration shall be revoked.
11. The Dealer acknowledges that these terms and conditions shall not impair the authority of, or replace or substitute any method of collection of the liability which the Minister of Finance had in

equity or at law prior to the execution of this agreement, or which the Minister of Finance may otherwise have, should the arrangement be broken.

12. The Dealer acknowledges that he has read and understands and will comply with the terms and conditions set out in this documents.
13. The Dealer acknowledges that the Registrar may take administrative action including a Proposal to Revoke the Dealer's registration as a Motor Vehicle Dealer and Salesperson arising from any matters that have occurred or that may occur in the future related to financial circumstances and honesty and integrity.
14. The Dealer acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
15. The Dealer hereby consents to an order of the Commercial Registration Appeal Tribunal, which may include the Terms and Conditions set out herein.
16. The Dealer hereby withdraws his appeal to the Commercial Registration Appeal Tribunal.
17. The Dealer hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of 1999.

(Signature) Wayne Easterbrook o/a Easterbrook Sales and Leasing

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

HERITAGE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RYAN ANDREW HERITAGE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 5th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RYAN ANDREW HERITAGE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ryan Andrew Heritage, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 1st, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Ryan Heritage
579 Antigua Crescent
Oshawa, Ontario, L1J 6B5

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Ryan Heritage (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) The Applicant agrees, if he is charged in the future, under any law, to immediately notify the Registrar, MVDA, in writing of the charges or convictions against him. Upon any future convictions the Applicant's registration will be automatically revoked.
- 2) The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer, in writing, of the charges or convictions against him and to provide the Registrar with proof of same.
- 3) The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 4) The Applicant acknowledges that his registration will not prevent the Registrar from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
- 5) The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 6) The Applicant acknowledges that the disclosure provided by him to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of his disclosure in entering into these terms and conditions.
- 7) The Applicant agrees to immediately enrol in the Ontario Motor Vehicle Industry Council Certification Course and to be responsible for all fees in relation to enrolment. The Applicant further acknowledges that enrolment in the course entitles me to a sixty (60) day conditional registration period that allows for my successful completion of the course (including passing the exam).
- 8) The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.

9) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.

10) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership

11) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.

12) The Applicant agrees to provide, as soon as possible, copies of any and all judgments rendered against the Applicant as well as good and sufficient evidence that said judgments have been paid or that satisfactory payment arrangements have been reached with the Applicant's creditors.

13) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.

14) The Applicant understands that should he breach any of the terms and conditions set out herein in whole or in part, the Registrar, MVDA is directed to, and shall carry out the Proposal to Revoke, and the Applicant's registration shall be revoked.

15) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

16) The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

Witness _____ (Signature) Salesperson, Ryan Heritage

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton,
Registrar Motor Vehicle Dealers Act
Date:

HOLLAND

CRYSTAL RUBY HOLLAND

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELMER MERKLEY
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

CRYSTAL RUBY HOLLAND, Applicant
unrepresented

DATE OF HEARING: September 7, 2000

DECISION RELEASED: September 13, 2000 Windsor

REASONS FOR DECISION

A hearing was held on September 7, 2000, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Crystal Ruby Holland (the "Applicant")
Motor Vehicle: 1995 Pontiac Gas, plate # 948 TSC (the "vehicle")
Date of Appeal: August 16, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 7, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

On Sat July 30, 2000 approx @ 10:30 pm I was driving my ex-boyfriend Pat O'Hearn to his brother-in-laws Body Shop on Church Ave. When we got into an argument (very bad) argument I pulled into an alley way off Bruce and Wyndotte. We continued to argue and I told Pat to get out of my car 3 times and he refused to. So I turn off my car off took my keys and got out. I started walking to a near by store 7-11 Wyndotte W. to cool off and get something to drink. When I arrived at the store I realized I didn't have my purse. So I started back to my car when I got there my car was gone by this time I was very very upset because Pat knew he is not to drive any vehicle. And that I wouldn't let him drive my car for any reason. Also that I know his licence is under

suspension. I then walked to Pat's brother-in-laws Body Shop no one was there. I then walked home very upset when I arrived home approx @ 12:30 B 12:45 pm. My car and Pat weren't there. I paged Pat right away he returned my call. He said he used my spare keys out of my purse and moved my car up the alley way. So it wasn't blocking the alley way.
* I received my letter Order to Impound on August 2, 2000.

The Applicant testified that she is a 36-year-old single mother with a 10-month-old baby and a 14-year-old boy. Mr. Pat O'Hearn, the car driver, had been living with her for about nine years, but they had recently separated. Since the separation, the Applicant has continued to provide complete transportation for Mr. O'Hearn to and from work and any other points of interest.

The Applicant is quite aware that Mr. O'Hearn's driver's licence was under suspension at the time and remains under suspension until July 6, 2001 for the offence of "impaired driving" under the Criminal Code of Canada.

In her testimony, the Applicant stated that on July 30, 2000, she was driving Mr. O'Hearn to his brother's body shop on Church Avenue in the City of Windsor. Along the way, the two of them got into a heated argument which caused her to pull into an alley and ask Mr. O'Hearn to leave the car. When he refused to leave, the Applicant removed her keys from the ignition, left the car, and walked to a nearby 7-11 store to cool off and get something to drink. At this point, she remembered leaving her purse in the car which contained another set of keys for her residence and car. On her return to the alley, she observed her car missing and immediately walked to Mr. O'Hearn's brother-in-law's body shop. Finding no one there, she walked about twenty-five (25) blocks to her home. She paged Mr. O'Hearn on the telephone and later picked him up with a vehicle borrowed from her girlfriend.

Mr. O'Hearn told her that he took the spare keys from her purse and drove her vehicle to his brother-in-law's body shop. While travelling along the alley, he was stopped by the Windsor City Police and the car was impounded. This information was confirmed on August 2, 2000 when the Applicant received a copy of the impoundment notice.

The Applicant made no effort whatsoever to contact the Windsor Police about the whereabouts of her car or to pursue any charges against Mr. O'Hearn for "theft" or "taking the vehicle without consent." She simply called a few towing agencies in Windsor in an attempt to retrieve her car. Nevertheless, the "notice of impoundment order" did eventually supply the needed information.

The Applicant does not believe that Mr. O'Hearn intended to deprive her of the vehicle. He simply intended to return the vehicle to her residence.

Mr. O'Hearn, in his testimony, confirmed that he took the keys from the Applicant's purse and drove to his brother's body shop. Along the way, he was stopped by the police and the Applicant's car was impounded. Mr. O'Hearn confirmed that he operated the vehicle while he was disqualified from driving. He testified that he knew there was a spare set of keys around for the vehicle and that he had his own keys for the car prior to his suspension.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Patrick O'Hearn;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 6, 2001.

Police Constable Michael Robertson of the Windsor Police Department confirmed observing Mr. O'Hearn operating the vehicle in the alley and following the vehicle to an apartment unit at 29 Bruce Street in the City of Windsor. He confirmed charging Mr. O'Hearn for "driving while disqualified" as well as impounding the Applicant's vehicle.

Since both the Applicant and Mr. O'Hearn were well known by the officer, including their previous relationship, no charges were considered for "taking without consent." He stated that it would be very doubtful if the Windsor Police Department would accept a "stolen" report in this case based on the known circumstances. The alley is considered a public roadway within the meaning of the Highway Traffic Act.

On the basis of the evidence given at the hearing, the Tribunal finds the following to be the fundamental facts found proven:

1. The Applicant is the owner of the motor vehicle that was the subject of the impoundment order.
2. At the time of the impoundment order, the Applicant's motor vehicle was driven by Patrick O'Hearn.
3. At the time of the impoundment of the Applicant's motor vehicle, Patrick O'Hearn's driver's licence was under suspension for "impaired driving."
4. Neither the Applicant or Constable Michael Robertson believes that Patrick O'Hearn had any intent to deprive the owner of the benefit of ownership (or possession) permanently.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

The burden of proof is on the Applicant to establish whether the vehicle was in fact stolen.

The Tribunal has found that the driver took the Applicant's vehicle without the Applicant's prior knowledge and consent. However, there is no evidence before the Tribunal that the actions on the part of the driver constituted theft of the vehicle.

The Applicant testified that she made no attempt whatsoever to call the police and pursue "stolen vehicle" charges against the driver since Mr. O'Hearn had been charged

for "driving while disqualified", and she did not believe the driver intended to deprive her of the benefit of ownership (or possession) permanently.

Therefore, the Tribunal finds that the Applicant has insufficient grounds for appeal under section 50.2(3)(a).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: *September 13, 2000*

GENERAL MOTORS ACCEPTANCE CORPORATION

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50.2**

IN THE MATTER of an application by General Motors Acceptance Corporation to appeal the decision of the Registrar of Motor Vehicles pursuant to section 55.1 of the *Highway Traffic Act*;

AND IN THE MATTER of

GENERAL MOTORS ACCEPTANCE CORPORATION

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an electronic hearing in the above matter was scheduled to be held on Friday, September 15, 2000 at the Tribunal;

AND WHEREAS a letter was filed, dated September 13, 2000, by the Applicant's counsel requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard at **1:30 p.m. on Friday, September 22, 2000** at the **Licence Appeal Tribunal, 1 St. Clair Avenue W., 12th Floor, Toronto, Ontario,**

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: September 14, 2000

URANUS AUTO SALES INC. AND NOORALLAH AHRARI AND VENUS AUTO SALES
INC. AND FOROOZAN VAF AEI

URANUS AUTO SALES INC. AND NOORALLAH AHRARI AND VENUS AUTO SALES
INC. AND FOROOZAN VAF AEI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE AND TO REFUSE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
BILL McINTOSH, Vice-Chair

APPEARANCES: IAN DUCHARME, Counsel, representing the Applicants
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: June 14,15 and 16, 2000 and
August 29, 2000 Toronto

REASONS FOR DECISION AND ORDER

This is an appeal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) (the "Tribunal") by Uranus Auto Sales Inc. ("Uranus") and Norallah Ahrari ("Ahrari") from a Notice of Proposal (the "Proposal") dated December 13, 1999 issued by the Registrar to revoke the registrations of Uranus and Ahrari, as motor vehicle dealer and salesperson, respectively, under the *Motor Vehicle Dealers Act* (the "Act").

Venus Auto Sales Inc. ("Venus") and Foroozan Vafaei ("Vafaei") also appeal the Registrar's proposal of December 13, 1999 to refuse their registrations as motor vehicle dealer and salesperson, respectively, under the Act.

The Proposal was issued in terms of section 7(1) of the Act, which reads as follows:

Section 7(1):

Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

The Proposal is further based on section 5(1),(b),(c),(ii) and (d) of the Act, which read as follows:

Section 5(1):

An Applicant is entitled to registration or renewal of registration by the Registrar except where,

.....

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;or

(c) the applicant is a corporation and,

.....

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty;or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

THE EVIDENCE:

The evidence presented by the Registrar at the hearing dealt with a number of allegations, all of which the Registrar contends warrants revocation of the registrations of Uranus and Ahrari and refusal of registrations of Venus and Vafaei.

ALLEGATIONS REGARDING URANUS AND AHRARI

ODOMETERS

(i) MARJORIE ALEXANDER

The first witness for the Registrar was Marjorie Alexander who testified that she observed from a trade magazine called the "Auto Trader" that Uranus had advertised a 1992 Nissan Maxima motor vehicle for sale. Pursuant to the advertisement, Alexander went to the premises of Uranus on or about August 25, 1998 to see the advertised motor vehicle and observed the odometer reading of the motor vehicle as 126,800 kms.

When at Uranus' premises, she spoke with two men regarding the motor vehicle and was given a business card by one of these men. The business card given to her reflected the name "GOLDEN AUTO INC." as well as the name "DARIUS YAZDI". On the back of the business card the man who gave it to her wrote the words "1992 Black Maxima, 126 kms, fully loaded, sun roof" (Exhibit 1, Tab 10).

On August 25, 1998 when Alexander was at Uranus' premises a bill of sale was prepared and Alexander signed it. (Exhibit 1, Tab 10) At the time of signing the bill of sale, she left a cheque for the agreed deposit of \$300.00. This deposit cheque was made in favour of Golden Auto Inc. She was informed by the man who handed her the business card that her deposit cheque of \$300.00 was to be made to Golden Auto Inc. hence her making that cheque in its favour (Exhibit 1, Tab 10). The following day Alexander obtained an ownership history of the vehicle from the Ministry of Transportation and telephoned the previous owner of the vehicle, one Joseph Mittleman. Alexander was told by Mittleman that he had traded in the Maxima to a motor dealer when he purchased a new vehicle on January 24, 1998. At the time of the trade in the vehicle's odometer read 178,000 kms. Mittleman further stated that by arrangement he continued using the car after January 24, 1998 until early April 1998, during which period he estimated he put another 3000 to 4000 kms on the vehicle. Upon learning this, Alexander decided not to proceed with the purchase of the vehicle. She demanded, and received, the return of the deposit.

Alexander stated she was of the firm opinion that she was dealing with Uranus when she bought the vehicle, as it was Uranus that advertised the vehicle under its name, address and the telephone number and the premises where she viewed the vehicle on August 25, 1998, had Uranus' sign displayed outside. Alexander further stated that it was of importance to her what distance the vehicle had travelled and that if she knew it had travelled more than 180,000 kms she would not have bought it.

Further documentary evidence tendered at the hearing by the Registrar's counsel indicated that the vehicle was sold to Uranus at a motor vehicle auction held in Montreal on May 6, 1998. The bill of sale issued by the auctioneers indicated that the vehicle sold at the auction to Uranus had an odometer reading of 185,968 kms at the time of the auction sale. (Exhibit 1, Tab 12)

During the testimony of Ahrari, he conceded that he attended the auction on May 6, 1998 on behalf of Uranus and that the vehicle was purchased by it for \$7,250.00, plus taxes. He also conceded he signed the bill of sale on Uranus' behalf and that the vehicle was, pursuant to its purchase by Uranus at the auction, registered in Uranus' name and was at no time registered in the name of Golden Auto Inc. Ahrari denied he tampered with the vehicle's odometer.

(ii) MARIO PIPIA

Mario Pipia and his wife Agate Pipia both gave their testimony through an interpreter who translated from Italian into English. Mr. Pipia stated he did not speak or read English.

Both Papias attested to Mr. Pipia having purchased a 1991 Chevrolet Cavalier motor vehicle from Uranus in terms of a bill of sale dated July 7, 1999.

The Papias testified that the vehicle's odometer indicated about 147,000 kms when Mr. Pipia purchased it from Uranus. Mrs. Pipia was present when her husband signed the bill of sale and paid a deposit of \$300.00. (Exhibit 1, Tab 18) Mrs. Pipia could not remember if there was any handwriting on the left side of the bill of sale under the heading "basic vehicle". Mr. Pipia contended that when he signed there was no handwriting on the bill of sale under the heading "basic vehicle". Both Papias and Ahrari

agree that there was a dispute concerning the actual purchase price of the vehicle which centred around whether the agreed purchase price was \$5,300.00 or \$5,405.00. Papias claim the agreed price was \$5,300.00 which they paid in full to Uranus. Ahrari contends the agreed price was \$5,405.00 and after the Papias paid \$5,300.00 there was an outstanding balance of \$105.00 due to Uranus which was never paid.

The Papias contend that Ahrari refused to hand them a copy of the bill of sale until the \$105.00 was paid to Uranus. Pursuant to Ahrari's refusal, the Papias' son complained to OMVIC and asked it to obtain a copy of the bill of sale. OMVIC interceded on the Papias behalf and did obtain a copy for them.

The Papias further contend that after obtaining delivery of the vehicle, they became aware of the vehicle's odometer not giving a true reading as to the distance travelled. The odometer appeared to overregister the distance travelled. They did not complain to Ahrari regarding this over-reading as they had already experienced "other troubles" with the vehicle and had had Uranus fix those other troubles. The Papias claim to have found Ahrari unpleasant to deal with, and they therefore did not raise the odometer issue with Ahrari. They contend that Ahrari never indicated to them that the odometer was faulty or that it was not giving a correct reading. Ahrari, according to the Papias, at no stage indicated what "T.K.U." meant and neither of the Papias recollected seeing these letters behind the "distance travelled" on the bill of sale.

Ahrari testified that when Uranus purchased the Cavalier motor vehicle, it was delivered by the vendor to Uranus from Hamilton, Ontario. On delivery, the driver of the vehicle reported to Ahrari that the odometer was not registering correctly. Accordingly, on June 15, 1999, Uranus purchased from an auto recycling firm a used odometer for the vehicle and had it installed in the vehicle. The invoice for Uranus' purchase of the used odometer reflected that that odometer indicated a reading of 145,000 kms. (Exhibit 11, Tab 14) The bill of sale, between Uranus and Papias reflects a distance travelled of "146,990 kms T.K.U".

The Papias testified that had they known that the vehicle had travelled a distance of 206,000 kms, they would not have purchased the vehicle. They also testified that they were at no time told about the letters "T.K.U." or what those letters meant.

The documentary evidence, attested to by inspector Louise Gingras of OMVIC, indicates that Uranus, represented by Ahrari, purchased the motor vehicle on June 11, 1999 from Daleo Motors and according to the bill of sale executed when Uranus purchased the vehicle, it had travelled a distance of 206,419 kms. (Exhibit 1, Tab 18 page 2) This evidence was not disputed by Ahrari.

(iii) DENNIS SUKHAL

The evidence of OMVIC's witnesses was that during the course of investigating Uranus, certain documents were obtained including a copy of a bill of sale dated May 26, 1999 between Uranus and Dennis Sukhal for a Toyota Camry. (Exhibit 7) This document indicated to the investigator that the document was incomplete as to detail. The detail that did not appear on the bill of sale was the address and telephone numbers of Sukhal and the "distance travelled" by the vehicle which was left entirely blank. A written query was addressed by OMVIC to Sukhal after enquiries revealed his address. The query addressed to Sukhal was as to the distance travelled by the vehicle when he purchased it from Uranus. Sukhal replied to OMVIC's query and advised that the odometer reading

was 124, 000 kms at the time of purchase (Exhibit 6). Since receipt of this communication from Sukhal, it has not been possible to establish further contact with him and it was not possible to ensure Sukhal's attendance at the hearing.

OMVIC's documentary evidence shows that Uranus purchased the vehicle, which it subsequently sold to Sukhal at an motor dealer's auction on April 21, 1999. A copy of the bill of sale dated April 21, 1999 was tendered in evidence and indicated that the odometer reading on the Toyota Camry was 183,492 kms at the date of the sale. (Exhibit 9)

Ahrari in his testimony did not contest that the Toyota Camry was purchased by Uranus at the auction on April 21, 1999 and did not deny that his signature appears on the bill of sale as representative of Uranus when Uranus purchased the vehicle at the auction. Ahrari did not deny the odometer reading of 183,492 kms on the bill of sale.

(iv) 1993 CAMRY, 1988 PRELUDE, TOYOTA 4 RUNNER AND MAZDA 626

Louise Gingras, an inspector with OMVIC, testified regarding the above four motor vehicles.

She stated that she attended at the premises of Uranus on August 5, 1999 to inspect of books and records of Uranus. During that visit to Uranus' premises, she noted the vehicle identification numbers (VIN's) relating to some 18 motor vehicles on Uranus' premises. She also noted the kilometers registered on some eleven motor vehicles. She committed her observations to writing at the time (Exhibit 1, Tab 20). Among the vehicles seen by Gingras on the premises of Uranus on August 5, 1999 were the four vehicles referred to above. At that time, Gingras observed and recorded in her notes the kilometers shown on each of the four vehicles' odometers.

When recording the kilometers, she "rounded off" the kilometers shown to the nearest thousand. She therefore noted the kilometers on the odometers of the four vehicles as follows:

1993 Camry	138,000 kms
1988 Prelude	158,000 kms
Toyota 4 Runner	135,000 kms
Mazda 626	134,000 kms

Gingras went on to testify that on August 10, 1999 she was again at the premises of Uranus inspecting documents. While there, she received instructions by telephone from Laura Gordon, Director of Compliance with OMVIC, to inspect and verify the odometer readings of the above four motor vehicles, as the odometer readings on the bills of sale provided to OMVIC by Ahrari did not accord with odometer readings taken by Gingras on August 5, 1999.

Gingras, immediately inspected and checked the four vehicle's odometer readings and recorded her observations(Exhibit 1, Tab 21) as follows:

1993 Camry	184,000 kms
1988 Prelude	198,000 kms
Toyota 4 Runner	249,000 kms
Mazda 626	234,000 kms

On October 20, 1999, Gingras visited the premises of Uranus again and met with Ahrari. She raised the odometer readings of the above vehicles with Ahrari and asked for an explanation as to the different readings she had noted on August 5, 1999 and August 10, 1999. She stated that Ahrari told her he had been approached by a man from Africa, Mr. Housin, who wished to buy the above four vehicles from Uranus for export to Africa. Housin gave Ahrari \$10,000.00 U.S. in cash as a deposit on the vehicles. Housin then took the vehicles for inspection and then returned them to Uranus' premises. Ahrari stated he was unaware that Housin had altered the vehicles' odometers when he took them for inspection. After returning the vehicles, Housin cancelled the deal, as he was not able to proceed with exporting the vehicles. Ahrari refunded the \$10,000.00 U.S. deposit to Housin. When Ahrari later discovered that Housin had altered the odometers, Ahrari changed the odometers back to their original readings. At the October 20, 1999 meeting, Gingras made notes of her discussion with Ahrari. (Exhibit 1, Tab 28)

Counsel for Ahrari and Uranus conceded, on behalf of his clients, that when the above four motor vehicles were acquired by Uranus their odometer readings were as follows:

1993 Camry	184, 541 kms
1988 Prelude	198, 829 kms
Toyota 4 Runner	249,252 kms
Mazda 626	234,802 kms

Ahrari in his testimony, essentially confirmed the evidence of Gingras. However, on June 16, 2000, he stated under cross-examination by the Registrar's counsel, that Housin "never took the cars away" from Uranus' premises and that Housin "never had the keys to the cars". When on August 29, 2000 (to which date the hearing had been adjourned on June 16, 2000), Ahrari was again asked whether or not the vehicles were removed from the premises of Uranus, he answered that they were removed by Housin and then returned.

Gingras stated that during her questioning of Ahrari on October 20, 1999, she asked Ahrari for the bill of sale between Uranus and Housin. Ahrari told her there had been no bill of sale drawn up.

Under cross-examination, Ahrari stated that he did not know the whereabouts of Housin. He also stated that he had placed the \$10,000.00 U.S. cash deposit received from Housin in an envelope and did not deposit it into a bank. When the transaction with Housin collapsed he handed back the \$10,000.00 U.S. in cash to Housin. He had no receipt available from Housin that he refunded the deposit of \$10,000.00 U.S. to Housin.

CONTRAVENTION OF ACT AND REGULATIONS

The evidence at the hearing was that Uranus was initially registered under the Act as a motor vehicle dealer on May 31, 1990 and Ahrari as a salesperson on July 5, 1990. At that time the registered premises of Uranus was 894 1/2 Queen Street, West, Toronto.

The evidence further revealed that on June 6, 1990 an inspector from the Ministry of Consumer and Commercial Relations visited the above premises and spoke with Ahrari.

During this visit, Ahrari was given a garage register as well as a copy of regulations to the Act all of which were discussed with Ahrari. (Exhibit 1, Tab 8)

On May 27, 1993 an inspection at Uranus' premises revealed deficiencies and contraventions of the regulations under the Act and such deficiencies and contraventions were noted and brought to Uranus' attention. Included in the noted contraventions was the failure by Uranus to keep books and records at its registered place of business. (Exhibit 1, Tab 9)

On September 3, 1998 a further inspection was held at Uranus' premises. The books and records were not available for inspection. At this inspection, it was ascertained by OMVIC's inspector, Ms. LeeDempsey, that Uranus had vacated its premises at 4000 Steeles West and no longer had premises from which to operate as a motor vehicle dealer. When on September 14, 1998 the books and records of Uranus were requested for inspection Ahrari's wife informed Ms. LeeDempsey that they were "at home", but it was not known where. (Exhibit 1, Tab 14)

On September 28, 1998, Ms. LeeDempsey again met with Ahrari. Ahrari told Ms. LeeDempsey that Uranus had moved out of its premises, which he stated it had sublet. He said its books and records were stored in Brampton at another business, while some cars were at Ahrari's home and others were at his mechanic's shop. (Exhibit 1, Tab 16)

Despite the various visits and demands to inspect the books and records of Uranus, they have not been made available to the Registrar for inspection.

Ahrari stated in his testimony that effective August 1, 1998, Uranus had sublet the premises it had leased at 4000 Steeles Avenue West and had moved out of those premises (Exhibit 11, Tab4). Ahrari further testified that Uranus, after it had moved from 4000 Steeles Avenue West, had found other premises and from January 1, 1999 had commenced operating from those other premises at 141 Oakdale Road, North York, Ontario. Prior to moving from 4000 Steeles Ave. West on August 1, 1998, Ahrari conceded that as from April 1998 he permitted the Lavasani brothers to operate a motor vehicle dealership from 4000 Steeles Avenue West. He also allowed the brothers to use Uranus' name when buying or selling motor vehicles.

Ahrari stated that on October 7, 1998 he had his motor vehicle broken into and articles were stolen from it. Among the stolen articles were "some bills of sale, some files of Uranus and some auction cards". He made a written report of this theft to Peel Region Police (Exhibit 11, Tab 11). Ahrari also stated that Revenue Canada had on July 13, 1998 taken some of Uranus' books and documents which included:

- Bank statements and cancelled cheques for 1995, 1996 and 1997
- Sales invoices and sales journals for 1995, 1996 and 1997
- Cheque disbursements and journal for 1995, 1996 and 1997
- General ledger for 1995, 1996 and 1997
- Purchase invoices for 1995, 1996 and 1997

Revenue Canada returned the above books and documents to Ahrari on April 14, 1999 (Exhibit 11, Tab 13).

In addition to evidence covering the various above aspects, further evidence was placed before the Tribunal regarding the allegation that unregistered salespersons had been

used by Uranus in the course of its business. One of such allegations was made by Farhad Pourgolafshan ("Farhad"), a witness who gave evidence at the hearing for Ahrari and Uranus.

In his testimony, Farhad stated that he is an engineer and doctor of Chinese medicine who met Ahrari in or about 1997/1998. Ahrari spoke with Farhad regarding his concerns with two brothers by name Lavasani. Ahrari told Farhad that he had entered into an agreement with the Lavasani brothers in relation to the business of and premises occupied by Uranus. Ahrari stated that he was worried about the deal and not happy in his association with the Lavasani brothers. Ahrari wanted to extricate himself from the Lavasani brothers and the arrangement he had made with them and enlisted the support of Farhad to intercede with the brothers on his behalf.

Farhad stated he was happy to represent Ahrari and try and mediate a resolution. During the period of his representing Ahrari, Farhad had visited the premises of Uranus at 4000 Steeles Avenue West and he had seen both Lavasani brothers upon the premises. He had also observed both brothers negotiating with prospective customers of Uranus in regard to the sale of motor vehicles. He stated that each brother had a desk within the premises of Uranus from which they operated. During his acting as mediator to try and resolve the issues that had arisen between Ahrari and the Lavasani brothers, he had become aware that the brothers had invested financially in Uranus and had moved their business, known as Golden Auto Inc., into Uranus' premises and brought their inventory of cars to Uranus' premises. During the time that the Lavasani brothers were operating from 4000 Steeles Avenue West, Farhad observed that Ahrari was in and out of the premises on a daily basis. He appeared to be attempting to collect monies due to him. During this time, the Lavasani brothers showed little respect for Ahrari. In mediating a dissolution of the arrangements between Ahrari and the Lavasani brothers, certain issues arose including the return of motor vehicles to either Uranus or Golden Auto Inc., the return of files that belonged to either party and resolving who would remain at the premises at 4000 Steeles Avenue West. The resolution of these issues required that Uranus move its designated premises and inventory from 4000 Steeles Avenue West.

Ahrari also called Nayebyazdi Daryoush ("Yazdi") to testify. Yazdi stated that he met with Reza Lavasani, one of the two Lavasani brothers, when Reza proposed a partnership in a motor vehicle dealership with Yazdi. The Lavasani brothers operated a business as motor vehicle dealers which was called Golden Auto Inc. Golden Auto Inc. had moved into 4000 Steeles Avenue West where Uranus was operating. In order to better know whether or not to enter into partnership with the Lavasani brothers, Yazdi spent time at 4000 Steeles Avenue West, and it was while there that Marjorie Alexander came into the premises. Reza Lavasani was sitting with Yazdi when Alexander entered. Reza asked Yazdi to help him in negotiating with Alexander. Yazdi did so and it was then that he gave his business card (Exhibit 1, Tab 10) to Alexander. At this time, Yazdi believed Golden Auto Inc. was registered as a motor vehicle dealer, but a week or so thereafter he learned that this was not the case. He did not thereafter persist in investigating a partnership with the Lavasani brothers and left the business at 4000 Steeles Avenue West.

ALLEGATIONS REGARDING VENUS AND VAF AEI

The evidence introduced during the hearing was that Venus was incorporated under the Business Corporations Act, on May 9, 1990. At that time Ahrari was appointed first

Director of the Venus and its registered office was at 894 1/2 Queen Street West, Toronto (Exhibit 11, Tab 2). On May 15, 1990 Vafaei became a Director and Officer of Venus together with Ahrari. Ahrari ceased to be a Director and Officer of Venus on September 15, 1998.

On May 15, 1990, Uranus was incorporated under the Business Corporation Act, with Ahrari and one Deena Qayumzada as its first Directors. The registered office of Uranus was at 894 1/2 Queen Street West, Toronto (Exhibit 11, Tab 3). Ahrari was also appointed Uranus' President and Officer on May 15, 1990.

Vafaei testified that she is the wife of Ahrari and was a registered salesperson under the Act. She was employed by Uranus from November 1996 to November 1998 as a salesperson as well as secretary and bookkeeper. Initially, Venus was a "shelf company" and did not operate. Vafaei further testified that it was intended that Venus, once registered as a dealer under the Act, would operate out of one and a half units situated at 141 Oakdale Road. Uranus would occupy the other units at 141 Oakdale Road and would sublet the one and a half units to Venus. In August 1998, Vafaei applied for reinstatement as a salesperson while Venus applied for registration as a dealer. Both applications were refused. Vafaei also stated that if Ahrari was to be denied his salesperson's registration she was herself no longer interested in furthering her application for registration.

She also stated under cross-examination that Ahrari would act as a salesperson for Venus if Venus obtained registration and that she needs the assistance of Ahrari in order to operate Venus. For this reason she will locate Venus' business at 141 Oakdale Road alongside the premises of Uranus.

Laura Gordon, Director of Compliance with OMVIC, stated in her testimony that she had serious concerns regarding the registration of Venus and Vafaei. The relationship of Ahrari and Vafaei was a close one and not at arms length. The sublease of August 1999 (Exhibit 1, Tab 33) for the premises Venus hoped to occupy at 141 Oakdale Road supported Gordon's belief regarding the ongoing close relationship between Ahrari and Vafaei. The difficulty experienced by OMVIC in obtaining access to the books and records of Uranus, the poor and inadequate manner in which Ahrari had completed bills of sale, the critical aspect of apparent odometer tamperings as well as the employing of persons who are not registered salespersons, all lead Gordon to have serious concerns to permitting either Venus or Vafaei being registered.

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

1. Uranus was registered as a Corporation under the Business Corporation Act R.S.O. 1990 on May 15, 1990.
2. Venus was registered as a Corporation under the Business Corporation Act R.S.O. 1990 on May 9, 1990.
3. Ahrari was appointed Director, President and Officer to Uranus on May 15, 1990.

4. Ahrari was appointed Director and an Officer of Venus on May 9, 1990.
5. Vafaei was appointed a Director and an Officer of Venus on September 15, 1999.
6. Uranus was registered as a motor vehicle dealer under the Motor Vehicle Dealers Act R.S.O. 1990 on May 31, 1990.
7. Ahrari was registered as a motor vehicle salesperson under the Motor Vehicle Dealers Act R.S.O. 1990 on July 5, 1990.
8. Vafaei was registered as a motor vehicle salesperson under the Motor Vehicle Dealers Act R.S.O. 1990 from November 13, 1996 to November 13, 1998.
9. Ahrari and Vafaei have at all relevant times been husband and wife.
10. On May 6, 1998, Uranus, then represented by Ahrari, purchased a 1992 Nissan Maxima motor vehicle at a motor vehicle dealers auction and the disclosed odometer reading of that vehicle on the auctioneers bill of sale was 185,968 kms.
11. Uranus advertised the aforesaid 1992 Nissan Maxima motor vehicle for sale in an publication known as the "Auto Trader" and pursuant to such advertisement Marjorie Alexander viewed the motor vehicle at the premises then occupied by Uranus at 4000 Steeles Avenue West, Toronto.
12. The odometer reading on the 1992 Nissan Maxima was, on the day Alexander viewed it at Uranus' premises, 126,800 kms. In fact, when the vehicle was shown to Alexander at Uranus' premises, the distance travelled by it was in excess of 180,000 kms.
13. Uranus, therein represented by Ahrari, entered into a bill of sale with one Mario Pipia in respect of a 1991 Chevrolet Cavalier motor vehicle. Ahrari represented to Pipia on the bill of sale that the aforesaid motor vehicle had travelled a distance of 146,990 kms with the letters "T.K.U." behind the figures of 146,990 kms. Ahrari did not inform Pipia that "T.K.U." meant "true kilometers unknown". Ahrari knew and failed to disclose to Pipia that the true kilometers travelled by the vehicle, when Uranus purchased the vehicle was 206,419 kms.
14. Uranus did not deliver to Pipia a duplicate original copy of the bill of sale upon completion of the sale transaction, as required by section 16(7) of Regulation 801 to the Act.
15. Uranus represented by Ahrari, when completing the application form for a limited power train warranty for the vehicle purchased by Pipia, falsely informed the warranty corporation, to whom application was made, that the vehicle had travelled 146,990 kms.
16. Uranus represented by Ahrari, when entering into a bill of sale with Dennis Sukhal in relation to the sale of a Toyota Camry motor vehicle, failed to disclose the distance travelled by that vehicle, in breach of section 16(2)(a) of Regulation 801 of the Act. The bill of sale also did not comply with section 16(2)(a) of Regulation 801 of the Act.

17. Uranus, when it purchased the above-noted 1993 Camry, 1998 Prelude, Toyota 4 Runner and Mazda 626 motor vehicles, knew that those vehicles' odometers had, respectively, indicated that the vehicles had travelled a distance of 184,541 kms, 198,829 kms, 249,252 kms and 234,802 kms. During the period that the four vehicles were in the possession and control of Uranus and displayed by it for the purposes of sale to the public, the odometers of the vehicles were altered to show in each instance lesser kilometers than when Uranus purchased the vehicles.
18. The four motor vehicles referred to in the previous paragraph were not removed from Uranus' premises by one Housin.
19. Uranus represented by Ahrari, failed to notify the Registrar of the change of location from 4000 Steeles Avenue West, Toronto as required by Section 13(5) of Regulation 801 to the Act.
20. Uranus represented by Ahrari, failed and/or refused to give the Registrar's investigators free access to the premises to inspect the books and documents of Uranus as required by Section 11(1) of the Act.
21. Ahrari permitted the Lavasani brothers to act as salespersons on behalf of Uranus at a time that he knew or ought to have known that such brothers were not registered as salespersons and, in doing so, contravened Section 4 of the Act.
22. Ahrari permitted the Lavasani brothers to share the premises at 4000 Steeles Avenue West with Uranus and to trade using the name of Uranus and its registration number.

DECISION AND REASONS:

The onus of proof rests upon the Registrar to prove that:

- (i) The past conduct of Ahrari affords reasonable grounds for the Registrar's belief that Ahrari will not carry on business in accordance with law and with integrity as required by section 5(1)(b) of the Act;
- (ii) The past conduct of Ahrari as Officer and Director of Uranus affords reasonable grounds for the Registrar's belief that Uranus' business will not be carried on in accordance with law and with integrity and honesty, as required by section 5(1)(c)(ii) of the Act;
- (iii) Ahrari and/or Uranus are carrying on activities that are in contravention of section 5(1)(d) of the Act
- (iv) The past conduct of Vafaei affords reasonable grounds for the Registrar's belief that Vafaei will not carry on business in accordance with law and integrity as required by section 5(1)(b) of the Act.

- (v) That past conduct of Vafaei as Officer and Director of Venus affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty as required by section 5(1)(c)(ii) of the Act.
- (vi) Venus and/or Vafaei are carrying on activities that will be, if Venus and/or Vafaei are registered, in contravention of the Act and the regulations in terms of section 5(1)(d) of the Act.

The Registrar bases his proposal on a number of grounds which were dealt with in evidence at the hearing and which are analyzed and considered hereunder.

1. ODOMETERS

(a) MURIEL ALEXANDER

The evidence of Ms. Alexander, which is accepted by the Tribunal, was that she observed a Nissan Maxima advertised by Uranus for sale in a magazine. The advertisement gave the name and address of Uranus where the vehicle could be viewed and pursuant to the advertisement, Ms. Alexander called at the premises of Uranus where she inspected the vehicle. During her inspection, she observed that the vehicle's odometer registered 126,800 kms. Based on the odometer reading, she was prepared to purchase the vehicle subject to checking on the vehicle's history. When she began to check on its history she learned from a previous owner, one Mittleman, that in or about April 1998, some four months prior to Ms. Alexander viewing the vehicle at Uranus' premises, it had in excess of 180,000 kms. Alexander did not proceed with the purchase of the vehicle and demanded and received a refund of the \$300.00 deposit.

When the vehicle was sold to Uranus on May 6, 1998, the auctioneer's bill of sale clearly indicates that the vehicle had at that date an odometer reading of 185,968 kms. Ahrari conceded that he attended the auction on behalf of Uranus and that his signature appears on the auctioneer's bill of sale when the vehicle was sold to Uranus.

Based on the evidence placed before it, the Tribunal concludes that after Uranus took possession and ownership of the vehicle in May 1998, and while it was in Uranus' possession, Ahrari caused, or permitted, the odometer reading to be altered so as to indicate a lesser distance than it had, in fact, travelled. In the Tribunal's opinion, this is an act of dishonesty which, at the very least, reflects on the lack of integrity of Ahrari. The result of reducing an odometer reading by some 60,000 kms. prejudices that vehicle's purchaser, or potential purchaser, and is a breach of the duty owed by the dealer to such purchaser or potential purchaser.

Cory J. in his decision in the matter of Herman Motor Sales Inc. et al and Registrar of Motor Vehicle Dealers and Salesmen 29 O.R. (2d) 431 stated as follows:

"....., the Act and Regulations stress the importance of odometer readings. There can be no doubt that the readings form the basis for the assessment in value of most vehicles. To tamper or interfere with the odometer readings must be considered seriously and must constitute a grave breach of the duty of the dealer."

(b) PIPIA

Mr. and Mrs. Pipia's evidence is that they observed the odometer of the vehicle they had purchased was not registering correctly. It was, in fact, over registering. There was no evidence that Ahrari had deliberately altered with the odometer's reading. The evidence showed that the malfunctioning of the vehicle's odometer was brought to the attention of Ahrari when the vehicle was delivered to Uranus' premises immediately after it had purchased the vehicle. Ahrari cannot be faulted when he replaced the malfunctioning odometer, as the Tribunal finds that he did.

However, Ahrari should have made full disclosure to the Papias' that the odometer had been replaced and he should, in addition, have disclosed the reading of the defective odometer when it was removed for replacement, so as to comply with section 19(2) of Regulation 801 to the Act. This Ahrari did not do. The Papias were left with an inaccurate and untrue picture of the distance travelled by the vehicle. The failure to disclose, quite apart from it resulting in breach of the regulations under the Act, was a breach of duty which he owed to the Papias.

Additionally, Ahrari should have explained to the Papias the meaning of the words "T.K.U.". This he also did not do and this failure is most disturbing in that Mr. Pipia clearly did not understand English as was apparent when he gave his evidence through an interpreter.

The Tribunal believes that Ahrari should have recognized the Papias' lack of knowledge of the language and should have clearly spelled out the meaning of "T.K.U." This, Ahrari failed to do.

The Tribunal finds that Ahrari's conduct amounted to deception and dishonesty and reflects a lack of integrity.

(c) SUKHAL

The documentary evidence tendered by the Registrar was that Sukhal had indicated in writing, in answer to a query addressed to him by OMVIC, that the vehicle he purchased from Uranus had an odometer reading at the time of sale of 124,000 kms. This evidence was not disputed by Ahrari's counsel. However, he did complain that Sukhal was not present to give viva voce evidence. This complaint is without justification in view of the fact that the bill of sale between Uranus and Sukhal (which the Registrar had obtained from Uranus' records) did not contain Sukhal's address or telephone number. According to the Registrar's counsel, Sukhal was only found after considerable effort and then only when the written query was addressed to him. When later efforts were made to have Sukhal give evidence at the hearing, he could not be found. The Tribunal therefore accepted the best evidence that was available.

It was not disputed by Ahrari that when Uranus purchased the vehicle at a motor dealers auction, the odometer registered 183,492 kms. The copy of the bill of sale between Uranus and Sukhal, obtained by the Registrar from the records of Uranus pursuant to the Registrar's investigation, reflected a blank where the "distance travelled" by the vehicle should have been inserted by Uranus.

The failure of Ahrari to have fully completed the Sukhal bill of sale in respect of the odometer's reading and Sukhal's address is a breach of Sections 15(2)(o) and (a) respectively of Regulation 801 to the Act.

Ahrari left undisputed Sukhal's statement that when he took possession of the vehicle its odometer indicated 124,000 kms. This fact, as well as Ahrari's not disputing that when Uranus purchased the vehicle at an auction, the bill of sale indicated an odometer reading of 183,492 kms., leads the Tribunal to the belief that while the vehicle was in Uranus' possession, the odometer was turned back. At no stage did Ahrari deny the above facts. He did not contend that he was not the controlling mind of Uranus or that some other party was responsible for the odometer's differing readings.

Accordingly, the Tribunal finds that Ahrari tampered with the vehicle's odometer or caused it to be tampered with. In so doing, he breached the duty he owed to Sukhal and to the public at large. His conduct in the Tribunal's view was not only lacking in integrity but was dishonest and, once again, the Tribunal refers to the Herman decision, *supra*.

(d) 1993 CAMRY, 1988 PRELUDE, TOYOTA 4 RUNNER AND MAZDA 626

The Tribunal had the opportunity of observing witnesses Gingras and LeeDempsey, both investigators with OMVIC and of listening to their testimony. Having done so, the Tribunal has no hesitation in accepting their testimony and preferring it to the testimony given by Ahrari, who was found to be evasive and contradictory. In his testimony given on June 16, 2000 Ahrari clearly stated, when under cross-examination, that the four above vehicles did not leave Uranus' premises with Housin and that Housin was not given the keys to the vehicles. Yet, when the hearing resumed some two months later, Ahrari stated that Housin had removed the vehicles and, after their return to Uranus' premises had observed that the odometers had been tampered with. The contradictory evidence given by Ahrari reflects poorly on his credibility .

In addition, the Tribunal finds the version of events described by Ahrari to be so far fetched as to border on a flight of fantasy. There was no bill of sale given to the investigators by Ahrari when they asked him for a bill of sale during their investigation. There was no bank deposit regarding the \$10,000.00 U.S. There were no documents either available or produced to the investigators when they closely discussed this matter with Ahrari. It is, in the Tribunal's opinion, unlikely in the extreme, that a motor dealer would, even temporarily, part with possession of four vehicles without having some form of written agreement with Housin, of whose whereabouts Ahrari had little or no knowledge.

The Tribunal finds that the odometers of the above four vehicles were altered by Ahrari after such vehicles came into Uranus' possession and ownership. Such alterations occurred before August 5, 1999 and the Tribunal finds that the odometers of the four vehicles were again altered by Ahrari after August 5, 1999 and before August 10, 1999. This latter alteration by Ahrari was done due to his concern that he knew that OMVIC's investigators had observed, on August 5, 1999, readings that did not accord with odometer readings when the vehicles were purchased by Uranus.

The Tribunal finds that the alteration of the vehicles odometers prior to August 5, 1999 while the vehicles were in the possession of Uranus was done by Ahrari with the intention to mislead the public as to the true distance travelled by each of such vehicles. This conduct was dishonest and indicated a lack of integrity.

CONTRAVENTIONS OF THE ACT AND REGULATIONS

Exhibit 11, Tab 4 indicates that Uranus sublet the premises it had leased at 4000 Steeles Avenue West to Golden Automotive. The exhibit is a copy a sub-lease agreement entered into between Uranus and Golden Automotive and was effective August 1, 1998. Ahrari confirmed the existence of this sublease during the hearing and stated that Uranus left 4000 Steeles Avenue West on August 1, 1998. There was no evidence placed before the Tribunal that the Registrar was notified of the change of location within five days after such change and as such it is a breach of section 13(5) of Regulation 801 to the Act.

On June 22, 1990, the premises, then occupied by Uranus, were visited by an inspector from the Ministry of Consumer and Commercial Relations and the relevant Regulations under the Act were discussed with Ahrari, at length and left with him.

On May 27, 1993, a further visit was made by a Compliance Officer of the Ministry. That visit revealed a contravention by Uranus in regard to the non-maintenance of books and records on the premises. Ahrari acknowledged receipt of the contravention notice left at Uranus' premises.

On September 3, 1998, an inspector from OMVIC, Ms. LeeDempsey, called at the premises of Uranus to inspect its books and records but was unable to do so as the records were not on the premises or available for inspection.

On September 14, 1998, inspector LeeDempsey spoke with Vafaei, who was then at the premises of Uranus, and again requested the books and records of Uranus to inspect them. Vafaei advised her that the books and records were not on Uranus' premises but were "at home" and that their specific location there was unknown.

Again on September 28, 1998, inspector LeeDempsey called upon Ahrari to produce the books and records of Uranus. Again, they were not available for inspection, with Ahrari claiming they were at an address in Brampton.

On October 7, 1998, Ahrari claims the books and records of Uranus were stolen, not from Uranus' premises, but from Ahrari's motor vehicle.

On August 10, 1999, inspector Louise Gingras called at the premises of Uranus for the purpose of conducting an inspection. Again books and records were not available and not on the premises.

The above synopsis confirms that Uranus' books and records were not available for inspection as a result of the conduct of Ahrari. Ahrari's conduct denied the Registrar an opportunity to measure Uranus' compliance, or otherwise, with the Act and regulations.

Quite clearly, Ahrari's repeated failure to make available the required books and records was a violation of Ahrari's obligations under the Act and its regulations. Ahrari made no effort to comply with the requirements of the Act and regulations to make the books and records of Uranus available for inspection. His conduct was obstructive.

In the Tribunal's opinion, the past conduct of Ahrari reflects adversely on Ahrari's preparedness or willingness in the future to work in a spirit of co-operation with the Registrar. Ahrari's repeated non-compliance with the Act and regulations does not augur well for his future compliance with his legal obligations.

Quite apart from Ahrari's failure to allow access to and inspection of Uranus' books and records in terms of Sections 10 and 11 of the Act, he has failed to comply with other aspects of the Act and Regulation 801. As previously pointed out, he has failed to comply with Section 19 of Regulation 801 in relation to the exchange of an odometer in the Pipia vehicle. He has failed to comply with Section 16 of that regulation concerning the correct and full completion of bills of sale. Considering Ahrari's ten years in the industry coupled with his repeated non-compliance with both the Act and its regulations, the Tribunal finds no reason to disagree with the Registrar's belief that the past conduct of Ahrari affords reasonable grounds for the Registrar's belief that he will not carry on business in accordance with law and with integrity and honesty.

Finally, the Tribunal finds that Ahrari knew that the Lavasani brothers were not registered as dealers or salespersons. Despite this knowledge, Ahrari assisted the Lavasani brothers and permitted them not only to use and trade in motor vehicles from Uranus' designated premises but also to use Uranus' registration and to buy and sell motor vehicles. This conduct and attitude in and of itself shows a total lack of integrity on Ahrari's part and cannot be condoned, even if Ahrari was fearful of harm at the hands of the Lavasani brothers, as he claimed.

VENUS AND VAFAEI

Although Vafaei has no criminal convictions registered against her and has not offended against the Act or regulation during such time as she operated as a registered salesperson, it is the opinion of the Registrar that she is an unsuitable candidate for registration as a salesperson. The Registrar bases his views on the spousal relationship that exists between Ahrari and Vafaei. The Tribunal has noted the evidence of Vafaei that she does not wish registration as a salesperson if Ahrari is denied his application and further notes that Vafaei, on her own evidence, stated that she will rely on Ahrari's advice and assistance in operating Venus.

In summary and conclusion based on the evidence placed before this Tribunal as well as the reasons dealt with, it is the decision of the Tribunal to confirm the Registrar's proposal and to revoke the registrations of both Ahrari and Uranus. For the reasons already stated the Tribunal finds Ahrari to be unworthy of registration. For the same reasons, the Tribunal finds that due to the existing close relationship of Ahrari and Vafaei and Vafaei's clearly stated intent to involve Ahrari in the business of Venus should it be registered under the Act, it would be inappropriate to allow either or both registrations of Vafaei's and Venus because the obvious control of Venus would lie in the hands of Ahrari, whose past conduct is fully discussed above.

DECISION:

Accordingly, by virtue of the authority vested in it under Section 7(4) of the *Motor Vehicle Dealers Act*, this Tribunal directs the Registrar to carry out his proposal to revoke the registration of Uranus and Ahrari and to refuse the registration of Venus and Vafaei.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair, presiding

Bill McIntosh
Vice-Chair

Released: September 14, 2000

KOTSARIDAS, CATHRINE and CHATZITHEOFANOU, ANASTASIOS o/a ROYAL TOURS

CATHRINE KOTSARIDAS AND ANASTASIOS CHATZITHEOFANOU
O/A ROYAL TOURS

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *TRAVEL INDUSTRY ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:
NO ONE APPEARING for the Applicants
FATIMA HUSAIN, Counsel representing the Registrar,
Travel Industry Act

DATE OF
HEARING: September 14, 2000 Toronto

ORDER

WHEREAS, a Notice of Proposal was issued by the Registrar under the *Travel Industry Act* (the "Registrar"), dated June 8, 2000, to Revoke the Registration of Cathrine Kotsaridas and Anastasios Chatzitheofanou o/a Royal Tours (the "Applicants");

AND WHEREAS, the Applicants appealed the Notice of Proposal to the Tribunal;

AND WHEREAS, the Applicants' appeal was set down for hearing before the Tribunal, on September 14, 2000, at 9:30 a.m. at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario;

AND WHEREAS, Counsel for the Registrar, was present at the hearing on September 14, 2000, and no one appeared for the Applicants;

AND WHEREAS, after the matter had been adjourned for 30 minutes to the allow Applicants time to arrive, Counsel for the Registrar requested an order dismissing the Applicants' appeal and confirming the Registrar's Proposal;

AND WHEREAS, upon hearing of submissions by Counsel for the Registrar, the Tribunal was satisfied that Applicants' had been notified of the hearing and had received Notice of Hearing;

NOW THEREFORE this Tribunal orders that the appeal of Cathrine Kotsaridas and Anastasios Chatzitheofanou o/a Royal Tours is hereby dismissed and the Tribunal directs the Registrar to carry out his Proposal dated June 8, 2000, to revoke the registration of Cathrine Kotsaridas and Anastasios Chatzitheofanou o/a Royal Tours.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: September 14, 2000

JACKSON, DONALD G. o/a STOUFFVILLE TRAVEL CENTRE

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
DONALD G. JACKSON O/A STOUFFVILLE TRAVEL CENTRE
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: November 12, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

DONALD G. JACKSON O/A STOUFFVILLE TRAVEL CENTRE

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Donald G. Jackson o/a Stouffville Travel Centre, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: September 14, 2000

B E T W E E N:

DONALD G. JACKSON O/A STOUFFVILLE TRAVEL CENTRE

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Donald G. Jackson o/a Stouffville Travel Centre (hereinafter referred to as "the Registrant") is a sole proprietor who is registered as a travel agent (Registration No. 04649703/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration as a travel agent on March 12, 1999.
2. By letter dated September 17, 1999, the Registrant was requested to file his financial statements for the fiscal year ended June 30, 1999, on or before September 30, 1999.
3. On October 5, 1999, the Registrant was again requested to file his financial statements for the fiscal year ended June 30, 1999, as required by Ontario Regulation 806/93, as amended, made under the Act ("the regulations").
4. By letter dated October 27, 1999, the Registrar requested the Registrant to file his financial statements for the fiscal year ended June 30, 1999, on or before November 10, 1999.
5. On April 5, 2000, the Registrant filed the Form 1 filing for the period ended December 31, 1999. The filing had been due by February 14, 2000.
6. On June 9, 2000, the Registrar issued a Notice of Proposal to the Registrant as a result of his failure to file financial statements as required by the regulations.
7. To date, the Registrant has not filed its financial statements for the fiscal year ended June 30, 1999. The statements had been due by September 30, 1999.
8. To date, the Registrant has not filed the Form 1 filing for the period ended June 30, 2000.
9. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Commercial Registration Appeal Tribunal under s. 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 9, 2000, with respect to Donald Gordon Jackson o/a Stouffville Travel Centre;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation");
 - b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - c) The Registrant shall submit to the Registrar a renewable and irrevocable Letter of Credit in the amount of \$10,000.00 (Canadian), with the beneficial interest in favour of the Travel Industry Council of Ontario, on or before October 31, 2000;
 - d) The Registrant shall maintain the above-noted renewable and irrevocable Letter of Credit in the amount of \$10,000.00 (Canadian) with the beneficial interest in favour of the Travel Industry Council of Ontario for so long as the Registrar shall so require;
 - e) The Registrant shall maintain a proper trust account pursuant to and in accordance with section 36 of the Regulations, and such account shall be properly designated as a *Travel Industry Act* trust account on or before September 30, 2000;
 - f) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 28th day of each month for the preceding month, beginning on **October 28, 2000**, for the month of September, 2000, for so long as the Registrar shall so require;
 - g) If the above-noted trust account reconciliations as filed according to (ii)(f) are incomplete and/or reveal a customer deposit deficiency, the Registrant will have **five (5) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - h) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30, 2000, on or before **September 30, 2000**;
 - i) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending June 30, 1999, on or before **October 31, 2000**;
 - j) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of

the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- k) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending June 30, 2000, on or before **December 31, 2000**;
- l) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- m) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31, 2000, on or before **February 14th, 2001**;
- n) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30, 2001, on or before **August 14, 2001**;
- o) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending June 30, 2001, on or before **September 30, 2001**;
- p) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
- q) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31, 2001, on or before **February 14, 2002**;
- r) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30, 2002, on or before **August 14, 2002**;
- s) The Registrant shall file the financial statements as required by the Regulation for the fiscal year ending June 30, 2002, no later than **September 30, 2002**;
- t) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **30** days from the date of notice of the deficiency to fully and completely address any deficiency and produce proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- u) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - v) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - w) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions **(ii) (c) and (e) to (t)** inclusive, the Registrar **shall revoke** the Registrant's registration on five **(5)** days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by his signature below that he has obtained or has had full opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of September, 2000.

Donald Gordon Jackson
o/a Stouffville Travel Centre

Registrar, *Travel Industry Act*

Mr. Donald G. Jackson, Proprietor

Michael Pepper, Registrar
Travel Industry Act

RAMPERSAUD

BASMATEE RAMPERSAUD

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

No one appearing for the Applicant

DATE OF HEARING: September 14, 2000 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8 as amended, **Basmatee Rampersaud** (the "Applicant"), appealed a decision of the Registrar of Motor Vehicles (the "Registrar") as set out in the Order to Impound, dated August 12th, 2000;

WHEREAS the Tribunal set a hearing for September 14th, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m., which did proceed;

AND WHEREAS the Applicant was duly notified by Notice of Hearing, dated August 29, 2000, was delivered by courier to the Applicant on August 29th, 2000, and proof of service filed. At 9:45 a.m., the hearing was adjourned until 10:30 a.m. to allow the Applicant more time to arrive or make contact by telephone if they wished to participate. At 10:30 a.m. there being no communication from the Applicant, the hearing commenced in the Applicant's absence.

AND WHEREAS Kim Grosskurth, representing the Registrar of Motor Vehicles was present at the hearing on September 24, 2000 and no one appeared on behalf of the Applicant;

AND WHEREAS ON READING the Applicant's Notice of Appeal, Owner's Position, Ministry of Transportation's submissions as well as Exhibits 1 and 2, no one appearing for the Applicant although properly served as appears from proof of service filed, this Tribunal finds that due to delay, non-attendance and failure to proceed on the part of the Applicant, the Applicant has abandoned these proceedings;

THIS TRIBUNAL ORDERS that the appeal by the Applicant is dismissed and pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, the Tribunal confirms the Registrar's Order to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *September 19, 2000*

GIRLATO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
IDA AND GIORGIO GIRLATO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

IDA AND GIORGIO GIRLATO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TRI-VALLEY DEVELOPMENT CORPORATION

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on September 20, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against the Respondent* to commence at the Tribunals Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Monday, September 25, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 19, 2000

KNP CORPORATION CANADA

KNP CORPORATION CANADA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Presiding member
WILLIAM WARBURTON, Member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

ANDREW PEWNGAM,
Agent representing KNP Corporation Canada

DATE OF HEARING: September 15, 2000

DECISION RELEASED: September 20, 2000 Toronto

REASONS FOR DECISION

A hearing was held on September 15, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: KNP Corporation Canada (the “Applicant”)
Motor Vehicle: 1993 Nissan Maxima, plate #AFYE 668 (the “vehicle”)
Date of Appeal: August 24, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 15, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

I, Andrew Pewngam on behalf of the vehicle owner, KNP Corporation Canada wish to appeal the impound order no. 0602226 on the following reasons.

This vehicle; 1993 Nissan Maxima VIN # JN1HJ01C4PT023351 bearing plate # AFYE668 was leased to Luu, Thi-Vui of 2801 Jane Street apartment # 1115, Downsview, Ontario M3V 2H8 on September 28, 1999. Attached herewith the lease agreement.

At the time of the lease, the leasee's driver's license is valid. But being a leaser, we have no control over the operation of the vehicle. Since the lease is behind three months payment, we are taking over the possession of the vehicle. As such we are paying for all charges incurred to this date upon your release.

In consideration of the above, we hope you could set aside the above impound order and release the said vehicle to us on receipt of our payment.

KNP Corporation Canada rents and leases new and used vehicles. Its fleet consists of approximately 15 vehicles. The impounded vehicle was leased in September of 1999. As of June 2000, the leasee has been in default of its monthly lease obligation.

When a leasee signs a lease agreement with the Applicant, the leasee is required to remit a security deposit upon signing the lease. In this case, the security deposit was in the amount of \$3,000. This security deposit is a safety net for the Applicant in the event the leasee falls behind on monthly lease payments. This money may also go towards repairing any damage incurred to the vehicle when it is returned to the Applicant on completion of its lease.

In the Agent's testimony, he indicated the Applicant's rule of practice towards repossessing a vehicle consists of:

- (a) a 30-day grace period in which the leasee is given a chance to pay back the defaulted amount;
- (b) if the leasee fails to remit its monthly payment, the monthly payment is deducted from the security deposit; and
- (c) if the payments continue to remain in arrears for an additional two months, the Applicant commences proceedings to repossess the vehicle.

In this case, the Applicant was in a position to repossess the vehicle in August at which time the vehicle was impounded.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 4 & 5):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Vinh Duc Luu;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 20, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for its claim to be considered under section 22(2), the Agent must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

With regard to section 22(3),

- (a) the Applicant is a leasing company. In the Agent's testimony, its fleet consists of approximately 15 vehicles. Therefore, there may be available vehicles to be rented and/or leased.
- (b) The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting. The vehicle is scheduled to be released from impoundment on September 23, 2000. The Applicant currently holds in its possession \$3,000, which represents a security deposit for the impounded vehicle. Therefore, the Applicant in its sole discretion may have the right to apply these monies towards the defaulted monthly payments (approximately \$437 per month) as well as the impoundment fees (approximately \$1,200 to \$1,400).

- (c) The Applicant being a leasing company is also not considered a person ordinarily transported by the vehicle.

Evidence was heard that the Applicant may have incurred some financial hardship as a result of the loss of the vehicle. The Applicant's Agent may pursue compensation from the suspended driver, Vinh Duc Luu, as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

The Applicant and its Agent have not presented the Tribunal with any evidence that would demonstrate that every reasonable option has been considered as contemplated by section 22(4) of the Regulation.

The Tribunal accordingly finds the Applicant has not established that it has or will suffer exceptional hardship as defined by Ontario Regulation 632/98, subsection 22.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

William Warburton, Member

RELEASED: *September 20, 2000*

MOSKOVITCH

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
ISRAEL AND SHEILA MOSKOVITCH

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting the
said Decision pursuant to section 16(2)

ISRAEL AND SHEILA MOSKOVITCH

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

GRAND METROPOLITAN DEVELOPMENTS LTD.

Added Party

CONSENT ORDER

Upon the application to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) by the Applicants, Israel and Sheila Moskovitch and Counsel for the Ontario New Home Warranty Program for issuance of a Consent Order of the Tribunal to settle the issues in the claim; and

Having reviewed the written Minutes of Settlement signed by the Applicants and signed on behalf of the Ontario New Home Warranty Program and the Added Party, Grand Metropolitan Developments Ltd., as to the disposition of these issues which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, pursuant to section 16(3) of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter O.31, this Tribunal orders that the issues set out in Schedule "A" in this matter are disposed of on the basis of the terms set out in the said Schedule AA and the matter is hereby closed.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: September 19, 2000

SCHEDULE 'A'

ISRAEL AND SHEILA MOSKOVITCH

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

GRAND METROPOLITAN DEVELOPMENTS LTD.

Added Party

The parties have agreed to settle the proceeding before the Licence Appeal Tribunal on the following terms.

1. Ontario New Home Warranty Program ("ONHWP") and Grand Metropolitan Developments Ltd. will jointly pay the total sum of \$6,000 to Stewart Moskovich in full and final satisfaction of all claims raised or set out in a conciliation report dated July 7, 1999, a decision letter dated March 8, 2000, and a Request for Hearing dated March 27, 2000 pending before the Licence Appeal Tribunal (the "Tribunal").
2. This release does not apply to any defects claimed by letters dated May 18, 2000 and May 24, 2000 from my solicitors to ONHWP and the Builder, that were not raised or set out in the above-mentioned conciliation report, decision letter or Request for Hearing.
3. Stewart Moskovich will withdraw his hearing before the Tribunal and will sign a release in a form satisfactory to ONHWP and Grand Metropolitan Developments Ltd. and his solicitors.

"Stewart Moskovich"

"Grand Metropolitan Developments"

"Netanus Rutherford"

Ontario New Home Warranty Program
Manager, Dispute Resolution

GHEBRE-MEDHIN

DANIEL GHEBRE-MEDHIN

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL INDUSTRY
COMPENSATION FUND CORPORATION UNDER
THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: JOHANNE N. MORISSETTE ,Vice-Chair

APPEARANCES: DANIEL GHEBRE-MEDHIN, appearing on his own behalf
FATIMA HUSAIN, Counsel representing the Board of Trustees,
Ontario Travel Industry Compensation Fund

DATE OF
HEARING: August 30, 2000 Ottawa

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Board of Directors of the Ontario Travel Industry Compensation Fund Corporation by its decision letter dated June 5, 2000, refused the claim of Mr. Daniel Ghebre-Medhin for reimbursement from the Travel Industry Compensation Fund. They stated that the claim was received beyond the filing deadline set out in Regulation 806/93 under the *Travel Industry Act* (the "Act").

Mr. Daniel Ghebre-Medhin, filed a Notice of Appeal on June 20, 2000, to the Licence Appeal Tribunal.

ISSUES:

Is the claim non-eligible because it was filed beyond the limitation period?

EVIDENCE:

Mr. Ghebre-Medhin, on April 22, 1997, booked travel services with 141603 Canada Ltd., o/a Unitravel Services (the "Registrant"), a formerly registered travel agent, for travel services departing on July 1, 1997, from Ottawa to Asmara, Eritrea, and return. The Applicant paid a deposit for the services in the amount of \$1000.00 to the Registrant, and received a receipt for the deposit. In or around the end of June 1997, the Applicant testified that he no longer required to travel to Eritrea since his sister was no longer ill and accordingly attended Unitravel to cancel his travel plans. He further testified that

Ms. Edda Battistella of Unitravel advised him that he would get his money back as soon as she got the money from the airline. He further testified that throughout the summer of 1997, he kept going to the office asking for his money and she kept saying to him that she was still waiting for the money from the airline. In or around the second week of September, he attended the office of Unitravel only to find the office closed and the premises vacated with only a sign on it saying "for rent". He further testified that it was only around January 2000 that he met Ms. Battistella when she advised him that he should make his claim from the Travel Industry Council of Ontario ("TICO") and she gave him the phone number. On January 24, 2000, he filed his claim with the Travel Industry Compensation Fund (the "Fund"). By letter dated March 13, 2000, the claimant was informed that he was not within the required six months deadline.

TESTIMONY OF THE RESPONDENT

Ms. Laurie Ferlan is the claims coordinator for the Fund and testified to the effect that on September 17, 1997, the Registrant voluntarily terminated its registration and ceased to operate. The Tribunal accepts this date as the latest date that could be considered the date of the event giving rise to the claim. She further testified that arising out of the failure of Unitravel Services, 24 claims have been received at the Travel Industry Council of Ontario. Of these claims, 23 were received between the dates of September 26, 1997 and February 19, 1998. Of the claims received to date, 18 claims have been paid from the Ontario Travel Industry Compensation Fund for a total amount of \$21,221.89.

THE LAW:

Section 50(1) of Regulation 806/93 under the *Travel Industry Act* states that:

Section 50(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- a) the customer made payment for the travel services directly to or through a registered travel agent;
- b) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and
- c) the customer has not been reimbursed by,
 - i) the registrant because the registrant is unable to pay by reason of bankruptcy or insolvency,
 - ii) any other person who has received the customer's money, or
 - iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract for insurance.

.....

Section 50(2) A reimbursement under Section (1) is limited to the amount paid by the customer to the travel agent for those travel services that were not provided.

Section 53. A customer or a registrant shall make a claim for reimbursement in writing to the board of directors within six months after the event that gave rise to the claim for reimbursement.

Section 54(1) The claimant shall provide such evidence to the board of directors as it may require to prove the claim.

ANALYSIS:

The Applicant in this matter is definitely a sincere person who was evidently not aware of the laws surrounding this situation. It is also very evident that from September 1997 until January 2000, he was always under the impression that eventually he would get his refund from this travel agent; however, he had, from his own testimony, not seen or heard from Ms. Battistella since January of 1999 and unfortunately did not seek any advice to ascertain his rights concerning the deposit. Had Mr. Ghebre-Medhin sought advice, he would have been able to submit his claim within the prescribed time by legislation. This is a very unfortunate circumstance for an Applicant who can not afford to lose this amount of money.

The Tribunal accepts the submission of Council for the Ontario Travel Industry Compensation Fund Corporation that this claim is excluded due to the limitation period as set out in Section 53 of the Regulation 806/93. Accepting the proposition that the latest date for the event that gave rise to this claim is the business failure of the Unitravel Services, then the Applicant would have had to file his claim by no later than March 18, 1998. Unfortunately this claim was not filed until January 24, 2000.

The Tribunal further accepts the submission that this section is a mandatory section, the word "shall" makes it mandatory and precludes the Tribunal from exercising any discretion to permit an extension of time frame for filing the claim.

Therefore, the Tribunal must deny the claim by the Applicant.

ORDER:

Accordingly, pursuant to the authority vested in it by the provisions of the *Travel Industry Act* and Regulations made thereunder, the Tribunal directs the Board of Trustees of the Ontario Travel Industry Compensation Fund to disallow the claim of the Applicant.

LICENCE APPEAL TRIBUNAL

Johanne N. Morissette
Vice-Chair

Released: September 20, 2000



IN THE MATTER OF an application by R&S Transportation Inc./Harj-Min Carriers Inc. dated June 27, 2000 requesting an appeal before the Licence Appeal Tribunal pursuant to Section 50(1) of the *Highway Traffic Act*, to consider the appeal of the Suspension and Seizure Order of the Deputy Registrar dated June 26, 2000 to be effective on July 4, 2000.

AND IN THE MATTER of the *Highway Traffic Act* R.S.O. 1990 Chapter H.8 as amended;

AND IN THE MATTER of the safety records of R&S Transportation Inc./Harj-Min Carriers Inc.;

AND IN THE MATTER of the Commercial Vehicle Operator's Registration (CVOR) certificate #126-488-670 issued to R & S Transportation Inc. and certificate #133-189-137 issued to Harj-Min Carriers Inc.;

AND IN THE MATTER of the plate portion of permits for and number plates for all commercial motor vehicles and trailers registered in the name of R. S Transportation Inc./Harj-Min Carriers Inc.

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: MURRAY FORBES, Counsel for the Respondent
SHELLY TROUPE, Agent for the Applicant
SATWINDER KANG, Applicant Safety Compliance Manager

**DATE OF
PRE-HEARING:** September 11th, 2000

ORDER AND SUMMARY OF DISCUSSION

A Pre-hearing Conference between the parties was held on September 11th, 2000 in Toronto at 1 St. Clair Avenue West, 12th Floor as set forth in the Tribunal's Notice of Pre-hearing Conference dated July 26, 2000.

The Tribunal makes the following Orders respecting the hearing:

1. The hearing dates have been set for November 6th, 7th and 8th, 2000, at 1 St. Clair Avenue West, Toronto, 12th Floor.
2. It was determined that the filing dates with the Tribunal of submissions/evidence from both parties would occur **on or before September 29, 2000. The Applicant will provide the Respondent with their expert's report on or before October 17th, 2000. If necessary, all further reply submissions are to be exchanged on or before October 27th, 2000.**

Parties will file 5 copies with the Tribunal and 1 copy to all parties. It was noted that the Tribunal requires full disclosure 10 days prior to the hearing.

3. The Respondent will present testimony and evidence from one witness: Ms. Margaret Mooney, who will go through the material that was before the Registrar at the time of the decision to impose the sanction, and will introduce records from the files of the two companies that are under review.

The evidence to be used by the Respondent will include:

- Explanation of the CVOR monitoring system and publications
- A review of the various documents relating to the Order
- Notice of Suspension relating to the Show Cause meeting, and documents in support of the Notice
- Analysis of the Applicant's CVOR record, Safety Net reports, company Audit, and Accident Reports.
- Documents relating to the Applicant's fleet size with reference by company,
- United States documents relative to audit and rating.
- all relative file documents.
- Any other such materials to be provided in response.

4. The Applicant will present testimony and evidence from two witnesses. These will include: Satwinder Kang, Safety Compliance Manager, and possibly Mohinder Val Virk, President of Harj-Min Carriers Inc.

The evidence presented by the Applicant will include:

- The policies and procedures implemented by the Applicant June 1st, 2000.
- Accident and records.
- Current company profiles from various jurisdictions showing decreases in accidents, violations, and convictions.
- Report of a third party analyst on company compliance produced by Motor Transports Consultants Inc. including an audit on the Applicant's policies and procedures.
- Will Say statement of Mohinder Val Virk.

5. It was outlined at the Pre-hearing Conference that:

The Registrar has issued a Suspension and Seizure Order, dated June 26, 2000 pursuant to section 47 of the *Highway Traffic Act*, that as of July 4, 2000, to be imposed for thirty (30) days for the CVOR certificates and plate portions for all of the commercial vehicles for both companies.

The Tribunal will be reviewing in detail a time period of approximately two years prior to the Suspension Order, prior to June 26th, 2000.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

SPINKS

SHERI SPINKS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

SHERI SPINKS, Applicant
unrepresented

DATE OF HEARING: September 14, 2000

DECISION RELEASED: September 20, 2000 Toronto

REASONS FOR DECISION

A hearing was held on September 14, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Sheri Spinks (the “Applicant”)
Motor Vehicle:	1995 Audi A6Q, plate #AHFW 330 (the “vehicle”)
Date of Appeal:	August 29, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 14, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Applicant presented the Tribunal with a work sheet detailing her monthly expenses, and a copy of her pay stub with earning statement that she wished entered into evidence as exhibits. There was no objection from the Respondent, and these two documents were entered into evidence as exhibit numbers seven and eight. All other documents entered into evidence were exhibited with the consent of both parties.

The Respondent asked that the witness for the Applicant be excluded from the hearing while the Applicant was giving her testimony. The Applicant did not object and the request was granted.

The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

GROUND FOR APPEAL OF IMPOUNDMENT ORDER

RE: Impoundment Order No. 0501213

I am appealing the impoundment of my vehicle pursuant to section 50.2 (d) of the *Highway Traffic Act*. The loss of my vehicle for the impoundment period will result in exceptional hardship.

I am a responsible person and have been recognized as such by those who know me. I am a very responsible driver and have never had any problems with my vehicle in the past; my perfect driving record is evidence of that. My car is currently impounded as a result of the fact that my brother, who has suspended license, was caught driving my car.

I was not aware, nor did I give my brother consent to drive my vehicle. My brother was in care of my vehicle for the purposes of repairs. I had dropped off my car to him on the afternoon of the 18th of August for him to replace my brake pads. I was under the impression that the brakes would be fixed at his residence and that I would pick the car up there when the repairs were completed. I would not have allowed my brother to have possession of my vehicle if I was aware his intentions were to drive it.

The impoundment of my vehicle is the result of my brother's actions that were through no control or knowledge of my own. My situation is not all that different from that of an individual who, dropping their vehicle off at a mechanic, is under the impression that the car will be taken care of, and not driven illegally. If I had taken my car to a mechanic to have the brake pads fixed, and without my knowledge someone had operated the car while their license was suspended, I do not think I could be held responsible for their actions, yet I am being held responsible for the actions of my brother.

I am currently employed at two different places. The short period of time that I have been without my vehicle has already proven to be extremely inconvenient and stressful. I work at a restaurant part-time in the evenings, sometimes until 3:00 am or 4:00 am. It is not possible for me to use public transportation at this time in the morning, nor would it be safe. It is also not possible to leave my full time employment and arrive on time for my part-time via public transportation because of the time restrictions and distance. It is not within my budget to take a cab to and from work, especially considering that both my full and part time locations of employment are approximately 15 km from my house. I have inquired with taxi companies in the area and have been informed that a one way fare would cost me approximately \$25 to \$30. I have looked into all the available alternatives, including a rental car. The expense of a rental vehicle to cover the remainder of the impoundment period is clearly not an option for me due to my financial situation.

Without my vehicle, I fear that I will not be able to maintain the attendance and punctuality records that I have worked hard to establish. This will not only jeopardize my employment but also my reputation within the company.

As well, the cost of recovering my vehicle from the impoundment location is going to cause me extreme financial hardship. The towing costs and related vehicle storage fees are quite hefty and beyond my means.

I thank you in advance for your consideration, and look forward to being able to present my appeal to you in person very soon.

Sincerely,

Sheri Spinks

The Applicant testified that she had taken the vehicle to her brother, Kenneth Spinks' house so that he could replace the brake pads on her vehicle. Mr. Spinks' driver's licence was under suspension at the time of the impoundment. She thought that the vehicle would be repaired on site and that she could pick it up later that day. She stated that she had no knowledge that her brother would drive her vehicle. At some time during that day, Mr. Spinks drove the Applicant's car, was stopped by police, and the vehicle was subsequently impounded.

The Applicant stated that since the impoundment, she has been having difficulty maintaining her employment schedule at her two places of employment. She testified that she has contacted taxi cab companies, and rental vehicles are beyond her means. In support of her testimony, the Applicant presented the Tribunal with documents showing her monthly earnings and expenses, as well as letters from her two employers.

The Applicant testified that though inconvenienced, she has managed to obtain rides from her mother who has her own vehicle, as well as from a co-worker, however she can not rely on these alternatives. Public transit is available for her to get to her full time job, though her part time job finishes very late at night and she would not use it.

Kenneth Spinks testified that his sister dropped off the vehicle for him to repair the brakes at his residence. He drove the vehicle to pick up some parts for the vehicle without her knowledge.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kenneth Spinks;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 31, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d) of the Act. Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment.

The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself. This includes the unfortunate fact that the Applicant's brother chose to drive her vehicle without her knowledge or consent, as well as any fees associated with the impoundment and subsequent release of the vehicle.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Applicant's oral testimony that she investigated alternatives lacked sufficient documentary corroboration, and failed to demonstrate that she could not afford an alternative to the impounded vehicle. The Tribunal finds her testimony insufficient in meeting the onus of proof required by section 22(4) of the Regulation. In fact, under cross examination, the Applicant appeared unwilling to incur additional expenses that would mitigate her situation as she believed that she was not at fault in the matter. Furthermore, the Applicant's testimony was that she has made use of alternatives to the impounded vehicle, including public transit, and occasional rides with her mother and co-workers.

Though inconvenienced, the Applicant has not suffered any loss of employment as a result of the impoundment. Furthermore, the Applicant has not presented the Tribunal

with sufficient evidence that would indicate that this loss of the vehicle would be immediate significant and lasting as per section 22(3)(b) of the Regulation.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *September 20, 2000*

PIFFL

NANCY PIFFL

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

NANCY PIFFL, Applicant
unrepresented

DATE OF HEARING: September 18, 2000

DECISION RELEASED: September 21, 2000 Kingston

REASONS FOR DECISION

A hearing was held on September 18, 2000, at Kingston, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Nancy Piffl (the "Applicant")
Motor Vehicle: 1993 Jeep CHK, plate #308 VAF (the "vehicle")
Date of Appeal: August 28, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 18, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The matter of ownership was questioned, as at the time of the impoundment the vehicle was owned by the driver, Kevin Brooks.

Present at the hearing was Ms Nancy Grace Piffl, who signed the Notice of Appeal, as owner. Ms Piffl informed the Tribunal that she acquired possession of the vehicle in question on or about August 21, 2000 as per new ownership on file.

The Respondent had no objection to Ms Piffl being accepted as Applicant as applicable legislation states that "The owner of a motor vehicle that is subject to an order of impoundment... may, upon paying the prescribed fee, appeal the order to the Tribunal." (Sec. 50.2 HTA)

The Tribunal proceeded on the understanding that the matter of jurisdiction would be addressed in the decision.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

License Appeal Tribunal
Suite 1200
1 St. Clair Avenue West
Toronto, Ontario
M4V 1K6

August 25, 2000

Attention: Hearing Co-ordinator

The following letter will outline our reasons for the appeal. Any further information you require we provide upon request. It should be noted that Kevin Brooks & I are considered common law & reside at the same address. It should be noted that I was unaware the license was suspended & Kevin was unaware until the day he was pulled over for an illegal left hand turn. From what we have gathered the license is around a care & control incident that occurred in March of 99 in Ottawa. Kevin moved to Kingston in July of 99 to work at Corcan & to reside with

Type of Hearing

According to the documents faxed on August 25/00 it states that an oral hearing can be done & is carried on in major centers. I reside in Kingston so if you so desired this could be meant. If such a hearing is not present in this city then our best is a written hearing and consent. Kevin & I both work so any travel to a different location will be difficult. A telephone conference may be possible which we could setup. I have checked off written hearing & consent but the alternatives could be meant if so desired provided the oral hearing is possible in Kingston.

Reason For the Appeal

The reason for the appeal is because the loss of the vehicle will result in exceptional hardship. Currently Kevin & I both work. I currently work at A&P which is located in the township. Kevin works at Corcan. So we need the vehicle for our employment purposes. My current work place is about 15-20 km from my residence. The other reason we need the vehicle is because my son who is 17 has 2 part time jobs. One of the jobs is pizza delivery with Pizza Hut, which requires a vehicle to do the job. He also requires a vehicle or transportation because he is always on call for extra shifts at both jobs. Without the vehicle it limits his ability to pickup shifts which he requires in order to pay for school and sporting activities. He has a valid driver license. As I am a single mother it is important my son work in order to ease my financial burden related to school and his sport activities. Obviously the biggest reason is the fact that in our household we have 3 people who have employment and require the vehicle to maintain such employment, especially my son.

The other reason the vehicle is required is currently I am assisting my parents who live outside of Kingston. My mother recently just had a heart attack so we need the vehicle in case of medical emergencies and to go to Napanee where his mother resides. She lost her husband in Oct 99 and she has a farm that requires his assistance in maintaining. Obviously until Kevin gets his license back, I will provide the transportation when it is required to go there and to Corcan. Kevin in full agreement of this.

We trust the following information is satisfactory. If you require further information please do not hesitate to call Kevin or myself at the enclosed numbers.

Nancy Piff

Kevin Brooks

The "*Owner's Position in Appeal*" filed for the Tribunal in support of the Appeal refers to an attached letter, dated August 25, 2000, signed by the Applicant Nancy Piffl and Kevin Brooks. (Exhibit # 3)

The Applicant claims impoundment will result in "...*exceptional hardship... current place of employment is about 15-20 km from... residence... son... 17 has 2 part time jobs... pizza delivery... requires vehicle... it is important... son work in order to ease... financial burden... require the vehicle to maintain... employment... assisting... parents who live outside of Kingston... need vehicle in case of medical emergencies...*"

At the hearing, the Applicant simply alluded to the letter, as the extent of the evidence to be considered.

In cross-examination, the Applicant confirmed that she has purchased a new vehicle and that "...*everyone managed to get around... walk... bike...*"

Evidence for the Registrar

A summary of the Registrar evidence follows.

The evidence of the Registrar consisted of the documents filed for the hearing and entered as Exhibit # 4.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kevin J. Brooks;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified or prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 23, 2001.

The evidence of the Registrar consisted of the documentary evidence to on file.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

After reviewing section 50.2 of the *Highway Traffic Act*, the Tribunal comes to the conclusion that it has no jurisdictional difficulties in accepting Ms Nancy Piffel as the Applicant. At the time the Notice of Appeal was signed, i.e. August 25, 2000, Ms Piffel was in fact the legal owner of the motor vehicle and, in any event, is authorized by Kevin Brooks to proceed with this appeal.

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss, as per subsection 50.2(3)(d).

Is there no alternative to the impounded vehicle?

According to subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98, the Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that she has bought a new car and that everyone “...*managed to get around...*”.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

The Applicant did not offer evidence regarding financial loss, and she did not satisfy the Tribunal that she has in fact incurred any loss of income or extra expenses which could be considered significant and lasting.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the loss will be borne by a person or persons who may be transported in the impounded vehicle, particularly Mrs. Piffel and her son.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

- d) the impact of the loss,
 - i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle and...
 - ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant is not one and the same as the person who was found to be "*Driving Disqualified*", therefore she meets the criteria set out in 22(3)(d)(i).

The criteria tested in subsection 22(3) of Ontario Regulation 632/98 are cumulative. That is, to be successful an Applicant must demonstrate all of the criteria of subsection 22(3). The Applicant has not established that there is no alternative to the vehicle and has not established that the loss is significant and lasting. Therefore, the Tribunal may not consider such loss as an exceptional hardship within the requirements of section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: *September 21, 2000*

McDONALD, LISA ROSA o/a CRUISE HOLIDAYS ON LAKESHORE

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
LISA ROSA McDONALD O/A CRUISE HOLIDAYS ON LAKESHORE
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 15, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

LISA ROSA McDONALD O/A CRUISE HOLIDAYS
ON LAKESHORE

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Lisa Rosa McDonald o/a Cruise Holidays on Lakeshore, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Vice-Chair

Released: September 18, 2000

B E T W E E N:

LISA ROSA MCDONALD O/A CRUISE HOLIDAYS ON LAKESHORE

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Lisa Rosa McDonald o/a Cruise Holidays on Lakeshore (hereinafter referred to as "the Registrant") is a sole proprietor who is registered as a travel agent (Registration No. 04638912/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration as a travel agent on October 26, 1998.
2. Prior to being approved for registration, the Registrant signed an acknowledgement of Terms and Conditions of Registration on September 23, 1998, and consented to further terms and conditions of registration on October 21, 1998, in which she agreed that, amongst other things, she would file financial statements and Form 1 remittances promptly, maintain trust accounting, maintain minimum working capital, and maintain books and records as required.
3. By letter dated November 19, 1999, the Registrant was requested to file her financial statements for the fiscal year ended December 31, 1999, on or before March 31, 2000, as required by Ontario Regulation 806/93, as amended, made under the Act ("the regulations").
4. On February 10, 2000, Ms. Maria Descours, an Inspector designated by the Registrar, *Travel Industry Act*, made a site inspection at the premises of the Registrant. The inspection revealed that while trust accounting was being properly maintained, there were minor compliance issues with both invoicing and advertising.
5. By letter dated May 5, 2000, the Registrar requested the Registrant to file her financial statements for the fiscal year ended December 31, 1999, on or before May 19, 2000.
6. On June 15, 2000, the Registrar issued a Notice of Proposal to the Registrant as a result of her failure to file financial statements as required by the regulations.
7. To date, the Registrant has not filed her financial statements for the fiscal year ended December 31, 1999. The statements had been due by March 31, 2000.
8. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under s. 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 15, 2000, with respect to Lisa Rosa McDonald o/a Cruise Holidays on Lakeshore;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation") and which she has acknowledged in her Terms and Conditions of Registration;
 - b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - c) The Registrant shall maintain the previously submitted renewable and irrevocable Letter of Credit in the amount of \$10,000.00 (Canadian), with the beneficial interest in favour of the Travel Industry Council of Ontario, for so long as the Registrar shall so require;
 - d) The Registrant shall maintain proper trust accounting pursuant to and in accordance with section 36 of the Regulations;
 - e) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending December 31, 1999, on or before **October 31, 2000**;
 - f) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - g) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31, 2000, on or before **February 14th, 2001**;
 - h) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending December 31, 2000, on or before **March 31, 2001**;
 - i) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - j) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30, 2001, on or before **August 14, 2001**;

- k) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31, 2001, on or before **February 14th, 2002**;
 - l) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending December 30, 2001, on or before **March 31, 2002**;
 - m) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - n) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - o) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - p) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions **(ii) (e) to (m)** inclusive, the Registrar **shall revoke** the Registrant's registration on five **(5)** days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by her signature below that she has obtained or has had full opportunity to obtain independent legal advice with respect to her consent to the terms and conditions set out in this document.

DATED at _____ this _____ day of September, 2000.

Lisa Rosa McDonald
o/a Cruise Holidays on Lakeshore

Ms. Lisa R. McDonald, Proprietor

Registrar, *Travel Industry Act*

Michael Pepper, Registrar
Travel Industry Act

NATUREWAYS CANADA TOURS INC. o/a NATUREWAYS CANADA TOURS INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
NATUREWAYS CANADA TOURS INC. O/A NATUREWAYS
CANADA TOURS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 20, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NATUREWAYS CANADA TOURS INC. O/A NATUREWAYS
CANADA TOURS INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

PURSUANT to the provisions of the *Travel Industry Act* R.S.O. 1990, Chapter T. 19 (the "Act"), Natureways Canada Tours Inc. o/a Natureways Canada Tours Inc. (the "Applicant") appealed a proposal of the Registrar under the Act dated June 20, 2000 in terms of which the Registrar proposed to revoke the registration of the Applicant as a travel agent;

AND WHEREAS, following the attendance on September 19, 2000, at the hearing before the Licence Appeal Tribunal of Fatima Husain, Counsel for the Registrar, *Travel Industry Act* (the "Registrar"), the parties had come to an agreement to settle prior to the hearing today, with an order to issue on consent with terms and conditions agreed to in Schedule "A";

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair

Released: September 19, 2000

B E T W E E N:

NATUREWAYS CANADA TOURS INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Natureways Canada Tours Inc. (hereinafter referred to as "the Registrant") is a corporation incorporated pursuant to the laws of Ontario and registered as a travel wholesaler (Registration No.0430807/W under the Travel Industry Act, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration on December 5, 1994.
2. Prior to being approved for registration as a travel agent, the Registrant signed a Consent and Acknowledgement of Terms and Conditions of Registration on November 18, 1994. In that document, the Registrant undertook to, among other things, file Form 1 contributions, maintain minimum working capital, maintain trust accounting and file financial statements as required by Regulation 806/93.

Form 1

3. The Registrant filed the Form 1 filing as required for the period ended January 31, 1995, on March 14, 1995.
4. The Registrant filed the Form 1 filing as required for the period ended July 31, 1995, on September 15, 1995.
5. The Registrant filed the Form 1 filing for the period ended February 29, 1996, on March 29, 1996.
6. The Registrant filed the Form 1 filing for the period ended August 31, 1996, on October 17, 1996.
7. The Registrant filed the Form 1 filing for the period ended February 28, 1997, on April 14, 1997.
8. The Registrant filed the Form 1 filing for the period ended August 31, 1997, on October 21, 1997.
9. The Registrant filed the Form 1 filing for the period ended February 28, 1998, on May 20, 1998.

10. The Registrant filed the Form 1 filing for the period ended August 31, 1998, on November 18, 1998.
11. The Registrant filed the Form 1 filing for the period ended February 28, 1999, on May 14, 1999.
12. The Registrant filed the Form 1 filing for the period ended August 31, 1999, on November 23, 1999. The filing had been due by October 15, 1999.
13. By letter dated April 24, 2000, the Registrant was requested to file its Form 1 filing for the period ended February 29, 2000, on or before May 8, 2000.
14. On May 9, 2000, the Registrant was requested to file its Form 1 filing as required on or before May 23, 2000.
15. On June 20, 2000, the Registrar issued a Notice of Proposal to Revoke Registration to the Registrant for its failure to file Form 1 for the period ended February 29, 2000.
16. The Registrant filed the Form 1 filing for the period ended February 29, 2000, on June 22, 2000. The filing had been due by April 14, 2000.
17. On June 26, 2000, the Registrant appealed the Notice of Proposal to Revoke Registration dated June 20, 2000.

Complaints

18. On March 14, 2000, Ms. Maria Descours, an Inspector designated by the Registrar, *Travel Industry Act*, made a site inspection at the business premises of the Registrant due to a high number of consumer complaints received by the Registrar.
19. On April 6, 2000, Mr. Howard Badham filed a complaint with the Registrar regarding a vacation purchased through the Registrant.
20. By letter dated April 7, 2000, the Registrant was requested to respond to the complaint of Mr. Badham within 14 days.
21. By letter dated May 31, 2000, the Registrant responded directly to the consumer, Mr. Badham, with respect to the issues identified in the complaint.
22. On April 6, 2000, Ms. Carriveau-Brown filed a complaint with the Registrar regarding a vacation purchased through the Registrant.
23. By letter dated April 7, 2000, the Registrar contacted the Registrant and requested him to respond to the complaint of Ms. Carriveau-Brown within 14 days.
24. By letter dated May 31, 2000, the Registrant responded directly to the consumer, with a copy sent to the Registrar, with respect to the issues identified in the complaint form of Ms. Carriveau-Brown.
25. On May 2, 2000, Ms. Patricia Dach filed a complaint with the Registrar regarding a vacation purchased through the Registrant.
26. By letter dated May 8, 2000, the Registrant was requested to respond to the complaint of Ms. Dach within 14 days.

27. On May 15, 2000, the Registrant responded to the complaint of Ms. Dach.
28. On May 10, 2000, Ms. Hanna Nielson filed a complaint with the Registrar regarding a vacation purchased through the Registrant.
29. By letter dated May 23, 2000, the Registrar contacted the Registrant and requested him to respond to the complaint of Ms. Nielson within 14 days.
30. By letter dated June 2, 2000, the Registrant submitted a response to the consumer with respect to her complaint.
31. On May 10, 2000, Mr. Norman McLeod filed a complaint with the Registrar regarding a vacation purchased through the Registrant.
32. By letter dated May 23, 2000, the Registrar contacted the Registrant and requested him to respond to the complaint of Mr. McLeod within 14 days.
33. By letter dated July 10, 2000, the Registrant submitted a response to the consumer, Mr. McLeod, with respect to his complaint.
34. On June 2, 2000, Mr. I.L. MacDonald filed a complaint with the Registrar regarding a vacation purchased through the Registrant.
35. By letter dated June 19, 2000, the Registrant was requested to respond to the complaint filed by Mr. MacDonald within 14 days.
36. By letter dated June 19, 2000, the Registrar requested the Registrant to respond no later than June 30, 2000, with respect to all outstanding complaints.
37. On June 29, 2000, the Registrant provided a copy of a letter dated May 15, 2000, and addressed to Mr. MacDonald, apparently in response to his complaint.
38. On June 26, 2000, the Registrant advised that it had replied in writing to the individual complaint files, and would request a personal meeting with the Registrar to further discuss a resolution of the outstanding complaints.
39. On August 2, 2000, the Registrant met with Rachel Palozzi, Compliance Officer at the Travel Industry Council of Ontario and an Inspector designated by the Registrar, *Travel Industry Act*, in order to discuss the outstanding complaints.

Financial Statements

40. The Registrant filed financial statements for the fiscal year ended August 31, 1995, as required pursuant to section 24 of Regulation 806/93, on January 15, 1996. The statements had been due by November 30, 1995. The statements revealed a working capital deficiency in the amount of \$10,910.00, based on reported sales.
41. On May 9, 1996, the Registrant addressed the outstanding working capital deficiency.
42. On February 4, 1997, the Registrant filed financial statements for the fiscal year ended August 31, 1996. The statements had been due on November 30, 1996. The statements revealed a working capital deficiency in the amount of \$1,996.00, based on reported sales.

43. On April 11, 1997, the Registrant filed evidence that the working capital shortfall had been addressed.
44. On December 11, 1997, the Registrant filed financial statements for the fiscal year ended August 31, 1997, as required. The statements had been due by November 30, 1997, and revealed a working capital shortfall in the amount of \$22,742.00.
45. By letter dated January 27, 1998, the Registrant was advised that the financial statements for the fiscal year ended August 31, 1997, as filed, revealed a working capital shortfall in the amount of \$22,742.00. The Registrant was advised to address this deficiency on or before February 12, 1998.
46. By letter dated March 13, 1998, the Registrar advised that the working capital deficiency as revealed by the financial statements as filed for the fiscal year ended August 31, 1997, remained unaddressed, and requested the Registrant to address the working capital deficiency on or before March 27, 1998.
47. On April 3, 1998, the Registrant addressed the working capital deficiency as revealed by the financial statements as filed for the fiscal year ended August 31, 1997.
48. On December 16, 1998, the Registrant filed the financial statements for the fiscal year ended August 31, 1998.
49. By letter dated December 21, 1998, the Registrant was advised that the financial statements as filed revealed a working capital shortfall in the amount of \$7,924.00.
50. On January 3, 1999, the Registrant addressed the working capital deficiency as revealed by the financial statements filed as at December 31, 1998.
51. On March 8, 2000, the Registrant filed the financial statements for the fiscal year ended August 31, 1999. The statements had been due by November 30, 1999.
52. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under s. 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 20, 2000, with respect to Natureways Canada Tours Inc.;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation");
 - b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - c) The Registrant shall ensure that all advertising is conducted in accordance with the Act and Regulation;
 - d) The Registrant shall, in future, respond to all complaints filed with the Registrar within 30 days after receipt of the notice of the complaint. Notice of the complaint, if any, shall be sent by facsimile transmission, courier, or mail to the Registrant;
 - e) The Registrant shall submit to the Registrar a renewable and irrevocable Letter of Credit in the amount of \$10,000.00 (Canadian), with the beneficial interest in favour of the Travel Industry Council of Ontario, on or before October 31, 2000;
 - f) The Registrant shall maintain the above-noted renewable and irrevocable Letter of Credit in the amount of \$10,000.00 (Canadian) with the beneficial interest in favour of the Travel Industry Council of Ontario for so long as the Registrar shall so require;
 - g) The Registrant shall maintain a proper trust account pursuant to and in accordance with section 36 of the Regulations;
 - h) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended August 31, 2000, on or before **October 15, 2000**;
 - i) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending August 31, 2000, on or before **November 30, 2000**;
 - j) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- k) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended January 31, 2001, on or before **March 16, 2001**;
 - l) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended August 31, 2001, on or before **October 15, 2001**;
 - m) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending August 31, 2001, on or before **November 30, 2001**;
 - n) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - o) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended January 31, 2002, on or before **March 16, 2002**;
 - p) The Registrant shall file Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended August 31, 2002, on or before **October 15, 2002**;
 - q) The Registrant shall file the financial statements as required by the Regulation for the fiscal year ending August 31, 2002, no later than **November 30, 2002**;
 - r) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **30** days from the date of notice of the deficiency to fully and completely address any deficiency and produce proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - s) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - t) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - u) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions **(ii) (d), (e), and (h) to (r)** inclusive, the Registrar **shall revoke** the Registrant's registration on five **(5)** days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had full opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of September, 2000.

Natureways Canada Tours Inc.

Registrar, *Travel Industry Act*

Mr. Luis O. Gomez, President
I have authority to bind the corporation

Michael Pepper, Registrar
Travel Industry Act

MARSHALL

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PAUL MARSHALL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 14th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PAUL MARSHALL

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Paul Marshall, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 20th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Paul Marshall
36 Yonge Street
Brighton ON K0K 1N0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Matthew Gillespie (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees, if he is convicted in the future, under any law, to immediately notify his employer in writing and to provide proof of same to the Registrar, MVDA.
3. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
4. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
5. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
6. The Applicant acknowledges that his registration will not prevent the Registrar, MVDA from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
7. The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
8. The Applicant agrees to give a copy of his order to his employer forthwith.
9. The Applicant agrees to give full disclosure, on all future applications submitted to the Registrar, MVDA regardless of whether the information has already been disclosed.
10. The Applicant has 30 days, from the date of this Order, to provide the Registrar, MVDA with proof that all outstanding judgements have been paid in full, or that repayment arrangements have been made.
11. The Applicant agrees if he is convicted in the future under the Narcotics Act, or Criminal Code of Canada his registration is automatically revoked.
12. The Applicant acknowledges that he has 60 days to enrol into and to successfully complete the OMVIC certification course and that all fees associated are the responsibility of the Applicant.

13. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant here by withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar, MVDA is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.
16. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

GILLESPIE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MATTHEW GILLESPIE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 23rd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MATTHEW GILLESPIE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Matthew Gillespie, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 20th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Matthew Gillespie
4 Giles Crt
Rexdale On M9V 4C5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Matthew Gillespie (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) The Applicant agrees, if he is charged in the future, under any law, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
- 2) The Applicant acknowledges that the disclosure provided by him to the Registrar, MVDA is accurate in all respects and that the Registrar is relying upon the veracity of his disclosure in entering into these terms and conditions.
- 3) The Applicant agrees to notify his employer of any future convictions under any law and to provide the Registrar with written proof of said notification signed by his employer.
- 4) The Applicant agrees not to transfer his registration as a salesperson under the Act to another dealer without having obtained prior written consent of the Registrar, MVDA to effect this transfer.
- 5) The Applicant agrees to give full disclosure, on all future applications submitted to the Registrar, MVDA regardless of whether the information has already been disclosed.
- 6) The Applicant agrees to give a copy of this order to his employer forthwith.
- 7) The Applicant acknowledges that the Registrar, MVDA may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
- 8) The Applicant hereby acknowledge that his registration as a motor vehicle salesperson will not prevent the Registrar, MVDA from taking legal action against him, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that might be alleged to have occurred in the past or that may occur in the future.

- 9) The Applicant agrees that if he breaches any of the terms and conditions contained in this document in whole or in part, the Registrar, MVDA is directed to, and shall carry out the proposal, and the Applicant's registration will automatically be revoked.
- 10) The Applicant agrees that he has 60 days to enrol into and successfully complete the OMVIC certification course and agrees that all fees associated are the responsibility of the Applicant.
- 11) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the terms and conditions set out herein.
- 12) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal
- 13) The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

(Signature) Matthew Gillespie

These terms and conditions are accepted by the Registrar, Motor Vehicle Dealers Act:

Carl Compton
Registrar

Date:

MUISE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
RONALD JOSEPH MUISE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 27th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

RONALD JOSEPH MUISE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Ronald Joseph MuiSE, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 21st, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Ronald Joseph Muise
52 Alton Avenue
Toronto, ON M4L 2M2

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Ronald Joseph Muise (hereinafter referred to as "the Salesperson") hereby consent to the following terms and conditions to his registration as a motor vehicle salesperson:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions;

1. The Salesperson acknowledges and understands that when the Salesperson or the Dealer, Canus Auto Traders Ltd. receives funds towards the purchase of a motor vehicle prior to the delivery of the motor vehicle, the entire amount received will be deemed to be trust funds and shall be held in a trust account.
2. The Salesperson agrees to maintain a ledger account, on behalf of the Dealer into which shall be entered the names and addresses of all persons from whom trust funds are obtained with details of the amounts retained and a record of all disbursements.
3. The Salesperson agrees to maintain on behalf of the Dealer, with respect to all funds that come into the Dealers hands, in accordance with clause 1 of this Order, a separate trust account into which the Salesperson and/or Dealer shall deposit the funds and the Salesperson and/or Dealer shall, at all times, keep the funds secure and make disbursements from the trust account, in accordance with the terms of the trust.
4. Where trust funds are paid to the Salesperson and/or Dealer in accordance with clause 1 of this Order, whether by way of deposit, down payment or otherwise, the Salesperson and/or Dealer agrees to retain the funds in trust for the purchaser until,
 - . the motor vehicle is delivered;
 - . the contract is mutually cancelled; or
 - . direction or authority is received from the Registrar concerning disbursements
5. The Salesperson, on behalf of the Dealer agrees to provide free access to books and records to any authorized representative of the Registrar.
6. The Salesperson, on behalf of the Dealer agrees to comply with the Retail Sales Tax Act with respect to the collection of tax and remittance when due.
7. The Salesperson on behalf of the Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.

8. The Salesperson acknowledges that his registration as a motor vehicle Dealer will be revoked if he breaches any of the terms and conditions set out herein.
9. The Salesperson hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
10. The Salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.
11. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this _____ day of _____ 2000.

Signature Ronald Joseph Muise

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.
Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

SCHUSTER, KARL S. AND SCHUSTER REALTY INC.

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario, 1990 Chapter R.4

IN THE MATTER of the REGISTRATION of
SCHUSTER REALTY INC. AND KARL S. SCHUSTER
as a Broker under the Act

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Real Estate and Business Brokers Act*
made pursuant to section 8 of the *Real Estate and Business Brokers Act*
TO REFUSE TO RENEW REGISTRATIONS
- Proposal dated: April 7, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SCHUSTER REALTY INC. AND KARL S. SCHUSTER

Applicants

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Counsel for Schuster Realty Inc. and Karl S. Schuster, the Applicants, and counsel for the Registrar under the *Real Estate and Business Brokers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the Statutory Powers Procedure Act, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Real Estate and Business Brokers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule "A".

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 18, 2000

**TERMS AND CONDITIONS TO THE REGISTRATION OF
SCHUSTER REALTY INC. AS A BROKER UNDER THE REAL ESTATE AND
BUSINESS BROKERS ACT**

To: The Registrar
Real Estate and Business Brokers Act
3250 Bloor Street West
6th Floor, East Tower
Toronto, Ontario
M6X 2X9

Pursuant to section 6(2) of the Real Estate and Business Brokers Act (the "Act"), the undersigned, Schuster Realty Inc. ("Schuster"), hereby consents and undertakes to abide by the following Terms and Conditions to its registration as a broker under the Act:

1. Any change in the signatories to Schuster's real estate trust account or in the officers, directors or shareholders of Schuster shall be made only with the prior written consent of the Registrar for a period of 5 years from the date of the signing of these Terms and Conditions.
2. Karl Schuster ("Karl") shall not be a partner, officer, director, manager or shareholder of Schuster for a period of 2 years from the date of the signing of these Terms and Conditions except Karl can be an officer, director or shareholder of Schuster for an initial grace period which grace period shall end upon the sooner of Karl completing the sale and transfer of all of the shares he owns in Schuster to Ludwig Schuster ("Ludwig") or 30 days from the date of the signing of these Terms and Conditions.
3. In the event that the sale and transfer of all the shares Karl owns in Schuster to Ludwig is not completed within 30 days of the date of the signing of these Terms and Conditions, Schuster shall immediately surrender Schuster's registration as a broker to take effect immediately, subject only to a reasonable winding up period for Schuster. During such winding up period for Schuster, no new trades in real estate shall be negotiated, entered into or written.
4. Schuster shall not be a partner or shareholder with any corporation or partnership where Karl is a partner, officer, director, manager or shareholder for a period of 2 years from the date of the signing of these Terms and Conditions.
5. Karl shall not be a signatory on the real estate trust account of Schuster for a period of 5 years from the date of the signing of these Terms and Conditions except Karl can be a signatory on Schuster's real estate trust account for an initial grace period which grace period shall end upon the sooner of Karl completing the sale and transfer of all the shares he owns in Schuster to Ludwig or 30 days from the date of the signing of these Terms and Conditions.
6. For a period of two (2) years from the date of the signing of these Terms and Conditions, Schuster will immediately advise the Registrar's office in writing of any charges laid against Karl under any statutes (except municipal parking violations) and any convictions or findings of guilt by any Court, as well as any civil court judgments or orders against Karl and Schuster, as well as any complaints made against Karl by members of the public or other registrants under the Act, or ethics decisions against Karl by a real estate board or the Ontario Real Estate Association or any complaints and compliance process or discipline proceedings under the By-laws of the Real Estate Council of Ontario.

7. Within three (3) months of the date of the signing of these Terms and Conditions, Schuster shall notify and provide written proof to the Registrar of the payment of the fines and victims surcharge of \$7,340.00 imposed by the Ontario Court of Justice in connection with guilty pleas on 4 counts of breach of trust under the Act and regulations by Schuster, and three Counts of breach of trust under the Act and regulations by Karl entered on March 26, 1999.
8. Schuster agrees to voluntarily surrender its registration under the Act, if Schuster, in the opinion of the Registrar, breaches any of the Terms and Conditions consented to herein or any of the obligations and terms and conditions prescribed by the Act and its regulations.
9. At no time shall Schuster have any agreements, oral or written, including without limitation, any hidden or side agreements with any person or corporation which would in any way violate the spirit and intent of these Terms and Conditions.
10. Schuster hereby acknowledges that if new or additional information comes to the attention of the Registrar related to the past conduct of Schuster's officers or directors or regarding Schuster's financial responsibility, or if Schuster breaches any of these Terms and Conditions, the Registrar may take further administrative action, including a proposal to revoke Schuster's registration, based on the totality of the evidence including the particulars set out in the notice of proposal to refuse to renew registration dated April 5, 2000.
11. These Terms and Conditions are signed in conjunction with and take effect simultaneously with the Terms and Conditions to the registration of Karl S. Schuster as a salesperson under the Act.
12. If any of these Terms and Conditions shall be deemed invalid, unenforceable, illegal or a mutual mistake, such Term and Condition shall be severed and the remaining Terms and Conditions shall remain in full force and effect.
13. Schuster hereby acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the Terms and Conditions set out herein.

Dated at Windsor this ____ day of August 2000.

SCHUSTER REALTY INC.

Registration No.: _____

Per: _____
I/We have the authority to bind the corporation

Print Name: _____

Title: _____

TERMS AND CONDITIONS TO THE REGISTRATION OF KARL S. SCHUSTER AS A SALESPERSON UNDER THE REAL ESTATE AND BUSINESS BROKERS ACT.

To: The Registrar
Real Estate and Business Brokers Act
3250 Bloor Street West
6th Floor, East Tower
Toronto, Ontario
M6X 2X9

Pursuant to subsection 6 (2) of the *Real Estate and Business Brokers Act* (the "Act"), I hereby consent and undertake to abide by the following Terms and Conditions to my registration as a broker under the Act:

1. Within 30 days of the date of the signing of these Terms and Conditions, I shall complete the sale and transfer of all the shares I own in Schuster Realty Inc. ("Schuster") to Ludwig Schuster ("Ludwig").
2. In the event that the sale and transfer of all the shares I own in Schuster to Ludwig is not completed within 30 days of the date of the signing of these Terms and Conditions as set forth in paragraph 1 above, I shall immediately surrender Schuster's registration as a broker to take effect immediately, subject only to a reasonable winding up period for Schuster. During such winding up period for Schuster, no new trades in real estate shall be negotiated, entered into or written.
3. In addition, in the event that the sale and transfer of all the shares I own in Schuster to Ludwig is not completed within 30 days of the date of the signing of these Terms and Conditions as set forth in paragraph 1 above, I shall immediately surrender my personal registration as a broker to take effect immediately. Upon the surrender of my personal registration as a broker in the event that the sale and transfer of all my shares in Schuster is not completed within 30 days of the date of the signing of these Terms and Conditions, I may submit an application for registration as a salesperson under the Act.
4. In the event that the sale and transfer of all the shares I own in Schuster to Ludwig is completed within 30 days of the date of the signing of these Terms and Conditions, upon the completion of such sale and transfer I shall immediately:
 - i) resign as an officer and/or director of Schuster;
 - ii) be removed as a signatory on the real estate trust account of Schuster;
 - iii) surrender my registration as a real estate broker under the Act; and
 - iv) I hereby consent and undertake to abide by the following Terms and Conditions to my registration as a salesperson under the Act:
 - a) I hereby consent to the voluntary suspension of my registration as a salesperson under the Act for a period of ninety (90) days commencing upon the sooner of my completing the sale and transfer of all the shares I own in Schuster to Ludwig or 30 days from the date of the signing of these Terms and Conditions (the "Suspension Period").
 - b) In the event that the sale and transfer of all my shares in Schuster is completed within 30 days from the date of the signing of these Terms and

Conditions, I shall immediately inform the Registrar in writing of the date on which the sale and transfer of all my shares in Schuster to Ludwig was completed.

- c) During the Suspension Period, I shall not trade in real estate contrary to the Act nor shall I accept any compensation or other remuneration for any trade in real estate, except that it shall not be deemed a breach of these Terms and Conditions if I accept compensation or remuneration for a trade in real estate in relation to an agreement of purchase and sale that has been accepted by the vendor and purchaser prior to the commencement of the Suspension Period (regardless of whether such agreement of purchase and sale is firm or conditional) even if the closing of such trade occurs during the Suspension Period.
- d) Within six (6) months of the date of the signing of these Terms and Conditions, I shall attend a course on the Real Estate Council of Ontario's Code of Ethics.
- e) Within three (3) months of the date of the signing of these Terms and Conditions, I shall notify and provide proof to the Registrar of the payment of the fines and victims surcharge of \$7,340.00 imposed by the Ontario Court of Justice in connection with guilty pleas on 4 counts of breach of trust under the Act and regulations by Schuster, and three Counts of breach of trust under the Act and regulations by me entered on March 26, 1999. If I do not provide the Registrar with such satisfactory proof within 3 months of the date of the signing of these Terms and Conditions, I shall immediately surrender my registration as a salesperson under the Act.
- f) Within six (6) months of the date of the signing of these Terms and Conditions, I shall provide the Registrar with satisfactory proof from my creditors that I have satisfied all outstanding judgments against me. Such proof shall include, without limitation, satisfaction of the following judgments:
 - 1. Execution No. 95-03309 issued on May 3, 1995 in favour of Craig Plumbing for the amount of \$5,102.22 plus \$80 for costs.
 - 2. Execution No. 97-01929 in favour of the Canadian Imperial Bank of Commerce issued on August 6, 1997 for the amount of \$ 8,597.51 plus \$420.85 for costs.
- g) If I do not provide the Registrar with satisfactory proof of satisfaction of all outstanding judgments within six (6) months of the date of the signing of these Terms and Conditions, I shall immediately surrender my registration as a salesperson under the Act.
- h) For a period of (2) two years from the date of the signing of these Terms and Conditions, I shall work closely with my broker and he shall monitor my activities in trading in real estate.
- i) For a period of two (2) years from the date of the signing of these Terms and Conditions, I and my broker shall immediately notify the Registrar in writing of any complaints (including, without limitation, any ethics or arbitration complaints) made against me by members of the public or other registrants under the Act, and I and my broker shall provide details of all such complaints and any documentation that the Registrar may

require and hereby consent to the releasing of any information or documentation by any third party (including without limitation, any local real estate board or the Ontario Real Estate Association) to the Registrar.

- j) I shall not apply for registration as a real estate broker under the Act for a period of five (5) years from the date of the signing of these Terms and Conditions.
 - k) I hereby agree not to be a sole proprietor, partner, an officer or director or manager of a real estate broker for a period of two (2) years from the date of the signing of these Terms and Conditions.
 - l) I hereby agree that I shall not hold nor shall any corporations or partnerships of which I have control either by way of a majority interest or as an officer or director or directing mind, hold any shares of a real estate broker corporation for a period of five (5) years from the date of the signing of these Terms and Conditions.
 - m) I hereby agree that I shall not be a signatory on any trust account for any real estate broker for a period of five (5) years effective the earlier of the completion of the sale and transfer of all my shares in Schuster to Ludwig and 30 days from the date of the signing these Terms and Conditions.
 - n) For a period of five (5) years from the date of the signing of these Terms and Conditions, my registration cannot be transferred to another broker without prior written authorization from the Registrar, which authorization shall not be unreasonably withheld. Should the Registrar authorize the transfer of my registration, any new broker must acknowledge and agree in writing to these Terms and Conditions.
 - o) For a period of five (5) years from the date of the signing of these Terms and Conditions, I hereby agree to provide to the Registrar at my cost, a then-current Execution Certificate for myself with each application for registration or renewal application under the Act. If at the time of submitting such application I have any judgments or debts or other amounts remaining unpaid or outstanding, I hereby agree to provide to the Registrar statements from those execution creditors showing the outstanding balance and the history of payments made together with any other documentation the Registrar may require in relation to those judgments, debts or other amounts.
5. At no time shall I have any agreements, oral or written, express or implied, including without limitation, any hidden or side agreements, with any person or corporation which would in any way violate the spirit and intent of these Terms and Conditions.
6. I hereby acknowledge that if new or additional information comes to the attention of the Registrar related to my honesty, integrity, compliance with the law or financial responsibility, or if I breach any of these Terms and Conditions, the Registrar may take further administrative action, including a proposal to revoke my registration, based on the totality of the evidence of my past conduct and/or financial position, including the particulars set out in the proposal to refuse to renew registration dated April 5, 2000.
7. I hereby agree to voluntarily surrender my registration under the Act, if I, in the opinion of the Registrar, breach any of the Terms and Conditions consented to herein or any of the obligations and terms and conditions prescribed by the Act and its regulations.

8. If any of these Terms and Conditions shall be deemed invalid, unenforceable, illegal or a mutual mistake, such Term and Condition shall be severed and the remaining Terms and Conditions shall remain in full force and effect.
9. These Terms and Conditions are signed in conjunction with and take effect simultaneously with the Terms and Conditions to the registration of Schuster Realty Inc. as a broker under the Act.
10. I hereby acknowledge that I have read and understood these Terms and Conditions and that I have obtained or have had the opportunity to obtain independent legal advice with respect to my consent to the Terms and Conditions set out herein.

Dated at Windsor, this _____ day of August 2000.

WITNESS' SIGNATURE

KARL S. SCHUSTER
Registration No.:

WITNESS' NAME

ACKNOWLEDGED AND AGREED TO BY:

WITNESS' SIGNATURE

BROKER'S SIGNATURE

WITNESS' NAME

EMPLOYER'S NAME

IVKER

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
IGOR IVKER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 11th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

IGOR IVKER

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Igor Ivker, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 15th, 2000

REVISED

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Igor Ivker
227 Major Mackenzie Rd
Richmond Hill ON L4C 1M6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Igor Ivker, (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is criminally charged in the future, to immediately notify the Registrar, *Motor Vehicle Dealers Act*, in writing, of the charges laid against him.
2. The Applicant agrees, if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
3. The Applicant agrees if he is convicted under the Criminal Code, *Motor Vehicle Dealers Act*, or *Business Practices Act* or any industry specific offence, his registration is automatically revoked.
4. The Applicant agrees that his explanation of the circumstances of the convictions is substantially as set out in the Applicant's written disclosure submitted to the Registrar
5. The Applicant agrees that should the Registrar be provided with information that he has been acting as a salesperson and has been involved in the buying and selling of motor vehicles without benefit of registration, his registration will automatically be revoked.
6. The Applicant agrees not to invite the public to deal at a place other than the dealership he is registered to.
7. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer. Should he wish to transfer his registration, he shall submit a new application for registration to the Registrar.
8. If the Registrar has evidence that the Applicant has failed to make restitution with respect to his previous criminal convictions or if he is in arrears with respect to payment due to the Ministry of the Attorney General, he shall comply with a written request from the Registrar and make repayment arrangements.

9. The Applicant agrees to provide full and complete disclosure on all future applicants and discussions with the Registrar, regardless of whether the disclosure has been previously provided to the Registrar.
10. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
11. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
12. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. The Applicant hereby acknowledges he has provided a copy of this Order to his employer forthwith.
16. The Applicant agrees that he has read, or has had someone explain this order to him, and understands that a signature on this document is binding.
17. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

(Signature) Igor Ivker

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

SHERMAN

SAM SHERMAN

APPEAL FROM A DECISION OF THE COMPLAINTS
COMMITTEE OF THE BOARD OF FUNERAL SERVICES
UNDER THE *FUNERAL DIRECTORS AND ESTABLISHMENTS ACT*

TO REFUSE A REFERRAL TO THE DISCIPLINE COMMITTEE
OF THE BOARD OF FUNERAL SERVICES
IN THE MATTER OF CAROL SAUCIER

TRIBUNAL: DAVID J. HUNT, Vice Chair

APPEARANCES:

DANNY LESKIW, Agent, representing the Applicant
BERNIE LeBLANK, Counsel, representing the Registrar,
Board of Funeral Services
NICHOLAS C. TIBOLLO, Counsel, representing the Respondent

DATE OF
HEARING: August 30, 2000

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Decision of the Complaints Committee of the Board of Funeral Services dated March 1, 2000, under the *Funeral Directors and Establishments Act* (the "Act") that the conduct of Carol Saucier ("the Respondent") does not warrant referral to the Discipline Committee of the Board of Funeral Services.

BACKGROUND:

Mrs. Brenda Sherman (the "Deceased") died on July 23, 1999 and Steeles Memorial Chapel ("Steeles") was hired by Mr. Sam Sherman (the "Applicant") to provide funeral services. The initial contact with Steeles was made minutes after the death of the Deceased. Brian Waterman telephoned Steeles Memorial Chapel at the direction of the Applicant, and spoke to the Respondent to advise her that the Applicant would be coming to make funeral arrangements and that they already owned burial plots at Pardes Shalom Cemetery (the "Cemetery"). Shortly after this telephone call, the Respondent telephoned the Cemetery and advised them of the death of the Deceased as well as other information which is in dispute.

When the Applicant arrived with his family and friends, they were met by the Respondent who introduced them to Larisa Meerova (Meerova), a funeral director employed by Steeles and working under the direction of the Respondent. Arrangements for the funeral were made by the Applicant and Meerova while the other family members and friends were in the office. A contract was signed by the Applicant setting out prices together with terms, and exclusions. The funeral was held July 25, 1999 and the wrong grave was opened by the Cemetery. After discussions with the

staff at the Cemetery, the correct grave was opened, and the funeral was completed the same day. The Applicant withheld a part of the payment to Steeles and legal action was commenced to collect the debt.

The decision of the Complaints Committee of the Board of Funeral Services set out in a letter dated March 1, 2000 is as follows:

In accordance with subsection 14(2)(c) of the *Funeral Directors and Establishments Act*, the Complaints Committee believes that the conduct does not warrant a referral to the Discipline Committee and no other action will be taken.

The Complaints Committee is not in the position to make findings of credibility and cannot determine what actually transpired in light of the conflicting versions of events. However, a significant concern has been raised and the licensee would likely avoid future complaints of a similar nature if the licensee were to obtain the cemetery information from the consumer, confirm it in writing and then convey the information in writing to the cemetery. In acting as agent for the consumer, the funeral director has an obligation to facilitate the arrangements made with the cemetery.

The Applicant by letter dated April 4, 2000 requested a hearing by this Tribunal respecting the decision of the Complaints Committee. This Tribunal conducted a hearing on August 30, 2000. A summary of the evidence is set out below.

ISSUE:

The issue in this case is whether the Complaints Committee erred in finding that the conduct of the Respondent did not warrant a referral of the matter to the Discipline Committee.

THE LAW:

Section 1 of the *Funeral Directors and Establishments Act* states as follows;

"funeral director" means an individual who provides or directs the providing of funeral services;

"funeral services" means the care and preparation of dead human bodies and the coordination of rites and ceremonies with respect to dead human bodies, but does not include services provided by a cemetery or crematorium owner under the *Cemeteries Act*;

Section 14 of the Funeral Directors and Establishments Act (the 'Act'), states as follows;

(1) the Complaints Committee shall consider and investigate complaints regarding the conduct or actions of any licensee, but no action shall be taken by the Complaints Committee under subsection (2) unless;

(a) a written complaint has been filed with the Registrar and the licensee whose conduct or actions are being investigated has been notified of the complaint and given at least two weeks in which to submit in writing to the Committee any explanations or representations the licensee may wish to make concerning the matter; and

(b) the Committee has examined or has made every reasonable effort to examine all records and other documents relating to the complaint;

(2) The Complaints Committee in accordance with the information it receives may,

(a) consider all or part of the matter;

(b) direct that all or part of the matter be referred to the Discipline Committee; and

.....

(3) the complaints committee shall advise the Registrar in writing of the action it proposes to take or recommend and its reasons therefor.

.....

(6) the Registrar shall send to the complainant and to the person complained against by prepaid first-class mail a copy of the proposal of the Complaints Committee and its reasons therefor, if any, together with notice that informs the person to whom it is sent that the person is entitled to a hearing by the Tribunal if the person mails or delivers to the Registrar and to the Tribunal, within fifteen days after the notice is served on the person, notice in writing requiring a hearing and the person may so require such a hearing.

.....

(8) If the complainant or the person complained against requires a hearing, the Tribunal shall appoint a time for and hold a hearing.

(9) After holding a hearing, the Tribunal may by order direct the Complaints Committee to carry out the proposal or refrain from carrying out the proposal and to take such action as the Tribunal considers the Complaints Committee ought to take in accordance with this Act and the regulations and, for such purposes, the Tribunal may substitute its opinion for that of the Complaints Committee.

Section 16 of the Act states as follows;

(1) The Discipline Committee shall,

(a) when so directed by the Board, Executive Committee or Complaints Committee, hear and determine allegations of professional misconduct or incompetence against a funeral director;

.....

THE EVIDENCE:

WITNESSES FOR THE APPLICANT

Evidence was given by the Applicant, Mr. Sam Sherman who testified that his son-in-law Brian Waterman volunteered to telephone Steeles Memorial Chapel, at his request, to advise them of the death of the Deceased. After the family arrived at Steeles Memorial Chapel, they were introduced to Meerova who took them into an office to discuss the funeral arrangements. Approximately 10 people were in the office, and it became difficult to hear, so Meerova asked the Applicant to sit close enough to her that she could discuss the matter with him. He recalled telling her that he and the Deceased had prepaid plots at the cemetery, and that the Deceased's mother, Goldie Starr was buried there as well.

His evidence was that he did not remember the plot numbers, and did not bring the documents with him due to the upset caused by the death of his wife. He said that he did offer to return home and get the documents for her, but she advised him that she did not need them as she would take care of it. After that, the costs and payment for the funeral was discussed, and she explained that they had to pay the costs in advance for opening and closing the grave. A contract was presented to him, which he read and signed. He did not read it in great detail and did not give it to anyone else to read. She also asked him to phone her with the Social Insurance Number of the Deceased as she needed it for one of the forms. Mr. Leskiw, agent for the Applicant, asked him if he had authorized Mr. Waterman to make funeral arrangements, and he stated that he did not.

In cross-examination, the Applicant stated that he had asked Mr. Waterman to make the appointment for him at Steeles, and had not asked him to arrange the funeral. He neither overheard the telephone conversation between Mr. Waterman and the Respondent nor what was discussed. Mr. Sherman testified that his mother-in-law, Goldie Starr, had been buried approximately 10 years before at the cemetery, and he was not aware if Mr. Waterman knew she was there. On the issue of the burial plots, the Applicant stated that he told Meerova that they had pre-paid plots, and offered to go home to get the documentation. He testified that the notice to be printed in the newspaper was discussed during the meeting with Meerova, and he knew that the notice had been approved, but he did not remember exactly how. Upon reviewing the notice, he confirmed that there was no mention of Goldie Starr in it.

During cross-examination, Mr. Sherman was shown the contract with Steeles (Exhibit 4, F) the exclusions in paragraph 5 on page 2 were pointed out by counsel, specifically the final paragraph which stated that the Funeral Directors "shall not be responsible for the cemetery property locations, depth, or width of a grave." Again he was unsure if he had read it over carefully or understood it, as he was quite distressed at the time it was first given to him. In his opinion, it was necessary to sign the contract if he wanted to have the funeral take place.

On the date of the funeral (July 25, 1999), the wrong grave was opened. It was a very hot day; many people left due to the delay. He was unsure who sorted out the problem, but he remembered that his niece showed the cemetery staff where the proper plot was, after which it was opened, and the funeral proceeded. Mr. Sherman agreed that it was the cemetery who opened the wrong grave rather than Steeles.

The Applicant testified that after the funeral he withheld \$1000.00 from the payment to Steeles, and was seeking some type of compensation and an apology. He wrote a letter to Steeles, but he did not write to the cemetery as he had no contract with them, and in his opinion it was the funeral providers job to look after him. The Respondent did send a response to his letter; however, he could not recall what it said. Mr. Sherman testified that he did have contact with Mr. Spiesman who is the Managing Director of the cemetery, and was advised to complain to the Registrar of the Board of Funeral Services if he had a problem.

The next witness for the Applicant was Mr. Brian Waterman who testified that he is the son-in-law of the Applicant and the Deceased. His evidence was that he went to the hospital when his mother-in-law died, and telephoned her niece Richelle to advise her of the death. The witness stated that Richelle told him that the Deceased wanted to be buried beside her mother Goldie Starr.

At the hospital, Mr. Waterman volunteered to place the phone call to Steeles, and spoke to the Respondent. His evidence was that he advised the Respondent that Mrs. Brenda Sherman had died, the family was coming to Steeles to make the funeral arrangements, and he made it clear to her that the Deceased had wanted to be buried beside her mother Goldie Starr. He advised the Respondent that the family had pre-paid plots at the cemetery, and the Respondent told him that she would advise the cemetery. When they arrived at Steeles, the Respondent told them that Meerova would make the funeral arrangements with them, and they were taken into a meeting room. Meerova sat at a desk with the Applicant and the witness' wife facing her. His evidence was that he was close enough to hear most of what was said although it was noisy and there were distractions. He did remember them discussing the burial plots, and he testified that the Applicant offered to go home and get the documentation concerning the burial plots in order to provide correct information. In reply to this offer, Meerova said she would look after everything, and the Applicant did not need to go home for the documents.

At the conclusion of his evidence in chief, Mr. Waterman repeated that he was not authorized to make the funeral arrangements and simply made a phone call, in which he advised the Respondent that the family was coming, and the Deceased was to be buried beside her mother Goldie Starr.

In cross-examination, Mr. Waterman confirmed that when he placed the phone call to the Respondent there was no one with him. He again repeated that he told the Respondent that the Deceased was to be buried beside her mother and that the Applicant and the Deceased had pre-paid plots. Before that date, he had not visited the cemetery and was not aware of the pre-paid plots. He said that he specifically gave the Respondent the name of the hospital, the name of Sam Sherman, emphasized that the Deceased wanted to be buried beside Goldie Starr and did not specifically say that there were pre-paid plots. At Steeles he confirmed that he did hear most of the conversation with Meerova, but there was confusion as people were talking at once. Forms were filled out, the casket was purchased, the rabbi was arranged, and the newspaper notice was worked out. Although Mr. Sherman was consulting his daughter, neither the witness nor the Applicant's daughter reviewed the contract. Mr. Waterman was present for the funeral, but he was not aware that there was a funeral director, and thought the rabbi might be acting in that capacity.

The next witness for the Applicant was his son Mr. Robert Sherman. He testified that on July 23, 1999 he went to the hospital as his mother had died. It was, of course, a

traumatic event for him. He remembers that Mr. Waterman volunteered to call Steeles, and once the death was confirmed by the hospital, the family members and friends went to Steeles Memorial Chapel with the Applicant. As his father made the funeral arrangements, the witness sat by his side, and he remembers his father telling Meerova that they had a double plot and that his mother was to be buried beside Goldie Starr. His father then corrected himself and said there was a triple plot, and offered to go home to get the documentation with all of the particulars. Meerova told them it was not necessary, and asked for a payment in advance for the cemetery to cover the cost of opening and closing the grave. She said that the cemetery would not open the grave and be ready for the funeral without the payment. In cross-examination, he said that he did see his father sign the contract, and he did not read it himself that day.

WITNESSES FOR THE RESPONDENT

The Respondent, Carol Patricia Saucier testified and stated that she had been a licensed funeral director for 14 years, and was the Managing Director of the Steeles Memorial Chapel for 12 years. Her primary duties are to oversee the staff, oversee the funerals, and deal with the accounts receivable. There are 8 funeral directors working under her direction.

Ms. Saucier remembered receiving a telephone call from Mr. Waterman on July 23, 1999 at approximately 9:30 a.m.. He advised her that his mother-in-law had died at the Humber Memorial hospital. She stated that she asked him if there was a plot, and he confirmed that there was a double plot at Pardes Shalom Cemetery. When she asked if the spouse was interred in the other plot, she was advised that he was alive, and would be coming with the family to see her. The last issue dealt with according to the witness was the time for the funeral, and was it agreed that 1:00 p.m. on Sunday would be acceptable. This conversation lasted no longer than 5 minutes, and she prepared a "First Call Sheet" (Exhibit 8) on which she noted the information given to her. She then called the manager of the cemetery to advise him of the death, that there had been a double plot purchased, and that the husband was still living.

Two or three hours later, the family came to arrange the funeral, and Ms. Saucier introduced them to Meerova who is a licensed funeral director, and had been advised of the information given in the initial telephone conversation.

Ms. Saucier next dealt with Mr. Sherman on August 9, 1999 when he came in with a partial payment and told her that there was a problem at the cemetery. She advised him that Steeles had not been advised that there was a third plot, and she says she apologized to him. Her evidence is that this was the first time she had been told about Goldie Starr. She looked up her records and found that on December 7, 1998 Steeles Memorial Chapel had provided the funeral services for Goldie Starr. The Respondent testified that the Applicant had paid a deposit of approximately \$2,400.00 including the fee to the cemetery for opening the grave. When he came in August 9, 1999 he paid approximately \$2,800.00, and left a balance owing of \$1000.00. Her evidence was that he asked her to get the cemetery to come to some type of agreement, and she told him that the cemetery had already been paid. She explained to him that the cemetery did not look at their documents, and if she had been told about Goldie Starr it would have been recorded, and she would have taken out her file from storage. In her opinion, the funeral director had nothing to gain by not mentioning Goldie Starr if she had been given that information.

On the issue of the funeral service, the Respondent stated that the funeral director that day was Mr. Yeheil Ben Ayom who advised her that the wrong grave had been opened, and he was told by the cemetery staff that they would have to come back the next day. He refused to leave, and the Applicant's niece took them to the correct plot which was then opened and the service was completed. The Respondent contacted the cemetery office, and spoke to the Secretary who advised her that the Applicant and the Deceased had purchased plots and were given two copies of the deeds and were required to send one copy back to them. She questioned whether this could be correct as it seemed unusual to her that the cemetery would not keep a copy of the deed in their records and would rely on the customer to send one deed back. Ms. Saucier remembered the letter from Nelia Sherman (Exhibit 4 A) and confirmed that she sent the reply (Exhibit 4 B) in which she said that Mr. Waterman did not explain the situation of Goldie Starr or the third plot. She testified that the second paragraph of the letter was typed by Meerova.

In cross-examination, she was repeatedly asked if she knew that Mr. Waterman did not have authority to make funeral arrangements, and she replied that she was told by Mr. Waterman that he had been asked to call, by the husband of the Deceased. He was to advise her of the death, and arrange for the Applicant to come to Steeles Memorial Chapel to make the funeral arrangements. She was then asked why she called the cemetery if Mr. Waterman did not have authority to make the funeral arrangements. The Respondent repeated that Mr. Waterman did not make the funeral arrangements, and she simply called the cemetery to advise them that the Deceased had died. The cemetery needed to know who had died, and if there was a prior burial. When she was asked why she advised them it was a double plot, she said that it was the information she had, and she expected them to look up the name in the cemetery records as they would have the correct information. In her opinion, it was the responsibility of the cemetery to determine if the person did own the plot, and in 14 years she had never given a plot location or row to a cemetery. Her understanding was that the Pardes Shalom Cemetery does not sell more than two plots in a row, and she had been advised this was a double plot.

Under the standard contract as used in this case (Exhibit 4) the location of the plot is not the responsibility of the funeral home. Her specific recollection was that Mr. Waterman did not mention Goldie Starr. She was unaware of whether Meerova also telephoned the cemetery.

The last witness was Larisa Meerova who has been a licensed funeral director for 2 years and employed by Steeles Memorial Chapel since 1998. She confirmed that she met with the Applicant and approximately 10 other persons on July 23, 1999 after receiving information from the Respondent together with the First Call Sheet. Her evidence was that she took the basic information required for the Statement of Death (Exhibit 5 N) as well as the necessary information for the funeral itself. The obituary notice was written, a casket was selected, and a rabbi was chosen. She went over the contract with Mr. Sherman by explaining the financial arrangements, and having him read the terms and conditions on the second page.

Ms. Meerova's evidence concerning the burial plot was that Mr. Sam Sherman told her that it was a pre-paid double plot and that Goldie Starr was never mentioned. It was pointed out to her repeatedly that the mother was mentioned when information was taken for the Statement of Death, and at item 12 the Deceased's mother's and father's names are shown. (These names as shown on the exhibit are Nathan Starr, and Goldie

Shulman) she stated that she received the parents' names, but she was not told that the mother of the Deceased was dead. In her portion of the letter of August 19 1999 (Exhibit B) she agreed that she stated that the name of the Deceased's mother was not mentioned during the arrangements. She testified that the Respondent had told her that she had called the cemetery prior to the arrangements being made with the family, and that the family had a double plot, one space for the Deceased and one space reserved for Mr. Sherman. She denied that the third plot was mentioned, or that Mr. Sherman offered to go home and get the information; however, she said they do not give the plot numbers to the cemetery in any event. As far as she was concerned, she had provided what was needed, and it was the responsibility of the cemetery to look up the plot numbers.

The witness stated that she did ask for the Social Insurance Number of the Deceased, but they did not have it with them, and the Applicant did not call her back with it. She did not call him to get it as she said it was not important to the funeral home although there was a place for it on the Statement of Death.

The last issue was whether there was confusion at the time the information was taken due to the number of people talking. Ms. Meerova testified that she did ask people to lower their voices, but she was not confused while taking information, and simply asked for things to be repeated when necessary. In her view, the arrangement of the funeral is a matter for the whole family, and she did not ask people to leave.

At the completion of the evidence, the Agent for the Applicant sought to have Larisa Meerova added as a Respondent although she was not mentioned in the Decision of the Complaints Committee of the Board of Funeral Services (Exhibit 1) dated March 1, 2000. The Tribunal ruled that this matter had been settled by an Order released August 2, 2000 after a pre-hearing held on August 1, 2000 with both Counsel as well as the Agent for the Applicant in attendance. After considering the arguments made by all parties, the Tribunal ruled that it was bound by the Order, and refused the request to reopen the matter.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that the initial call to Steeles Memorial Chapel was made by Mr. Waterman at the request of the Applicant for the purpose of notifying Steeles that the Deceased had died, and providing initial information. During the conversation the Respondent filled in an intake form known as a 'First Call Sheet' with the information considered relevant. The part of the sheet entitled 'Additional Information' was filled in on or after August 9, 1999 and was not a memo made at the time of the call. The recollections of the Respondent are primarily the information recorded on the form, and the Tribunal finds the evidence of Mr. Waterman credible that he did mention Goldie Starr as well as his understanding that there was a pre-purchased double plot. This conversation took only a few minutes, and may have been difficult due to Mr. Waterman's understandably upset state.

The Respondent believed that Pardes Shalom Cemetery sold no more than two plots in a row, and disregarded any part of the conversation with Mr. Waterman where Goldie Starr was mentioned as it did not seem relevant in light of her prior knowledge. She telephoned the cemetery to put them on notice that there would be a funeral and depended upon them to make inquiries in their records to confirm that the Applicant and

Deceased actually did own a double plot so that the Deceased had the right to be buried there.

In due course a group of approximately 10 people made up of the Applicant, members of his family and close friends arrived at Steeles Memorial Chapel, and were met by the Respondent. She introduced them to Larisa Meerova who was a funeral director of 2 years experience employed by Steeles. Ms. Meerova had conversation primarily with the Applicant, and on some occasions there was some difficulty hearing due to the many conversations in the room and questions or answers had to be repeated. She satisfied herself that she had clearly obtained the necessary information and did not order the grieving family members and friends out of the room as she felt that they had a right to be part of the process.

Ms. Meerova presented a contract to the Applicant. Prior to signing it, he took the opportunity to read it and did not give it to anyone else for review. The Tribunal finds that Mr. Sherman did advise her of the pre-paid plots to the best of his knowledge, and did offer to go home and get the paperwork; however, Ms. Meerova advised him that it was not necessary, and that she would take care of it.

It was clearly Ms. Meerova's belief that it was not her responsibility to provide the plot locations to the Cemetery as they had their own reliable records, and it was up to them to look it up.

The Tribunal finds that for the purposes of the "Statement of Death", Ms. Meerova clearly was given the name of the mother as Goldie Shulman, and the name of the father as Nathan Starr as shown on the document. Her evidence that she was not given the name Goldie Starr is displaced by credible evidence that she did receive the name. The Tribunal does not find that she necessarily has a recollection of being told the name Goldie Starr and intentionally misrepresented that fact to the Tribunal. It is probable that she was told the name of Goldie Starr but soon forgot it because she did not consider it relevant or necessary information, given that she had been advised that there was a double plot and the remaining space was reserved for Mr. Sherman. Further, the Tribunal finds Ms. Meerova was not concerned about the Social Insurance Number as she considered it unimportant for the purposes of the funeral home.

The relevant subsequent events are that the funeral proceeded, the wrong plot was opened, the funeral director refused to leave until the mistake was corrected after a significant delay, Mr. Sherman withheld part of the final payment, and Steeles Memorial Chapel commenced an action to recover the balance owing.

APPLICATION OF LAW TO FACTS:

Under section 14(9) of the Act, after holding a hearing, the Tribunal may by order direct the Complaints Committee to carry out its proposal or refrain from doing so and to take such action as the Tribunal considers the Complaints Committee ought to take under the Act and Regulation and for such purpose the Tribunal may substitute its opinion for that of the Complaints Committee.

The Tribunal must consider whether the actions of the Respondent, and the procedures used by the Funeral Directors under her supervision require referral to the Discipline Committee or some other order of this Tribunal.

The Respondent did not provide the Cemetery with information about Goldie Starr and the location (number) of the plots to the cemetery although the Applicant made a specific offer to provide the information to the Respondent. The Respondent refused that offer, gave assurances to the Applicant that the Respondent would "take care of it". The Respondent assumed she could rely on the cemetery to retrieve the information from their own records. That assumption was wrong, and the wrong burial plot was opened for the internment. Also, the contract signed by the Applicant for the funeral services provided an exclusion of liability on the part of the Funeral Director as to the location of the burial plot at the cemetery.

It does not seem reasonable to believe that a cemetery would open a grave, and bury the deceased without confirming the entitlement of the person to be buried in that plot according to the cemetery's own records. If they do not have the responsibility to check their records, then there is the very real probability of an incorrect burial every time honest, though incorrect information is received by a Funeral Director. A grieving relative may not be able to find the plot number and may not even be sure of which cemetery the plot is in. In this case, the Funeral Director, Ms. Meerova specifically refused the offer of reliable information, and accepted responsibility, by telling the customer that she would "take care of it". Ms. Saucier is the Funeral Director for the purposes of the Act. Ms. Saucier, was the Managing Director of Steeles Memorial Chapel and as such she was responsible for the actions of Ms. Meerova.

There is an exclusionary clause in the contract whereby the funeral home is not responsible for the plot location, width, or depth. However, the Tribunal finds that in the particular circumstances of this case it does not apply. In this case, the Applicant specifically offered to obtain the documentation to provide an accurate plot number which offer was specifically refused by the Funeral Director. He was told that the funeral home would "take care of it" and relied on that assurance. The Funeral Director can not now rely on an exclusionary clause in the contract when they have specifically assumed the obligation and caused the Applicant to rely on their representation.

The Tribunal finds that the Complaints Committee erred, and the matter should be sent to the Discipline Committee of the Board of Funeral Services.

DECISION:

Therefore, by virtue of the authority vested in it under section 14(9) of the *Funeral Directors and Establishments Act*, the Tribunal finds that the conduct complained of does warrant a referral to the Discipline Committee of the Board of Funeral Services and directs that this matter be referred forthwith.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: September 21, 2000

MASOUD

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
MAGID MASOUD

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

MAGID MASOUD

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TOWN WOODS HOME LIMITED

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 23-25, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Wednesday, November 15, 2000, and to continue November 16 and 17, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 25, 2000

HYRSKI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
DAVID HYRSKI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DAVID HYRSKI

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

EMBI HOMES INC.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 25-27, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, October 2, 2000, and to continue October 3 and 4, 2000, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 25, 2000

MAYBEE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
KENNETH MAYBEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 28th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KENNETH MAYBEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 19, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Friday, November 3, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 25th, 2000

S & L AUTO RECYCLERS INC. AND MERVLYN SLATTERY AND STEVEN LENNOX

S & L AUTO RECYCLERS INC. AND MERVLYN SLATTERY AND STEVEN LENNOX

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATIONS

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES:

TIMOTHY C. HOGAN, Counsel, representing the Applicants
A. MITCHELL GOLDBLOOM, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: August 21, 2000 Toronto

ORDER

FOLLOWING attendances on August 21, 2000, before the Licence Appeal Tribunal of Timothy C. Hogan, Counsel for S & L Auto Recyclers Inc. and Mervlyn Slattery and Steven Lennox (the "Applicants") and Mitchell Goldbloom, Counsel, for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

WHEREAS at the hearing on August 21, 2000, the Tribunal was advised by counsel for both parties that they have agreed to settle with terms and conditions;

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe
Vice-Chair

Released: September 19, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: S&L Auto Recyclers Inc.
1815 Scanlan Street
London, ON, N6A 4C3

Mervlyn Slattery
129 Banbury
London, ON, N6A 4C3

Steve Lennox
823 Dalkeith Crescent
London, ON, N5X 1S5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, S&L Auto Recyclers Inc. (hereafter the "Dealer"), Mervlyn Slattery and Steve Lennox (collectively the "Salespeople") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- a. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act, including without limitation all bills of purchase and sale together with reconditioning records. Where applicable, said records will include the VIN# of any replacement parts installed in a vehicle. The Dealer further agrees to store his books and records at the registered location.
- b. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify his registered name and the address of the location approved by the Registrar.
- c. The Dealer agrees not to invite the public to deal at a place other than his approved location.
- d. The Dealer agrees to operate exclusively from its registered location. The Dealer agrees to apply for the Registrar's approval, by way of written notice, of any change in location in the form required by the Registrar.
- e. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
- f. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
- g. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller. The Dealer shall seek and record identification from the seller and shall confirm in writing that the seller has authority to sell the vehicle for the registered owner.

- h. The Dealer agrees to register all vehicles purchased within 6 days after receipt by the Dealer of the subject vehicle's permit in accordance with the Highway Traffic Act. The Dealer will further comply with the requirements of the Highway Traffic Act with respect to wrecked vehicles so as to ensure that the records of the Ministry of Transportation indicate wrecked status.
- i. The Dealer agrees to ensure that it has in its possession bills of sale or written agreements for any vehicles sold or to be sold on consignment.
- j. The Dealer shall provide written notice concerning any vehicle to be sold. Said notice must be received three (3) days prior to the sale and must include the VIN# of any replacement parts the Dealer installed or had installed in the vehicle.
- k. The Salespeople shall not obliterate or permit the obliteration of vehicle identification numbers on vehicles or replacement parts.
- l. The Dealer shall not obstruct and shall provide free access to all books and records to any OMVIC inspector authorized to obtain same under the Motor Vehicle Dealers Act, the Highway Traffic Act or these terms and conditions.
- m. These terms and conditions shall come into effect one (1) month after executed and do not apply to transactions which occurred prior to that date.
- n. In the event of a breach of a term and condition or if convicted under Criminal Code section 354 or 355, the Registrar is directed to and shall carry out the proposal to revoke the registrations of the Dealer and the Salespeople.
- o. Notwithstanding paragraph n above with respect to any breach of these terms and conditions, excluding the charges under the Criminal Code and free access to books and records, the Registrar will provide written notice via fax and mail to the Dealer and Counsel for the Dealer of the alleged breach and the Dealer shall be obligated to rectify the breach within five (5) business days. Failure to comply with this provision will result in a revocation in accordance with paragraph n above.
- p. The Dealer & Salespeople hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- q. The Dealer & Salespeople acknowledge that they have had or have had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out herein.
- r. These terms and condition shall apply to all parties for a period of 18 months, after which time they are no longer in effect.

(Signature) Mervlyn Slattery

(Signature) Steven Lennox

S & L Auto Recyclers Inc.

(Signature) Name: _____ I have authority to bind the Corporation

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

SANJARI

KHASHAYAR (KEVIN) SANJARI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

KHASHAYAR (KEVIN) SANJARI, representing himself
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
PHILIP GORDON, Counsel, representing the Added Party,
Royal Chapin Gardens Inc.

DATES OF
HEARING: September 11 & 12, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal from the decision of the Ontario New Home Warranty Program ("the Program") dated March 31, 2000, wherein the Applicant's claim for damages for a breach of the Vendor's warranty was disallowed. The claim was for a repair of the items claimed. As set out herein, the Tribunal found that there was no jurisdiction over two claims, and on the others there was no breach of warranty, defect in materials or workmanship and no breach of contract by the builder. Accordingly, the Applicant is not entitled to succeed in his claim against the Program for the reasons hereinafter set out.

THE FACTS:

It is not disputed by the parties that the home is a house built by the Vendor, and sold to the Applicant and his wife Nazila Darai with a closing date of December 19, 1997.

On November 30, 1998 the Applicant first wrote to the Program requesting help for a number of items. On November 9, 1999 a Conciliation meeting was held between the Applicant, Mr. Jim Fortune the representative for the Program and Mr. Charlie Spillane the representative of the builder. Until the spring of the year 2000, the builder continued to work on the home to try to resolve the outstanding issues with the Applicant, but at the time of this hearing, several issues remain unresolved.

The Program disputes the entitlement of the Applicant to relief under Section 13(1)(a)(i) and Section 14(1)(b) of the *Ontario New Home Warranties Plan Act* (the "Act").

WITNESSES FOR THE APPLICANT

The Applicant testified. He called no other witnesses. At the conclusion of this hearing, certain claims were abandoned by the Applicant and evidence about them has not been included in the summary of the Applicant's evidence.

Mr. Sanjari testified that the lock on the door between the garage and the interior of his residence never worked properly. He stated that he had reported this problem, but Mr. Fortune omitted it from the Decision Letter. Mr. Sanjari later referred to the problem in his letter of December 16, 1999 to the Program.(Ex. 3, Tab 22)

Mr. Sanjari gave evidence on the issue of squeaking stairs, which is item 10 of the Decision Letter. (Exhibit 1) It was noted as a problem in the report of his home inspector at numbers 38 and 56 which refers to a "loose step". (Exhibit 3, Tab 2) It was reported by the Applicant in the Conciliation Request Form at Exhibit 3, Tab 9, item 14 which refers to loose stairs. In the Conciliation Inspection Report dated November 30, 1999 at item 2, Mr. Fortune noted that it was covered under warranty as a defect in workmanship. However, the Decision Letter of March 31, 2000 (at item 10) denied the claim, and indicated that "at the time of the inspection there was a minor amount of noise". Efforts had been made to repair the squeaking stairs, but the Applicant was not satisfied with the repair.

Mr. Sanjari testified that the ceramic tile in the kitchen was uneven and was noted to be uneven in his home inspector's report. Mr. Sanjari observed that some of the tiles were installed higher than others, leading to the uneven surface. When he put a level on the floor, he found that it was not even. He made no measurement of the height differences between the tiles.

Mr. Sanjari testified that he paid \$50 with his Conciliation request and should have received his money back because some of the issues were warrantied. He stated that he did not receive his money back although it was acknowledged in a letter that this should have been sent to him, and he testified that this was another error by the Program.

The next item referred to by Mr. Sanjari was the repair to the sliding door respecting the proper completion with insulation. This matter was not part of the Decision Letter as it was apparently repaired after the Conciliation. However, the evidence of the witness was that the insulation was not re-installed after the problem of water leakage was solved.

Mr. Sanjari testified that there was a problem with the lawn. He claimed that the sod had dried out before it was put down, that the grass was not very even, and that there was a bald patch approximately one foot square.

Mr. Sanjari stated that there was a noticeable defect under the bay window where there were two circular marks caused by nails. They had been painted over five or six times, but the marks were still visible. Mr. Sanjari disagreed with the Decision Letter which stated that the defect was due to knots in the wood and well within industry standards.

The Applicant also stated that there were ridges in the drywall. When he put a level over it, he could rock it to show that it was not even. He said that Mr. Fortune did not want to look at the problem and refused to use the level.

The next item was the wood trim. Mr. Sanjari explained that one of the window sills looked as if someone had dropped something heavy on it, but it had been simply painted over.

In cross-examination, Mr. Sanjari testified that he was the manager for an investigations company. He did not have background in construction. He agreed that he did get legal advice throughout the process of the purchase, had received further advice from the home inspector, and had called the Program on many occasions. When questioned about the Predelivery Inspection, he stated that many items were not completed at the time of the inspection, and he simply signed off on the ones beside which he had put a check mark. He was told that many things would be done later, and the builder continued to do things after he moved in. Mr. Sanjari agreed that he made no complaint to the Program until his letter of November 30, 1998, and asserted that it was his right to do this as he had a full one year period to make his complaint.

It was suggested to Mr. Sanjari that on November 9, 1999 when the Conciliation took place, certain items were removed from the list as still outstanding. He agreed that this was done, but said that Mr. Fortune had missed some items such as the late closing claim which was not put into the Decision Letter. He also disagreed that he consented to the matter of the garage door lock being removed from the items still at issue.

On the issue of the stairs, Mr. Sanjari testified that on April 17, 2000 the builder made another repair, but he did not see what was done as he had to go to work. He was therefore unaware of exactly what repair was carried out, and when he tried to rely on the home inspector's report it was pointed out to him that this document was dated November 21, 1998 and predated the repairs.

In the matter of the ceramic tiles, Mr. Sanjari testified that he was aware that approximately six tiles were replaced by a contractor hired by the builder. He was unaware of whether the tiles had rounded edges, but did know that the surface of the tiles was rough. When he was specifically asked if the variation in surface height was no more than 1/8 of an inch, his evidence was that he did not know and was relying on the inspector's report which said they were uneven and on his own observations.

Mr. Sanjari disagreed that the area under the patio door had been insulated and taped. He agreed that the water leak had been repaired, but maintained his position that the builder has left it open to see if it would leak again.

When the Applicant was asked about the issue of the sod, he stated that he did not know if the grading was approved by the municipality. He testified that at the time of the Conciliation, there was one bald area at the front of the house, and said it was a defect in workmanship or materials. When it was pointed out to him in the Agreement of Purchase and Sale (Exhibit 3, Tab 1, p. 3 item K.) that once the sod was down and the transaction closed, the homeowner who responsible to water and maintain the sod, he repeated his position that there was a defect.

On the issue of the marks under the bay window, he agreed that the spots are the size of dimes, but stated that one did not have to be too close to see it, and it is in a place that is seen when anyone approaches the house. He said that it had been re-painted repeatedly. He agreed that the repairs had been made after the date of the report by his home inspector.

The Applicant was asked if the ridges in the drywall were only visible in a certain light and at certain angles. He said that he could see the ridges and used the level to prove that the drywall was not even. He did not directly answer the question, and stated that the home inspector's report is proof, and that Mr. Fortune refused to see it.

With regard to the surface defect on the sill of the bay window, he testified that he did not think that the mark had been filled, sanded, and painted. In his opinion, it had only been painted. He agreed that the work was done after the inspector's report.

WITNESSES FOR THE PROGRAM

Mr. Jim Fortune and Mr. Charlie Spillane testified for the Program. Their testimony included reference to matters which were withdrawn by the Applicant at the end of the hearing, and reference to these matters has been deleted from this summary of the evidence as it is not relevant to the issues still before this Tribunal.

Mr. Jim Fortune testified that he is the Warranty Representative who dealt with the file on behalf of the Program. Mr. Fortune has been a Warranty Representative for nine years, spent two years as a client service representative. Before his employment by the Program was a building inspector in the town of Tottenham and was the chief building inspector for the Township of Adjula.

He testified that on November 9, 1999 he attended at the Applicant's home for the Conciliation and sat discussed matters with the Applicant and Mr. Spillane as the representative of the builder. At this time, he explained the process and tried to clarify the issues as set out in the three requests for Conciliation. Each item was reviewed, and a check mark was put beside those which had been repaired, and an X was put beside those which remained unresolved. The issue of the gap under the sliding door was marked with both a check mark and an X as the gap had been repaired, but there was still an issue of water seepage. A check mark was placed beside the garage door lock, and it was the understanding of the witness that this matter was resolved. As a result, no inspection of it was made, and it did not form part of the Decision Letter.

The witness testified that he found one loose stair that was squeaking, which he listed as a warrantable item. Since that date, he did not inspect the stair again, and was advised by the builder that a repair had been done. Mr. Fortune observed the ceramic tiles in the kitchen, and was informed that a repair had been carried out. He testified that the tiles were a rough, unglazed type of tile which naturally had an uneven surface. Even though some tiles were a little higher than others, he testified that they were acceptable and within industry standards so there was no defect in workmanship or materials.

On the issue of the refund of the \$50 Conciliation fee, he testified that the money should have been returned to the Applicant, and had given a commitment to return the cheque or money order. As far as he knew, the money had not been returned.

Mr. Fortune testified that he did not confirm if the insulation had been put back under the sliding door after the repair was made but agreed that it would be the obligation of the builder to restore the insulation and vapor barrier if it had not yet been done. Mr. Fortune testified that on the day of the inspection, the grass was uneven but not sparse, was green, and was growing well. He did not observe any bald spots, and when he

returned to view the exterior of the premises on September 8, 2000 the grass appeared to be in good condition, and he did not observe any bald spots. The witness testified that when he inspected the front of the house for the Conciliation, he observed a surface imperfection on the painted wood trim under the bay window. He described it as a small circular mark in the wood, approximately the size of a dime, which was visible upon close inspection, and not visible from the road. In his opinion, this was not a warranted item as it was well within the standards for building materials, and was not a defect in materials or workmanship. He believed that it was caused by the normal leakage of sap from a knot in the plywood used.

The witness testified that he also examined the drywall to look for the ridges described by the Applicant. He explained that when a home is constructed, drywall is butted together, and the joints are taped with a compound applied over the taped areas causing there to be a different texture from the surface of the drywall. The result is an area which can be noticed if viewed from certain angles, and under certain light conditions. In his opinion, it was not appropriate to test for ridges by applying a level to the area to see if it could be rocked. He explained that any area on a drywall surface would produce this effect if the level was placed over a wooden stud. Mr. Fortune inspected the walls and ceilings by visually examining them based on his experience. Any wall had imperfections, but in his opinion the walls and ceilings in the Applicant's home were acceptable. There was one room in the upstairs of the home that he did not enter, but he assumed that the Applicant would have taken him into it, if there was a problem with the wall or ceiling.

The last issue Fortune dealt with was the claim by the Applicant that there was poor finishing of the wood trim. He observed the window sill in question, but he did not find it to be below the standards of the industry and therefore found that it was not warranted under the Act.

In cross-examination, he testified that he did not think that he missed anything, and agreed that there was a different number of items in the Decision Letter than in the Conciliation. He explained that the issue of the delayed closing claim was not in the Conciliation Report, but was added to the Decision Letter as it was reported beyond the required time period, and it was better to deal with it then, rather than send it through the usual process to be turned down later for the same reason.

Mr. Fortune agreed that he had informed the Applicant that he was entitled to his \$50.00 back and had sent a letter saying that it would be returned. When he was questioned about the squeaking stairs, he agreed that in his evidence in chief he had referred to the squeaking at time of the inspection for the Conciliation report as a minor noise. It was pointed out to him in the Conciliation Report, he had described it as 'excessive'. He also confirmed that he been advised by the builder that the problem had been fixed. When he was asked about the lock on the garage door to the dwelling, he testified that he did not remember being told about it, and did not go to the garage to inspect it. On the issue of the defect on the wood under the bay window, he explained that you had to stand very close to see such minor deficiencies, and said that any piece of wood trim is going to have a small sap leak such as this. In his opinion, this was not a defect that would be covered by a warranty.

Mr. Charlie Spillane was called on behalf of the added party. He has been the Service Manager for FRAM Building Group since May 10, 1999. Prior to that he worked as a Defect Technician for different builders in the Toronto area, and is a certified home

inspector. He has been very active in the professional organization of home inspectors, producing training materials and is the After Sale Service Chairman of the Metro Toronto Home Builders Association. He outlined the history of the home beginning with the pre-delivery inspection on February 18, 1997, the closing of the transaction on February 19, 1997, the Pre-Delivery Inspection being signed off on April 1, 1998, and a period after April when no complaints were received until December 11, 1998 when notice was sent of deficiencies. After this there was a series of meetings with the homeowner, and repairs of various items until March 2000. Mr. Spillane stated that during this time, a number of items were dealt with as a goodwill gesture even though they were not considered to be the subject of a warranty, and he provided a list.

Mr. Spillane testified that the lock on the garage door leading to the house had been repaired and the matter was withdrawn at the Conciliation meeting. He testified that the squeaking stair had been fixed, and explained that different methods of repair are used depending on the cause of the squeak. After the Conciliation meeting on Monday April 17, 2000, a renovator was hired who removed drywall, re-secured the stair stringers, carried out repairs, and replaced the drywall. The first repair would probably have been to apply hot glue and screw down the stair in the affected area. In his opinion, there was no evidence of an abnormal squeak during his visit to the home on May 14, 2000. He testified that wooden stairs always suffer some amount of deflection and produce some noises. The witness testified that he was involved in repairs to the ceramic tile to try to satisfy the Applicant that the floor was even and level. Matching tiles were found, and approximately 10 new tiles were installed. In the opinion of Mr. Spillane, the color match was good and the floor was sufficiently even.

On the issue of the insulation under the sliding patio door, Mr. Spillane stated that he inspected it on March 14, 2000 and it had been properly reinstalled.

Mr. Spillane testified that two repairs were carried out on the mark in the wood under the bay window. In his opinion there were two knots in the wood which were bleeding sap, and causing a minor discolouration. This was a common occurrence with spruce and pine plywood and is a minor defect which is within the industry standards. Two attempts were made to fix it to try to satisfy the customer. The first time the area was sanded, primed, and painted. When this did not satisfy the Applicant, the area was sanded, a coat of shellac was applied, it was primed, and painted.

Mr. Spillane observed the condition of the lawn. He testified that the sod had been put down before August 11, 1998, the grading was approved by the consulting engineer after installation of the sod, and in his opinion it appeared to be perfect the last time he saw it.

Mr. Spillane said that he observed the mark in the pine window sill, and that it had been repaired by being filled, sanded, and repainted.

Mr. Spillane testified that the drywall was not defective, and that any of the normal problems caused by shrinkage and drying had been dealt with at a year-end drywall inspection, at which time problems are repaired.

In cross-examination, Mr. Spillane testified that he had taken courses involving defect recognition which were a prerequisite to being certified as a home inspector by their professional organization. He stated that he was the service manager for the entire company, and was not present when each repair was carried out but tried to ensure that

repairs were done in a timely fashion. When he was questioned about the "goodwill repairs", he said that many of the items done went beyond the warranty and were above the standard required in the industry.

Mr. Spillane testified that he was advised of the problem with the sliding patio door when he got the Conciliation Request. He stated that there was a water leak only after 10 minutes of spraying the outside portion of the bottom of the door with a garden hose, and he recommended repairs be done which eventually lead to the replacement of the door frame. When he was asked about the attempts to fix the stairs properly, he testified that in his opinion the stairs had been fixed properly, but multiple attempts were required as the Applicant expected the stairs to be silent. If the Applicant wanted a staircase without squeaks, it would be necessary that either steel or concrete stairs be installed. He also disagreed with Mr. Fortune's description in the Conciliation Report of the squeaking from the one stair as being excessive. He agreed that the builder guaranteed to repair defects for one year, but he did not consider this a defect.

Mr. Spillane gave his opinion that many of the comments in the home inspector's report provided by Applicant showed that standards were being applied which were above industry standards.

During Mr. Spillane's cross-examination, questions were asked about work which was done unrelated to matters in the Decision Letter, the allegation of an unauthorized entry of the Applicant's home by a contractor and the return of the house key to the Applicant. These issues are beyond the jurisdiction of this Tribunal and not dealt with in this decision.

FACTS FOUND PROVEN:

At the Conciliation with Mr. Fortune, the Applicant and Mr. Spillane, certain issues were removed as they were already settled. The Tribunal accepts the evidence of Mr. Fortune that he did not inspect the lock on the garage door to the interior of the home, and that a check mark was put beside item 16 (the garage door lock) indicating that it was no longer an issue. Mr. Spillane also recalled that the issue had been withdrawn. Although the Applicant testified that he did not withdraw this item, the recollections of Mr. Spillane and Mr. Fortune are consistent with the documentary evidence indicating that it was withdrawn. There was no evidence that Mr. Fortune was taken to see the lock during the inspection, although this would be expected to have occurred if it was still an issue. The item was therefore not part of the inspection, and did not form part of the Decision Letter.

The Tribunal finds that at the time Mr. Fortune inspected the home, he found the squeaking of the stair to be excessive and a defect in workmanship covered by Warranty. Since that date, repairs have been carried out and no further inspection has been done by Mr. Fortune. The report of the home inspector produced by the Applicant predates the repairs and does not reflect the current condition. Mr. Spillane has testified that he has been in the house since the most current repairs, and finds that the stair does not produce more noise than is common and acceptable for a set of wooden stairs, and that the normal type of repair has been carried out by the builder and by a private contractor hired for that purpose. The Applicant has testified that in his opinion the stair still squeaks more than it should, but he is not able to compare this with acceptable standards within the industry.

The Tribunal finds that the ceramic tile on the kitchen floor are unglazed and with a rough textured surface. This surface is described by the Applicant as uneven, and is also described as uneven in the report from his home inspector. There is no evidence from the Applicant as to what the difference in height is from one tile to another, and he was unable to say whether the tiles had rounded edges or not. Repairs were carried out, and some tile were replaced. Mr. Fortune gave the only estimate of the height difference in the tiles and testified that with tiles of this nature they would not be absolutely even. In his opinion, the installation was within industry standards.

The Tribunal has evidence from all witnesses that the tiles are uneven but no evidence that it is beyond the industry standard for that type of tile.

There is no dispute by the Program that the Applicant is entitled to the return of his \$50.00 payment as the Conciliation did find some items subject to warranty. Although it is clear that the Program intended to refund this money there is no evidence that this was completed, and the only direct evidence is from the Applicant who gave credible evidence that it was not returned to him.

The Tribunal finds that the builder replaced the door frame for the sliding door and was obliged to replace the insulation and vapor barrier. There is testimony from the Applicant that he has not seen that this was done; however, it is not clear what steps he has taken to examine the area or whether he would recognize the completed repair. Mr. Spillane has testified that he has inspected the repair, and that the insulation and vapor barrier were installed.

The Tribunal finds that there are two small discoloured areas in the wooden panel below the bay window at the front of the house. Each area is found to be approximately the size of a dime. There have been two attempts to repair, and the discolouration has reappeared. In the opinion of the Applicant this is a defect which must be repaired, and in the opinions of Mr. Fortune and Mr. Spillane this discolouration is caused by the bleeding of sap from a knot in the plywood which is a common occurrence when spruce or pine plywood sheets are used in construction. There is evidence that the area has been sanded, shellac has been applied, and it has been primed and repainted. This defect is found to be a common feature of the material used, is not visible except upon close inspection, and is minor in nature.

There is evidence that the Applicant has seen ridges in the drywall and that when a level is put across the ridge and pushed on either end, a sound can be produced proving that the middle is higher than the ends. The Tribunal finds that these ridges are not visible at all times and must be detected by the use of the level, or be viewed from a particular angle under certain lighting conditions. They are consistent with the description by Mr. Fortune that they are the areas where drywall has been butted together, taped and a compound applied thereby increasing the height of the area. The Tribunal finds that these areas with drywall joined are not obvious to the untrained eye and are sufficiently minor that they must be confirmed by the use of the level over the taped and slightly raised area as described.

The Tribunal finds that there is the small mark in the window sill of the bay window at the southeast corner of the living room. This is a surface defect caused by contact with some object at some time on a soft wood, and it has been repaired by the builder.

The Applicant was not at home to observe how all repairs were carried out, and there is evidence from Mr. Spillane that the area was filled, sanded and repainted. There is found to be a small visible mark on the window sill.

The Tribunal finds that the sod was put down on the Applicant's property after a heat wave and was uneven and dry in some areas. There is evidence that at the time of the Conciliation, it had recovered and was green and growing although still uneven, and the Tribunal finds that at the present time there is, at worst, only a bald area of no more than one square foot.

ISSUES:

The issue in this case is whether this Tribunal has jurisdiction over matters not included in the Program's Decision Letter, and on matters over which this Tribunal has jurisdiction, had the Applicant met the burden of proof and proven that his claims are under the Act.

APPLICABLE LAW:

Section 1 of the *Ontario New Home Warranties Plan Act* states:

"home means",

- (a) a self-contained one-family dwelling, detached or attached to one or more others by a common wall,
- (b) a building composed of one or more than one and not more than two self-contained, one family dwellings under one ownership,
- (c) a condominium dwelling unit, including the common elements, or
.....

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

Section 13 of the Act states:

- (1) Every vendor of a home warrants to the owner,
 - (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in materials,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free from major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in materials, design, and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;

(g) alterations, deletions or additions made by the owner;

(h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;

(i) damage resulting from an act of God;

(j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;

(k) damage caused by municipal services or other utilities;

(l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 of the *Ontario New Home Warranties Plan Act* states:

- (1) Where,
 - (a) a person who has entered into a contract with the vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract.
 - (b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or
 - (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.
- (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.
- (3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

Regulation 892, of Section 1 of the *Ontario New Home Warranties Plan Act* states:

"major structural defect" means, for the purposes of clause 13 (1)(b) of the Act, any defect in work or materials,

- (a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
- (b) that materially and adversely affects the use of such building for the purpose for which it was intended,

including significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners, and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Section 16 of the *Ontario New Home Warranties Plan Act* states:

(1) Where the Corporation makes a decision under section 14, it shall serve notice of the decision, together with written reasons therefor, on the person or owner affected.

.....

(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold hearing and may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to have taken in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

Regulation 892, of Section 4 of the *Ontario New Home Warranties Plan Act* states:

(1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

.....

Regulation 892, of Section 6 of the *Ontario New Home Warranties Plan Act* states:

.....

(3) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to the owner out of the guarantee fund in respect of a claim made after August 1, 1989 under clause 14(1)(b) or (c) of the Act is \$100,000.00.

.....

CASE LAW:

Re: ONG (1995) O.C.R.A.T.D. No. 103 (October 2, 1995)

In this matter before the Tribunal, the Applicant made a claim for a defect in workmanship, compensation resulting from a delayed closing and a sum of money provided for as a penalty payable under the Agreement of Purchase and Sale in the event that the builder failed to meet certain deadlines. Although the Tribunal found that the builder was responsible for the payment of the penalty based on the delay, the Tribunal had no jurisdiction over a claim for damages for the breach of a contract which was not a breach of the warranty provided for in section 13 (1) of the Act.

Re: BALDASSARRE (1998) O.C.R.A.T.D. No. 83

In this matter before the Tribunal, the Applicant raised six issues in which he alleged there were defects in workmanship and materials. An architect was called as a witness by the Applicant who pointed out various problems but was vague about the cause of the problem. The Tribunal found that where it was not possible to determine if the defects were caused by shrinkage of materials or poor workmanship it could not find that there was the sustainable claim against the Program as the Applicant had not met the onus to prove his case. The evidentiary test set out on page 6 was that:

"for the Applicant to succeed in this matter, he must prove on a balance of probabilities that there has been a breach of warranty or warranties by the vendor and if he has accordingly suffered damages. This is in terms of s. 14 (1) of the Act."

Re: SOPORITA (1999) O.C.R.A.T.D. No. 166

In this matter before the Tribunal, there were numerous claims made by the Applicant of defects in workmanship and materials. Two Decision Letters had been rendered, only one had been appealed, and the time for an appeal had expired. The Tribunal found that it did not have jurisdiction over the issues in the Decision Letter that had not been appealed. Most of the complaints by the Applicants had been resolved, but there were a few outstanding, and the Tribunal found that the Applicants were seeking unrealistic standards of perfection that were not reasonable. Perfection was not a reasonable expectation for a standard home, and allowances had to be made for minor imperfections. The defects which existed in the home were found to be of a minor nature and the claim was denied.

Re: BREEN (1999) O.C.R.A.T.D No. 86

In this matter before the Tribunal, the Applicant claimed that there were major structural defects together with other defects in workmanship and materials. There was also the issue of claims for matters not included in the Decision Letter. Attempts were made by the builder to remedy the defects which did exist, but these did not meet with the approval of the Applicants. The Tribunal found that it did not have jurisdiction over matters which were not contained in the Decision Letter. Further, the Tribunal found that the Applicants had not provided proof that the repairs did not meet acceptable industry standards so there was no evidence of a defect in workmanship or materials and thereby no breach of the warranty.

Re: CHEWERDA (1997) O.C.R.A.T.D No. 49

In this matter before the Tribunal, the Applicant had made a claim for a breach of warranty, and there was the issue of whether they had filed their claim in time. The Applicants were one day late in filing their claim, and Tribunal found that it did not have power to waive the time requirement in the Act and there was no procedure for an extension to be given. The Tribunal found it had no authority to remedy the situation for the Applicant by giving an extension of time for filing the claim.

APPLICATION OF LAW TO FACTS:

The Tribunal finds that it has no jurisdiction to deal with the matter of the garage door lock as it was not covered in the Decision Letter. This Tribunal has authority to substitute its decision for that of the Registrar, but in this case no decision was made by the Registrar.

The Tribunal can not substitute its decision for one which does not exist, and therefore is without jurisdiction to make an order.

The second jurisdictional issue is whether the Tribunal has power to order the reimbursement of the \$50.00 Conciliation fee. In this case there was no doubt that the Applicant is entitled to receive the money; however, the Tribunal has no jurisdiction to make an order where there has not been a breach of a warranty under section 13 (1) of the Act. There is no authority in the Act for the order requested by the Applicant, and the Tribunal finds that it has no jurisdiction to make such an order.

The Tribunal finds that repairs have been carried out to the squeaking stair but that it is not to the satisfaction of the Applicant. Mr. Spillane has experience in construction and testified that the problem has been rectified so that the stair is within the reasonable standard for a wooden staircase. The builder warrants that the home is free of defects in the workmanship and materials. However, the standard is not perfection and some allowance must be made for minor imperfections especially with materials which are subject to shrinkage. There is no evidence before the Tribunal that the squeaking noises produced by the stairs exceed acceptable limits and the Applicant has failed to meet the onus of proof upon him, and the Tribunal dismisses this claim.

The Tribunal has found that the ceramic tile floor in the kitchen is not absolutely even. However, there is no proof that it exceeds the tolerable limits for a rough textured and unglazed tile. Although the Applicant states that the tiles are uneven, he has no measurements or photographs to show the extent of it. The only evidence before the Tribunal of the acceptable tolerance within the industry is from Mr. Fortune and Mr. Spillane who testified that it is of a minor nature and within the standard to the industry. In the circumstances, the Applicant has failed to satisfy the onus of proof on him, and the Tribunal dismisses this claim.

The Tribunal has found that the builder did replace the insulation under the sliding door, and that claim is dismissed.

The Tribunal has found that the discolourations under the bay window are of a minor nature and are caused by the bleeding of sap from a knot or knots in the wood which is found to be a common property of the materials used. The Tribunal, therefore, finds that this is not a defect that is covered by a warranty under the Act.

The Tribunal has found that the ridges on the drywall are caused by the normal process of taping. They are not readily apparent to the eye except under certain conditions. There is evidence that they meet industry standards, and the Applicant has failed to meet the onus of proof to show that they are defects subject to a warranty, and the Tribunal dismisses this claim.

The Tribunal has found that the mark on the window sill is of a minor nature, is consistent with the federal property of the building material, and has been repaired. This small mark is found not to be a defect of workmanship or materials covered by warranty, and the Tribunal dismisses this claim.

The Tribunal has found that there is no more than a one foot square bald patch on the Applicant's lawn. This is found to be of a minor nature and consistent with the normal wear and tear on a residential lawn and as such is not a defect in workmanship or materials covered by warranty and the Tribunal dismisses this claim.

DECISION:

Therefore, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act* the Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow the Applicant's claims.

LICENCE APPEAL TRIBUNAL

DAVID J. HUNT
Vice-Chair

Released: September 25, 2000

0195/ADLS/00/017

En vertu de l'article 50.1 du *Code de la route*, L.R.O. de 1990, chap. H.8 tel que modifié, interjette appel d'une décision rendue par le registrateur des véhicules automobiles conformément à l'alinéa 48.3 (2) du *Code de la route*;

L'APPEL CONCERNE UNE SUSPENSION ADMINISTRATIVE DE PERMIS DE CONDUIRE POUR UNE PÉRIODE DE 90 JOURS.

TRIBUNAL: ANTOINE AOUAD, D.M., Président de l'audience

PRÉSENTS: KYLE BIEL, Représentant du registrateur des véhicules automobiles

Requérant
Non représenté

DATE DE
L'AUDIENCE: le 13 septembre 2000

MOTIFS DE LA DÉCISION

Une audience a été tenue le 13 septembre 2000, à Toronto (Ontario), pour entendre l'appel interjeté par le requérant en vertu de l'article 50.1 du *Code de la route*, L.R.O. de 1990, chap. H.8 modifié. Le Tribunal rend la décision suivante et présentera ses motifs à une date ultérieure.

LE TRIBUNAL CONFIRME la suspension imposée par le registrateur aux termes du paragraphe 48.3 du *Code de la route*.

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Antoine Aouad, D.M.
Président de l'audience

FAIT LE: *le 14 septembre 2000*

0195/ADLS/00/017

En vertu de l'article 50.1 du *Code de la route*, L.R.O. de 1990, chap. H.8 tel que modifié, interjette appel d'une décision rendue par le registrateur des véhicules automobiles conformément à l'alinéa 48.3 (2) du *Code de la route*;

L'APPEL CONCERNE UNE SUSPENSION ADMINISTRATIVE DE PERMIS DE CONDUIRE POUR UNE PÉRIODE DE 90 JOURS.

TRIBUNAL : ANTOINE AOUAD, D.M.,
Président de l'audience

PRÉSENTS : KYLE M. BIEL
Représentant du Registrateur des véhicules automobiles

Requérant
Non représenté

DATE DE
L'AUDIENCE : le 13 septembre 2000

DATE DE
LA DÉCISION : le 14 septembre 2000

MOTIFS DE LA DÉCISION

Une audience a été tenue le 13 septembre 2000, à Toronto (Ontario), pour entendre l'appel interjeté par le Requérant en vertu de l'article 50.1 du *Code de la route*, L.R.O. de 1990, chap. H.8 modifié.

Le Tribunal a rendu sa décision le 14 septembre 2000 et présentera ses motifs à une date ultérieure.

LE TRIBUNAL A CONFIRMÉ la suspension imposée par le Registrateur aux termes du paragraphe 48.3 du *Code de la route* pour les motifs suivants.

MOTIFS

RENSEIGNEMENTS GÉNÉRAUX

AVIS D'APPEL ET DROITS PRESCRITS

Le présent appel est déposé auprès du Tribunal par voie d'avis d'appel au nom du Requérant, en vertu du paragraphe 50.1 du *Code de la route*, L.R.O. de 1990, chapitre H.8, tel que modifié. Le Requérant a opté pour que le Tribunal résolve l'appel par voie d'audience électronique (téléconférence). L'avis d'appel déposé en vertu du paragraphe 50.1 du *Code de la route* et daté du 8 août 2000 est parvenu au Tribunal le 15 août 2000, accompagné d'un mandat de 100 \$ couvrant les droits prescrits.

MOTIF DE L'APPEL

Le Requérant invoque le motif suivant dans l'avis susmentionné :

"Il m'était impossible, pour des raisons médicales, de fournir l'échantillon d'haleine/de sang demandé."

QUESTIONS PRÉLIMINAIRES

Le Répondant soumis des copies certifiées des documents du fichier ainsi qu'une version anglaise de l'Affidavit de l'agent de police #1 et du rapport du Médecin #1.

PRÉSENTATION DE DOCUMENTS ÉCRITS

par le Requérant

- a) pièce N^o 1 Avis d'appel daté du 8 août 2000
- b) pièce N^o 2 Soumissions écrites du Requérant datées du 22 juillet 2000
- c) pièce N^o 3 Renseignements médicaux du Requérant, reçus le 28 juillet 2000

par le Répondant

- a) pièce N^o 4 Soumissions du ministère des Transports, reçues le 6 septembre 2000

LITIGE

Compte tenu du fait que le présent appel relève de l'alinéa 50.1 (2) b) du *Code de la route* et, de ce fait, du Tribunal, voici la question à résoudre: est-ce que le Requérant a omis ou refusé de se conformer à un ordre de fournir un échantillon d'haleine/de sang parce qu'il en était incapable pour des raisons médicales?

LA LOI

Les dispositions des paragraphes 50.1 (1) et (2) du *Code de la route*, qui régissent la suspension administrative de permis de conduire, prévoient ce qui suit:

50.1 (1) La personne dont le permis de conduire est suspendu en vertu de l'article 48.3 peut interjeter appel de la suspension devant le Tribunal.

(2) Les seuls motifs pour lesquels une personne peut interjeter appel en vertu du paragraphe (1) et les seuls motifs pour lesquels le Tribunal peut ordonner l'annulation de la suspension sont les suivants :

- a) soit la personne dont le permis a été suspendu n'est pas la même que celle à qui a été donné un ordre de fournir un échantillon d'haleine ou de sang, ou sur qui un tel échantillon a été prélevé, selon le cas, en vertu des dispositions du *Code criminel* (Canada) visées au paragraphe 48.3 (3) ou conformément à celles-ci;
- b) soit la personne ne s'est pas conformée à un ordre donné en vertu de l'article 254 du *Code criminel* (Canada) de fournir un échantillon d'haleine ou de sang, ou a refusé de le faire, pour des raisons médicales.

Le *Code de la route* énonce ce qui suit au paragraphe 50.1 (4):

Le Tribunal peut confirmer la suspension ou ordonner son annulation.

Les paragraphes 15 (1), (2) et (3) du règlement 574 (modifié) du *Code de la route*, exigent qu'un rapport médical contienne :

- 15.(1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,
- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
 - (b) the name, date of birth and address of the person who is the subject of the report;
 - (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
 - (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Enfin, l'article 13 du règlement 574 (modifié) prévoit ce qui suit :

A person appealing a suspension has the onus of establishing the merit of the appeal.

LES FAITS

Durant l'audience, le Requéant réitère les déclarations faites dans ses remarques écrites et adressées au Tribunal.

Il atteste, en outre, qu'il a compris la demande faite pour qu'il fournisse un échantillon de son haleine. Il refuse puisqu'il croit qu'il ne pourra pas le faire à cause de la condition de ses poumons qu'il a acquise lorsqu'il travaillait comme mineur. Il paraît qu'il a perdu la majorité de ses poumons.

Lorsqu'on lui demande directement, durant l'audience, s'il a refusé de fournir un échantillon de son haleine, le Requéant réplique: "*Oui, j'ai refusé*".

Le Répondant compte sur l'information écrite fournie pour l'audience.

APPLICATION DE LA LOI AUX FAITS

À la fin, il importe d'établir le rapprochement entre la condition médicale du Requéant et la définition du paragraphe 50.1(2) (b), et si c'est pour cette raison qu'il a échoué et n'a pu fournir un échantillon d'haleine. Le Requéant a la responsabilité de fournir au Tribunal une raison médicale expliquant pourquoi il lui a été impossible de fournir l'échantillon d'haleine demandé.

Le paragraphe 48.3 du *Code de la route* définit le critère de la suspension du permis du conducteur:

(1) Si un agent de police est convaincu que la personne qui conduit le véhicule automobile ou qui en a la garde, la charge ou le contrôle répond à l'un des critères énoncés au paragraphe (3)...

2. La personne n'a pas fourni un échantillon d'haleine ou de sang à la suite d'un ordre donné en vertu de l'article 254 du *Code criminel* (Canada) ou refusé de le faire.

Le Requérant a du avoir plusieurs raisons pour ne pas pouvoir fournir un échantillon d'haleine, certaines pourraient être médicales. Pourtant, les faits sont claires et simples étant donné qu'il a admis avoir refusé de fournir un échantillon d'haleine. Le Tribunal considère que le Requérant ne rencontre pas le critère du paragraphe 50.1 (2) (b) qui lui demande de prouver que son échec à fournir un échantillon d'haleine est dû à des raisons médicales.

DÉCISION

Suite à la requête du requérant interjetant appel d'une décision rendue par le Registrateur des véhicules automobiles conformément à l'alinéa 48.3 (2) du *Code de la route*; et après avoir examiné les preuves déposées auprès du Tribunal ainsi que les observations du Registrateur et du Requérant;

Conformément au pouvoir qui lui est conféré aux termes du paragraphe 50.1 (4) du *Code de la route*, le Tribunal confirme la suspension.

TRIBUNAL D'APPEL EN MATIÈRE DE PERMIS

Antoine Aouad, D.M.
Président de l'audience

FAIT LE: *le 21 septembre 2000*

0206/ADLS/00/018

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: KENNETH KOPROWSKI
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
Representative for the Applicant
(by written submissions)

DATE OF
HEARING: September 12, 2000 Fort Frances

DECISION

A hearing was held on September 12, 2000, at Fort Frances, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski
Presiding Member

RELEASED: September 13, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: KENNETH W. KOPROWSKI
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
Representative for the Applicant
(by written submissions)

DATE OF
HEARING: September 12, 2000

DECISION
RELEASED: September 13, 2000 Fort Frances

REASONS FOR DECISION

A hearing was held on September 12, at Fort Frances, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on September 13, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated August 15, 2000, and was received by the Tribunal on August 21, 2000, together with the prescribed fee of \$100.00.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Applicant's Appeal Book - 6 parts

By the Respondent:

- a) Exhibit # 2 Written Argument of Respondent

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to

provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15.(1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

On reading the Affidavit of Senior Constable #1, it is confirmed that this incident took place on August 10, 2000. Constable #1 is a member of the Ontario Provincial Police,

Port Credit Detachment, and has been a police officer for 17 years. He is trained in the use of the Approved Screening Device (Alcotest).

While working the RIDE programme that night on westbound Queen Elizabeth Way to northbound Dixie Road in Mississauga, Ontario, Constable #1 stopped a vehicle driven by the Applicant at about 11:00 p.m.

The Constable asked the Applicant if he had had any alcoholic beverages to drink that night, and the Applicant answered that he had. The Constable asked the Applicant to provide a breath sample into an Approved Screening Device, and the Applicant agreed to do this.

To this point in our scenario, the above facts are agreed upon by both Constable #1, by way of his Affidavit, and by the Applicant, by way of his "Statement of Facts", being part 4 of Exhibit 1.

However, from the time that the Applicant agreed to provide a breath sample, the versions of the next sequence of events, as related by the Constable and by the Applicant, vary greatly.

First of all, Constable #1, in his Affidavit, states that, when the Applicant rolled down the window of his car to allow the Constable to speak to him, the Constable immediately smelled a strong smell of an alcoholic beverage from the interior of the motor vehicle. The Constable then smelled alcohol on the Applicant's breath. He observed the Applicant's eyes to be red and glassy, but his speech was not slurred.

On the other hand, the Applicant said, in his material, that he had had a single rye and soda to drink earlier that evening at supper. He had filed a copy of a restaurant receipt to confirm this. The receipt was timed-stamped at 10:23 p.m. on August 10, 2000. The Applicant states that he had not consumed any further alcohol or food during that evening.

Secondly, Constable #1, in his Affidavit, states that, after he had demonstrated to the Applicant how to use the Approved Screening Device (Alcotest), the Applicant was given 12 opportunities to provide a proper sample of his breath. However, no reading could be recorded. The Constable states that, at various times during these attempts, the Applicant would start and stop blowing instead of blowing continuously, despite the Constable's advice to blow continuously; the Applicant was not making a tight seal around the mouthpiece, and was blowing spit and breath onto the Constable's hand; and, on one attempt, the Constable states that the Applicant started to suck, not blow, on the mouthpiece.

The Constable allowed the Applicant to blow two more times (bringing the total attempts to 14), with no greater success in obtaining a reading.

Feeling that the Applicant was not making an honest effort to provide a breath sample, Constable #1 charged the Applicant with refusing to provide a breath sample, and served him with a 90-day suspension.

For his part, the Applicant states, in part 4 of exhibit 1, that he attempted to provide a breath sample, but he could not make the machine work. He states that he has been a diabetic for the past 14 years. He also stated that he is overweight.

In support of his Appeal, the Applicant had filed, as part 5 of Exhibit 1, a letter dated August 16, 2000, from Physician # 1, who has been the Applicant's family physician since November, 1973. Although the doctor does not state the frequency with which he has attended upon the Applicant, nor the date of his most recent examination of the Applicant (as required by section 15 of Regulation 574, as amended), he does state that a pulmonary function test was performed on the Applicant on August 16, 2000, some six days after the Applicant had been stopped by Constable #1.

Physician #1 states that one Physician #2 interpreted the test results. We are not told who Physician #2 is. We are not told how these results, on August 16, relate to the Applicant's condition six days earlier, on August 10, the day that he had been stopped.

In any event, Physician #1 writes that the test result revealed that the Applicant had only 60% of normal lung capacity, which improved to 65% after administration of a bronchodilator. Physician #1 concluded that these results would make it difficult for the Applicant to master up enough expiratory volume for a forceful exhalation.

In response to Physician #1's report, the Respondent has filed two reports from medical specialists who examined the letter of August 16, 2000, from Physician #1.

One report, dated August 24, 2000, is from Dr. Roger S. Goldstein. He is a consultant respirologist in practice since 1979, with a particular interest in chronic respiratory conditions such as asthma, emphysema, and chronic bronchitis. He is the Director of the University of Toronto Respiratory Divisional programme in Rehabilitation, and has been medical advisor to the pulmonary function laboratories for over 16 years. He is familiar with the Alcotest and Intoxilyzer 5000c units.

The second report, dated August 30, 2000, is from Dr. Eva S. Mate. Dr. Mate, of St. Michael's Hospital in Toronto, is a Respiratory Medicine consultant with a practice since 1982. Dr. Mate has had extensive experience in the management of chronic respiratory illness such as chronic obstructive lung disease and asthma. Also, Dr. Mate is aware of the breath sampling criteria required to provide acceptable information using an Intoxilyzer 5000c and Alcotest machine.

It was the Alcotest unit that Constable #1 had presented to the Applicant.

Having reviewed the information in this Appeal, including the report of August 16, 2000, from Physician #1, Dr. Mate concludes that the inability of the Applicant to provide a breath sample was due to inadequate effort on his part, rather than to the presence of underlying restrictive lung disease.

Similarly, having reviewed the report of Physician #1, Dr. Goldstein states that, even with a vital capacity of 60%, Applicant would be able to provide a satisfactory breath sample for analysis.

Since both Dr. Mate and Dr. Goldstein state that they are familiar with the Alcotest unit, and since they had reviewed both the Applicant's Statement of Facts and the report of Physician #1, I place great weight on their conclusions.

It is also noteworthy that, during the 14 attempts that the Applicant made to blow into the screening device, not once did he advise the Constable of any restriction or inability

to blow into the unit, nor did he exhibit any physical signs that would evidence an inability to blow properly into the unit.

APPLICATION OF THE LAW TO FACTS:

Upon reviewing all the evidence, this Tribunal is now required to determine whether the Applicant was unable to provide the required breath sample because of a medical reason.

I have examined carefully the Statement of Facts filed by the Applicant, and the report of Physician #1 dated August 16, 2000. I have also reviewed closely the Affidavit of Constable #1 and the reports of Dr. Goldstein and of Dr. Mate.

Having reviewed all the material in this Appeal, I have no hesitation in concluding that the Applicant has not satisfied the onus of establishing the merit of this Appeal. The observations of Constable #1, and the conclusions of Dr. Goldstein and of Dr. Mate leave me with the inescapable conclusion that there was no medical reason that the Applicant could not provide a sample of his breath.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated August 10, 2000, of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Kenneth Koprowski
Presiding Member

RELEASED: September 18, 2000

GENERAL MOTORS ACCEPTANCE CORPORATION

GENERAL MOTORS ACCEPTANCE CORPORATION

IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, c.H.8 as amended, section 50.2;

AND IN THE MATTER of a motion by General
Motors Acceptance Corporation seeking an
extension of the time requirements for this
Applicant to commence this appeal from an
impoundment order of the Registrar under
section 55.1 of the *Highway Traffic Act*;

AND IN THE MATTER of

GENERAL MOTORS ACCEPTANCE CORPORATION

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

RICHARD A PRENDIVILLE,
Solicitor for the Applicant by teleconference call

DATE OF
MOTION: September 22, 2000

ORDER

A motion was heard by teleconference on September 22, 2000, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

Submissions of Written Material

Applicant through its Solicitors submitted the following documents:

1. Copy of Impound Order dated June 23, 2000 relating to the impoundment of the motor vehicle for 180 days. (Exhibit # 1)
2. Original Notice of Appeal dated August 21, 2000 received by the Tribunal on August 28, 2000. (Exhibit # 2)
3. Statement of the Applicant's position under the heading "Summarization of Owner's Position". (Exhibit # 3)

The Facts

The following facts are the agreed facts.

1. The Applicant is the owner of a 1999 Pontiac Sunfire SE coupe, plate number ABKK 053 (the "vehicle").
2. The vehicle was impounded on June 23, 2000 for a period of 180 days pursuant to an order of the Registrar issued under section 55.1 of the *Highway Traffic Act* R.S.O. 1990, c.H.8 as amended (the "Act").
3. The vehicle at the time of its impoundment was being driven by William P. Kovacs.
4. The vehicle was leased by the Applicant to Kovacs under an agreement of lease.
5. Kovacs' driver's licence was under suspension at the time of the vehicle's impoundment.
6. By notice dated June 23, 2000, the Registrar of Motor Vehicles sent the Order to Impound the vehicle to the Applicant at 3250 Bloor Street West, Suite 800, Toronto, M8X 2Y5.
7. The Applicant sent to the Tribunal a written notice of appeal to the impoundment order, which notice of appeal was dated August 21, 2000 and was received by the Tribunal on August 28, 2000.
8. The notice of appeal by the Applicant was not filed with the Tribunal as required by section 20(1) of Regulation 632/98 under the *Highway Traffic Act*, within 15 days of the issuance of the order to impound.
9. "The Pound", to where the impounded vehicle had been taken, advised Kovacs about a week after impoundment that the vehicle could be "picked up" on August 7, 2000 but on August 4, 2000 advised Kovacs that the vehicle was to remain impounded until December 20, 2000.

10. By letter, dated June 23, 2000, the Licensing and Control Branch, Driver Improvement Office wrote a letter to Kovacs advising that the motor vehicle had been impounded for a period of 180 days. The address to which that letter was addressed was 175 Hoffman Street, Unit 1, Kitchener, Ontario, N2M 3N2. Kovacs no longer resided at that address.

The Law

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Board under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Board within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Board may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,

- (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
- (b) give the directions that it considers proper as a result of extending the time.

The Order

THE BOARD RULED TO REFUSE TO GRANT an extension of the time to commence this appeal for the reasons that follow.

REASONS FOR ORDER

Pursuant to section 20(1) of Regulation 632/98, the Applicant's Notice of Appeal should have been filed with the Tribunal within 15 days of the issuance of the order to impound the motor vehicle. The date of the issuance of the order to impound was June 23, 2000 and the notice of appeal to the Tribunal should accordingly have been filed by July 12, 2000. The notice of appeal was in fact filed with the Tribunal on August 28, 2000 a significantly longer period than permitted by the Regulations. Section 20(1) of Regulation 632/98 is clear and unambiguous. It states that the filing of notice of appeal with the Tribunal shall be within 15 days of the issuance of the impound order.

In support of the Applicant's motion, Kovacs has filed with the Tribunal the following statement:

"When I had my car Impounded on June 23, I called the Pound a week later to confirm when the car could be released and how much it would cost. I was told that the car had to stay for 45 days, and that I could only pick it up on Monday August 07, 2000. So on Friday, August 04, when I called to make a final confirmation about picking my car up on the 7th, they told me that the date was no longer the 7th. They told me that my car had to stay in the Pound until Wednesday, December 20, meaning my car was impounded for 180 days, and not the 45 days that I was told by the pound before. Had I been told about the 180 days by the pound when I first asked them, I would have done the Appeal process within the 15 days."

Section 20(7) of Regulation 632/98 gives the Board power to extend the time for commencing an appeal provided the Applicant establishes that "the owner, acting in good faith was unable through accident, illness or other cause beyond the owner's control to bring the appeal within the 15 days". Accident and sickness have no application in this matter. "Other cause beyond the owner's control" may apply depending on the circumstances.

Apart from section 20(7) of the above quoted regulation, section 7 of the *Licence Appeal Tribunal Act, 1999* gives the Tribunal the power to grant an extension if it is of the opinion there are reasonable grounds for applying for an extension and granting relief to the Applicant.

The onus of proof that there are reasonable grounds for the granting of an extension falls upon the Applicant. The Tribunal accepts that, initially, "the Pound" informed Kovacs that the vehicle's release would occur on August 7, 2000. This information came from the Ministry of Transport's own official(s) and Kovacs was entitled to rely on the correctness of this information. The information however proved to be incorrect, and the Tribunal finds that the Applicant, acting on such information, was prejudiced in filing an appeal within the prescribed period of 15 days from June 23, 2000, the date of issuance of the impound order. On the basis of the Ministry's official or officials giving Kovacs incorrect information and Kovacs relying on such misinformation to his detriment, the Tribunal, pursuant to section 7 of the *Licence Appeal Tribunal Act, 1999*, finds the Applicant had a reasonable ground for not filing its appeal within the prescribed period of 15 days of June 23, 2000.

However, Kovacs on his own statement states that had he been told of the vehicle being impounded for 180 days "I could have done the appeal process within the 15 days". Kovacs knew of the 180 days impoundment on August 4, 2000 and should therefore have filed his appeal by August 19, 2000. He did not do so. He, in fact, filed his appeal on August 28, 2000. No explanation or reason has been placed before this Tribunal as to why the appeal was not filed by August 19, 2000 and no reasonable grounds have been shown to exist for the granting of an extension.

Accordingly, the Tribunal refuses the Applicant's motion for an extension of time to appeal the impoundment order of the Registrar regarding the vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: September 26, 2000

PREHEARING

LINDA OHRSTROM-COELHO

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT* R.S.O.
1990, Chapter R. 4 as amended

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

KEN KAKOULLIS, Agent, representing the Applicant
GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF

PRE-HEARING: September 25, 2000

Toronto

ORDER

FOLLOWING attendances on September 25, 2000 at a prehearing before this Tribunal of Ken Kakoullis, Agent on behalf of Linda Ohrstrom-Coelho (the "Applicant"), and George P. Drametu, Counsel on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on November 14, 2000, and thereafter, if necessary, to continue at 9:30 a.m. on November 15, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario;

1. The parties to the hearing are the Applicant and the Registrar.
2. The issues to be dealt with at the hearing are contained in the Proposal of the Registrar.
3. The Applicant admits that:
 - (a) the judgment against the Applicant in favour of Canada Trustco Mortgage Company referred to in the Registrar's Book of Documents has not been paid by the Applicant as to the principal sum of such judgment, as well as costs and accrued interest.
 - (b) Davhill Investments obtained a judgment against the Applicant in 1996 in the sum of \$2,286.00.

(c) in January 1998, she was tried and convicted of the crime of fraud over \$5,000.00 and that pursuant to such conviction she was put on probation for a period of three years and was required to pay restitution of \$15,000.00.

(d) she has been charged with breach of the above probation order.

4. The Applicant intends to call 5 witnesses to testify at the hearing and the Registrar intends to call 2 witnesses to testify on his behalf.
5. Disclosure of documentation has been made by both the Applicant and the Registrar.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: September 26, 2000

GIRLATO

PREHEARING

IDA AND GIORGIO GIRLATO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ELIO BELLON, Agent, representing the Applicants
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
ANDY MINATEL, Agent, representing Tri-Valley Development
Corporation, Added Party

DATE OF

PRE-HEARING: September 25, 2000

Toronto

ORDER

FOLLOWING attendances on September 25, 2000 at a prehearing before this Tribunal of Elio Bellon, Agent on behalf of Ida and Giorgio Giralto (the "Applicants"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Andy Minatel, Agent on behalf of Tri-Valley Development Corporation (the "Added Party");

The Tribunal makes the following Order:

1. At the prehearing the above matter was settled by agreement of the Applicants and the Added Party.
2. The terms of settlement are:
 - (a) the Added Party shall pay to the Applicants by no later than October 2, 2000 the sum of \$5,000.00 in full and final settlement of all eleven issues referred to in the Program's decision letter of May 24, 2000.
 - (b) the Applicants accept the payment of \$5,000.00 from the Added Party in full and final settlement of all eleven issues referred to in the Program's decision letter of May 24, 2000.
 - (c) upon receipt of payment by the Applicants of \$5,000.00 from the Added Party they shall have no further claim or claims against the Added Party

or the Program in respect of all or any of the eleven issues referred to in the Program's decision letter of May 24, 2000 and they shall withdraw their appeal in this matter to the Tribunal.

- (d) upon the Applicants receiving a cheque for \$5,000.00 from the Added Party in respect of this settlement they shall jointly execute and hand to the Added Party a full and final release of both the Added Party and the Program.
- (e) upon receipt of the aforementioned release, the Added Party, shall immediately forward a true copy thereof to the Program who shall immediately advise the Tribunal of such receipt.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: September 26, 2000

BABES

GEORGE BABES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: F. BRUCE FITZPATRICK, Vice-Chair

APPEARANCES: DOUGLAS GOSBEE, Counsel, representing the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF HEARING: SEPTEMBER 18, 2000 TORONTO

ORDER

WHEREAS, George Babes (the "Applicant") appealed to the Licence Appeal Tribunal from a Notice of Proposal dated June 22, 2000 to refuse registration issued by the Registrar, *Motor Vehicle Dealers Act*;

AND WHEREAS, the appeal was due to be heard in Toronto on September 18, 2000;

AND WHEREAS, at the commencement of the hearing on September 18, 2000, the parties advised the Tribunal that they have drafted proposed Terms and Conditions;

AND WHEREAS, both parties requested an adjournment of the hearing to finalize the Terms and Conditions of the Applicant;

NOW THEREFORE this Tribunal Orders:

- 1) Should this matter not be settled the hearing is set for Wednesday, October 25, 2000, at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario. The parties however, undertake to advise the Tribunal in writing, as soon as a settlement is concluded.

LICENCE APPEAL TRIBUNAL

F. Bruce Fitzpatrick
Vice-Chair

Released: September 26, 2000

ORAV TRAVEL INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
ORAV TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 15, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ORAV TRAVEL INC.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

ADJOURNMENT

WHEREAS the Licence Appeal Tribunal appointed a time and place for a hearing in the above matter on September 28, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Wednesday, October 11, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 27th, 2000

McFEE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
ANGUS McFEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: August 23rd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ANGUS McFEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Angus McFee, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 26th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Angus McFee
342 Floud's Bridge Road
RR #1
Frankford ON K0K 2C0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Angus McFee (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar, MVDA.
2. The Applicant agrees to provide the Registrar with a clean copy of his Bankruptcy Discharge Papers.
3. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership for a period of two years.
4. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
5. The Applicant agrees to make full payment or make an arrangement for payment of any and all outstanding judgements or debts.
6. The Applicant acknowledges that his registration will not prevent the Registrar, MVDA from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
7. The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar, MVDA from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
8. The Applicant agrees that he has 60 days to enrol into and successfully complete the OMVIC certification course and that all fees associated are the responsibility of the Applicant.
9. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
10. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

11. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar, MVDA is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.
12. The Applicant agrees to give a copy of this Order to his employer forthwith.
13. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of 2000.

(Signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

PREHEARING

DANNY'S PLACE SUPPORT SERVICES a.k.a. ONYEKA VENTURES

APPEAL FROM A PROPOSAL OF THE DIRECTOR,
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TRIBUNAL : ROBERT ADAMS, Presiding member

APPEARANCES:

LISA STICHT, Counsel, representing Duke Oliogu and Danny's Place Support Services a.k.a. Onyeka Ventures
KATHARINE RENISAN and ANNA RAIMONDO, Counsel,
representing the Ministry of Community and Social Services

DATE OF THE
PRE-HEARING:

September 6, 2000

Toronto

ORDER

WHEREAS, Mr. Duke Oliogu representing Danny's Place Support Services a.k.a. Onyeka Ventures by letter dated July 13, 2000 requested a hearing before the Licence Appeal Tribunal pursuant to the provisions of Section 197, the *Child and Family Services Act*, (the Act), R.S.O. 190 Chapter 11 as amended. The Applicant appealed the proposal of the Director, under the *Child and Family Services Act*, dated July 4, 2000 to Refuse to Renew the licence of the Danny's Place Support Services Group Home under Section 195 and Section 196 of the *Child and Family Services Act*.

AND WHEREAS, a pre-hearing was held between the parties on September 6, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, as set forth in the Tribunal's Notice of Pre-hearing Conference dated July 4, 2000.

AND WHEREAS, the parties on consent agreed to adjourn the matter until December 11, 12, 13, 14, 2000, based on the terms set out in Schedule 1 attached here to.

The Tribunal on consent of the parties orders that:

1. The hearing scheduled for October 2, 3 and 4, 2000 in this matter is adjourned to be heard by this Tribunal commencing at 9:30 a.m. on December 11, 2000 and to continue on December 12, 13 and 14, 2000, if required;

2. During this period of adjournment, the parties will comply with the attached terms set out in Schedule 1 and with Schedules A, B, and C.

LICENCE APPEAL TRIBUNAL

Robert Adams,
Presiding Member

RELEASED: September 26, 2000

Schedule 1

IN THE MATTER OF AN APPEAL UNDER THE CHILD AND FAMILY SERVICES ACT

By Onyeka Ventures (Danny's Place) from a Notice of Intention by the Director to refuse to renew the licence to provide residential care for 6 children at Danny's Place:

Upon the consent of the Applicant and the Director and subject to the conditions contained in clause 4 hereof:

1. The hearing of this appeal is adjourned from October 2, 3, 4 to December 11, 12, 13, 14, 2000;
2. The licence will be deemed to continue until the decision of the Tribunal is rendered or this appeal is withdrawn;
3. The Ministry of Community and Social Services will continue to monitor the licensee regularly and will conduct a licencing inspection by November 17, 2000;
4. The conditions with which the licensee must comply are:
 - a) Subject to approval of the Director, by September 30, 2000, licensee must hire a supervisor whose responsibilities will include those set out in Schedule "A" hereto. The Ministry will provide the operator with a letter confirming when this condition is met.
 - b) All items of non-compliance cited in Schedule B being "Summary of Child and Family Services Act Requirements and Recommendations" dated June 29, 2000, and Schedule C "Notice of Intention" must be remedied to the satisfaction of the Director, by the 25th day of September, 2000;
 - c) The operator must hold training sessions every two weeks with trainers from an agency outside Onyeka Ventures and send minutes therefrom to the Ministry and the operator must send a proposed training schedule to the Program Advisor by September 25, 2000.
 - d) The operator must make best effort to establish a mentoring relationship with an experienced operator.

September 6, 2000

" _____ "
Robert Adams

" _____ "
Duke Oliogu, Applicant

" _____ "
Bonnie Corey, Director

RAHAL

ABRAHEEM RAHAL

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair
SHEENA MACASKILL, Vice-Chair

APPEARANCES: AMEDEO DICARLO, Counsel representing the Applicant
AVIVA R. HARARI, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: August 25, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Abraheem Rahal (the "Applicant") to the Licence Appeal Tribunal from a Notice of Proposal dated February 15, 2000, issued by the Registrar of the Motor Vehicle Dealers Act ("the Act") to refuse registration as a salesperson.

The Proposal is based upon subsection 5(1) of the Act. The Registrar argues that the past conduct of the Applicant affords reasonable grounds for the belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty, and that, having regard to the financial position of the Applicant, the Applicant cannot reasonably be expected to be financially responsible in the conduct of business.

FACTS:

Mr. Rahal, the Applicant, was born on October 23, 1966. He was previously registered as a salesperson under the Act from September 1990 to October 1997, at which time his registration lapsed and was not renewed. Since 1997, Mr. Rahal has been either self-employed or has worked for his brother in an eyeglass business.

In June, 1992 Mr. Rahal and Reza Pourazar incorporated a business known as Connect Trade Auto Sales Ltd. The name of this corporation was subsequently changed to Cars Connect Trade Ltd. According to a corporate search (Ex. 5, Tab 11), Reza Pourazar ceased to be a director in September 1992. Mr. Rahal stated that his name should have been removed as director in 1992 and that the removal of Reza Pourazar's name was an error. Mr. Rahal also stated that he was unaware, until these proceedings, that the corporation was still active and that he continues to be the sole director of Cars Connect Trade Ltd. This evidence is inconsistent with Ex. 5, Tabs 15 and 18 which are applications for the corporation filed in 1993 and 1995 showing the Applicant as a

director/owner of Cars Connect Trade Ltd. The corporation's registration under the Act was terminated in April, 1997.

Mr. Rahal stressed that he has no intention of applying to become a registered motor vehicle dealer; he only wants to work as a registered salesperson.

THE ISSUE:

The issue before the Tribunal is whether the evidence affords reasonable grounds for the Registrar's belief, and , as a result, whether the Registrar's proposal should be carried out.

THE LAW:

Section 5 of the Motor Vehicle Dealers Act (the "Act"), states as follows;

Section 5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

Section 6 of the Motor Vehicle Dealers Act (the "Act"), states as follows;

Section 6(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

Section 6(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 7 of the Motor Vehicle Dealers Act (the "Act"), states as follows;

Section 7(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the Registrar shall serve notice of the proposal, together with written reasons therefor, on the applicant or registrant.

Section 7(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice

under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal, and the applicant or registrant may so require a hearing.

Section 7(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection (1).

Section 7(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

.....

THE EVIDENCE:

i) Financial Position of the Applicant

Amanda LeeDempsey, Manager of Inspections with the Ontario Motor Vehicle Industry Council ("OMVIC") gave evidence on behalf of the Registrar.

The Registrar listed concern regarding the Applicant's financial responsibility as a ground for refusing to register him as a motor vehicle salesperson.

Ms. Dempsey stated that the Registrar based his conclusion that the Applicant could not be reasonably expected to be financially responsible in the conduct of his business on the following evidence:

- a) the fact that Mr. Rahal was bankrupt in 1989 and did not disclose this information on previous applications;
- b) the outstanding criminal restitution order and civil judgment in favour of the Toronto Dominion Bank;
- c) a debt to the Ministry of Finance in the amount of \$33,348.62 against Cars Connect Trade Ltd. for failure to remit retail sales tax during the time that the Applicant was an officer and director of the corporation which was of particular concern to the Registrar because these monies are paid by the consumer to be held in trust by the vendor with the expectation that the funds will be appropriately remitted to the government; and
- d) the fact that the Applicant lied on an application to obtain credit from the Toronto Dominion Bank.

Mr. Rahal testified on his own behalf.

Mr. Rahal testified that he filed for bankruptcy in 1989 when he was unable to close a real estate transaction for the purchase of property in East Gwillumbury for 1.7 million

dollars. Two months later he was able to close the deal and thus believed that the bankruptcy application had been withdrawn. Mr. Rahal stated that he did not realize that he was a discharged bankrupt until 1996 when he applied for credit. He states that this is why he answered in the negative in 1990, 1993 and 1995 to the question of whether he had ever been involved in bankruptcy proceedings. Mr. Rahal also stated that he never received the discharge documentation from the Trustee in Bankruptcy.

On cross-examination, Mr. Rahal stated that he had a lot of experience with credit bureaus and considered himself to be a "wise businessman" and an "expert in financing". Accordingly, the Tribunal finds it difficult to believe that the Applicant was unaware of his own bankruptcy.

Mr. Rahal stated that he was aware of Cars Connect Trade Ltd.'s obligation to pay the retail sales tax but that his former partner, Reza Pourazar, was responsible for making the payments. He stated that in 1996 Mr. Pourazar depleted all of the company accounts, fled Canada and left Mr. Rahal responsible for paying this debt.

Correspondence from the Ministry of Finance to the Registrar dated May 11, 2000 (Exhibit 5, Tab 12) shows an outstanding balance owed by Cars Connect Trade Ltd. of \$78,641.75. Statements of account from the Ministry of Finance dated June 21, 2000 and June 23, 2000 (Exhibit 7a and 7b) show a revised balance of \$33,310.26. The explanation provided on Exhibit 7b reads "Reversal of assessment 8292048 dated 22 Jan, 1999. This amount includes the adjustment of any additional interest charged on this assessment."

Mr. Rahal states that he made a \$15,000.00 payment to the Retail Sales Tax office in 1996 and four additional payments of \$2000.00 each, totalling \$23,000.00. He stated that he has no documentation to prove that he made these payments nor did he make any attempt to obtain documentation from his bank to bring to this hearing.

Although Mr. Rahal squarely blames his former partner for taking the monies owed to the Ministry of Finance, he has taken no steps to collect the monies from Reza Pourazar. This is despite the Applicant's own evidence that Mr. Pourazar is back in Canada, operating a motor vehicle dealership in the Toronto area.

Mr. Rahal admitted that he lied on the Toronto Dominion Bank loan application with respect to the intent to defraud conviction; however, he claims that a bank official advised him to provide incorrect information. This unnamed bank official was not called by the Applicant as a witness.

ii) Past Conduct of the Applicant

In the Registrar's view, as presented by Ms. LeeDempsey, the relevant past conduct which supports the Registrar's belief that the Applicant will not carry on business in accordance with the law and with integrity and honesty is the Applicant's criminal record and his failure to disclose some of these convictions on his application form dated January 17, 2000.

Question 9 on the January 17, 2000 application states:

Have you ever been found guilty or convicted of an offense under any law or are any charges pending? (This includes those instances where a

conditional or absolute discharge was ordered). If yes, list all charges and/or Convictions, and the circumstances surrounding each (attach sheets if necessary).

Mr. Rahal listed his convictions including some background facts and circumstances. These are set out in the Registrar's Proposal. Mr. Rahal also wrote "there may be some previous charges that I can't remember, that are prior to 1988." The Tribunal is satisfied that Mr. Rahal made no deliberate attempt to conceal any of his convictions to the Registrar on the January 17, 2000 application.

Ms. LeeDempsey emphasized that in 1997 Mr. Rahal was convicted of possession of stolen licence plates and an electronic control module. In May, 2000 he was convicted of intent to defraud the Toronto Dominion Bank. The sentence for the latter conviction includes probation and a restitution order in the amount of \$25,237.87. These recent convictions are industry specific occurring during a period of Mr. Rahal's registration.

Ms. LeeDempsey testified that the Applicant failed to disclose any of his criminal offence convictions in his previous applications in 1990, 1993 and 1995.

Ms. LeeDempsey testified that the nature of the criminal record, the seriousness of the offences and the recent conviction for intent to defraud provide the Registrar with legitimate cause for concern about Mr. Rahal's honesty and integrity.

Mr. Rahal testified that he did not know who had completed the previous 1990, 1993 and 1995 applications. Alternately, he suggested that these forms could have been "slipped" in to substitute his application form. Interestingly, he did acknowledge his signature on the application forms. The Tribunal finds Mr. Rahal's explanation for the prior concealment of his criminal record completely unbelievable and concludes that he did deliberately conceal his criminal record from the Registrar on applications filed in 1990, 1993 and 1995.

APPLICATION OF LAW TO FACTS:

Section 6 of the Act provides that the Registrar may refuse to register an applicant under the Act when the applicant under section 5 can not reasonably be expected to be financially responsible or the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty.

With respect to the Registrar's decision that the Applicant can not be reasonably be expected to be financially responsible in the conduct of business, the Tribunal finds that the Applicant is not financially responsible when it comes to monitoring and controlling his own personal and business related finances, and in meeting his obligations thereunder having regard to the Applicant's financial position. The Applicant did not disclose his prior bankruptcy and has an outstanding restitution and civil judgment against him.

With respect to the Registrar's decision that the Applicant would not conduct business in accordance with law and with integrity and honesty, it is Mr. Rahal's past conduct and the cumulative effect of the past conduct which must be considered by this Tribunal.

The Tribunal should only refuse to direct the Registrar to carry out his proposal if it believes that the Registrar is in error in concluding that reasonable grounds exist for his belief. The case of Brenner and the Registrar of Motor Vehicle Dealers and Salesmen 19 CRAT SCO Decisions and Orders (1971-1989) sets out the test to be applied by the Tribunal as follows:

"The effect of Sec. 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself."

It is vital that an Applicant show through a recent and sufficiently long course of conduct that he or she is a person to be trusted and not unfit to be registered under this Act. Mr. Rahal is unable to satisfy this test. Clearly, insufficient time has passed since his conviction three months ago. It is the Tribunal's finding that a greater amount of time is needed to persuade the Tribunal that the Applicant has established a new and reliable course of honest conduct in all of his dealings.

Bearing in mind the test outlined in *Brenner*, the Tribunal finds that the Registrar was not in error in concluding that the past conduct of the Applicant affords reasonable grounds for the belief that he will not carry on business in accordance with the law and with integrity and honesty. He failed to disclose criminal offences in his prior applications in 1990, 1993 and 1995, and has recent industry-specific convictions against him.

DECISION AND ORDER:

Accordingly, pursuant to the authority vested in it by Section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal to refuse the registration of Abraheem Rahal as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Sheena MacAskill
Vice-Chair

Released: September 28, 2000

KENT

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
JULIE KENT

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

JULIE KENT

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TONY POLSINELLI

Added Party

ADJOURNMENT

WHEREAS, the Tribunal appointed a time and place for a hearing in the above matter
on May 29 and 30, 2000;

AND WHEREAS, on May 29, 2000 the parties were in attendance at the Tribunal and at
the onset of the hearing, counsel for the Applicant requested an adjournment;

AND WHEREAS, upon consent of the parties, the matter was adjourned to August 14
and 15, 2000;

AND WHEREAS, counsel for the Respondent requested a further adjournment;

AND WHEREAS, upon consent of the parties, the matter was adjourned to September
28 and 29, 2000;

AND WHEREAS, counsel for the Applicant requested a further adjournment due to the
illness of the Applicant's spouse;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against all parties* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m. on Thursday, February 8, 2001, and to continue on February 9, 2001 at 9:30 a.m., if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: September 28th, 2000

ZAWADZKI

MARIANNE ZAWADZKI

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

MARIANNE ZAWADZKI, Applicant
JENNIFER ZAWADZKI, Agent for the Applicant

DATE OF HEARING: September 25, 2000

DECISION RELEASED: September 29, 2000 Kitchener

REASONS FOR DECISION

A hearing was held on September 25, 2000, at Kitchener, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Marianne Zawadzki (the "Applicant")
Motor Vehicle: 1986 Chev CEL, plate no. AATT 261 (the "vehicle")
Date of Appeal: September 6, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven as provided in section 50.2(3)(a) of the Act.

This matter came before this Tribunal on September 25, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The Tribunal made its ruling on the preliminary issue which follows.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Sept 6/00

To whom it may concern,

I am requesting an appeal by the Tribunal for the impoundment of motor vehicle AATT261 on Thursday August 24/00.

The vehicle had been stolen by Adrienne Agar and she drove it with a suspended licence without my knowledge or consent. Therefore, I would like to request an oral hearing to discuss the release of my car.

Adrienne Agar had been renting a room from me since Aug 1/00. She was a roommate who took my car keys while I was at work without my permission. I have no idea how often she had done this prior to the 24th.

Adrienne has been charged with operation while disqualified, Public Mischief, Probation Order, non-compliance, and taking motor vehicle without consent. These are not her first charges or problems with the law.

I, Jennifer Zawadzki, had been given motor vehicle AATT261 by the owner Marianne Zawadzki to take control over while she is in Quebec. I have been placed as primary driver. The ownership address has remained 120 Westwood Dr, Kitchener, as my mother is still owner of that home. However, we have been told by the police that it must be changed to her Quebec current address, which will be done immediately.

To continue with the appeal, my mother has asked that I bring forth the appeal on her behalf as I was the primary driver at the time of the theft. A letter stating this has been included.

Officer Dan Gray from the Stratford police was the officer on duty at the time of the accident, but has been away on 2 weeks holiday immediately following the charges to Adrienne. Therefore, Officer Foster has taken over and his report will be given as evidence the day of the hearing.

If I have left out any information please feel free to call me at 2733530 during the day or at 2735793 in the evenings.

I also please ask that the hearing be scheduled for either before the 15th day of September or after the 23rd day of September as I will be away on holidays during that time.

Sorry for any inconvenience.

Sincerely,

Jennifer Zawadzki

Miss Jennifer Zawadzki did not produce any witnesses at this hearing.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Adrienne Agar;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 15, 2002.

The Respondent did not produce any witnesses at this hearing.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(a).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S., Colo, 338F.2d 787,788*. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430*.

APPLICATION OF LAW TO FACTS:

As to the evidence established, the Applicant's agent, Jennifer Zawadzki, did not add anything to her written appeal. The grounds of her appeal under second 50.2(3)(a) require that she provide sufficient evidence to convince the Tribunal that her car had been stolen. Zawadzki reiterated the fact that her roommate, Adrienne Agar, took the car without her permission for the second time, but Zawadzki had no reason to believe that Ms. Agar did not intend to return the automobile. Ms. Agar had left all her clothing in the apartment, and at the time of the accident, there was no indication that she had been attempting to deprive the owner of the rights and benefits of ownership, or that she was trying to dispose of it. The representative for the Registrar of Motor Vehicles based her claim that the Order to Impound imposed by the Registrar be confirmed solely on the interpretation of the meaning of "stolen".

The meaning of the word "stolen" is defined in Black's Law Dictionary (sixth edition), page 1419- 1420. See above.

Miss Jennifer Zawadzki, readily admitted that the actions of her roommate did not in any way fit Black's definition of the word stolen. She did not believe that it had been Ms. Agar's intention to deprive her of the rights and benefits of ownership. The Tribunal can not, therefore, conclude that the car had been stolen, which is the ground of appeal the Applicant must establish to succeed in the appeal to this Tribunal.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing,
Presiding Member

RELEASED: *September 29, 2000*

244/MVIA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED
BY THE REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
(by teleconference call)

DATE OF MOTION: September 22, 2000 Toronto

ORDER

WHEREAS, the Registrar of Motor Vehicles (the "Registrar") did by written notice, dated August 29, 2000 order the impound of a certain motor vehicle VIN # _____ (the "motor vehicle");

AND WHEREAS, the Applicant ("Applicant") as the owner of the motor vehicle has filed a Notice of Appeal to the impound of the vehicle;

AND WHEREAS such appeal is to be heard at the Holiday Inn, Simpson B Room, 208 St. Mary's River Drive, Sault Ste. Marie, Ontario, commencing at 10:00 a.m. on Wednesday, the 27th day of September, 2000;

AND WHEREAS the Registrar has brought a motion, under section 7 of the Rules of Practice of the Tribunal, requesting:

- (a) that the hearing not be open to the public; and
- (b) that certain documentation to be submitted at the hearing not be accessible to the public.

AND WHEREAS the reasons for the Registrar's requests is that intimate personal matters may be disclosed at the hearing, of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof is in the interests of

the Applicant's child and disclosure would be in contravention of the *Young Offenders Act* R.S.C., as amended;

AND WHEREAS, the representative of the Registrar has submitted to the Tribunal and the Applicant a true copy of the September 21, 2000 affidavit of Witness #1, a Driver Control Analyst and the Registrar's Designate in the Driver Improvement Office and a true extract of the Ministry of Transportation records relating to the driver's record of the Applicant's child;

AND WHEREAS the Applicant informed the Tribunal that she has no objection to the making of an Order restricting the public's attendance at the hearing on September 27, 2000 and restricting the public's access to the affidavit of Witness #1 and the attachment to such affidavit which is marked "Exhibit "A"";

NOW THEREFORE, the Tribunal orders as follows:

- (a) The affidavit of Witness #1 dated September 21, 2000 together with Exhibit "A" attached to the affidavit shall not be accessible to the public and shall be kept separate from the public record;
- (b) Access by the public to such documents shall only be by the written order of the Tribunal or as otherwise authorized by law;
- (c) Both the affidavit of Witness #1 and Exhibit "A" attached thereto shall be separated from the exhibits and/or Book of Documents and shall be placed in a sealed envelope by the Registrar of the Tribunal which she shall marked "Confidential";
- (d) In place of such removed documents there shall be a true copy thereof inserted, which copy shall have all or any references obliterated from them as to the Applicant's child's name, address, date of birth, sex and height as well as driver's licence number and any driving offences and convictions registered prior to 1999.
- (e) The hearing of the Applicant's appeal shall not be open to the public and the public shall not have access to the hearing.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: September 25, 2000

0199/MED/00/022

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: JEFFREY LEE, D.C., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: F. CLAIRE ROWETT
Representative for the Minister

Applicant,
unrepresented

DATE OF
HEARING: September 18, 2000 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

Ms. Rowett, an employee with the Ministry of Transportation, was sworn and presented the following evidence.

The Applicant's driver's licence was downgraded effective January 20, 2000. (Exhibit # 2).

The Applicant's driver's licence was downgraded after the Ministry received an unsolicited medical report from Physician # 1. Physician # 1 indicated that the Applicant was suffering from cardiovascular disease namely moderate Aortic Stenosis and controlled atrial fibrillation (on coumadin) and Osteoarthritis of both knees and left shoulder. There was also history of a remote MI in 1997.

In response to Physician # 1's medical report, the Ministry informed the Applicant that his licence had been downgraded as he did not meet the medical standards for a classified licence. However, if he wished to retain his "B" class licence, he would have to apply for a medical waiver of the medical standards.

A medical waiver certificate (Exhibit #2, Tab 3) was submitted by Physician # 2.

A medical report, dated February 15, 2000, submitted by Physician # 2, Cardiologist, reported that the Applicant was asymptomatic from the cardiac standpoint.

Physician # 1, the Applicant's family physician writes that the Applicant "has several ongoing medical conditions which are clinically stable. He is followed diligently by a Cardiologist and is compliant with medication". (Exhibit #2 Tab 3B).

Physician # 2 wrote to Physician # 1 and indicates that "we have no evidence of underlying significant ischemia in this gentleman. Ms. Rowett, in her testimony, indicated that "surgery has been recommended." However, Physician # 2's report of May 10, 2000 states that "antibiotic prophylaxis for dental work and surgery has again been recommended." This means that antibiotic therapy should be taken as a precautionary measure should the Applicant undergo any dental work or surgical procedure.

The Medical Advisory Committee's recommendation, case study #183953, was for the Applicant to hold a "class "G" licence only - reconsider with satisfactory cardiologist's assessment and stress test". The Medical Advisory Committee's reason for the recommendation was for an aortic valve disease, poor exercise test and HTA 340/94; NSC 3.6.1. (Exhibit # 2 Tab 4).

The Ministry advised the Applicant on August 10th, 2000 of their decision that the Applicant not hold a licence higher than a Class "G". He was also told of his right to appeal to the Licence Appeal Tribunal.

The Applicant was sworn and gave testimony. According to the Applicant, he has never been sick or has he missed time from work. He provided a letter from his employer (Exhibit # 3 Pg 5). In addition to the medical reports already presented into evidence by the Respondent, the Applicant provided a report, dated August 18, 2000, from Physician # 2 written to the Ministry of Transportation as well as a letter written by Physician # 1 to Physician # 2.

Ms. Rowett advised that she had not received these documents, copies were made and time was allowed for Ms. Rowett as well as the Tribunal to read them.

The report written by Physician # 2, dated August 18th, 2000, recapped his previous letter to the Ministry (Exhibit #2, Tab 3C). In this letter, Physician # 2 states that "this gentleman has asymptomatic moderate aortic stenosis and chronic atrial fibrillation". Physician # 2 notes that Physician # 1 has a note in her file from the Ministry that the Applicant's licence was revoked because of his stress test. Physician # 2 continues and says, "I am pleased with all of these results, and I am pleased with his coronary status and it is my personal feeling that this gentleman is fit to drive with his present licence. (Exhibit 3 Page 9).

The second letter, dated August 18, 2000 from Physician # 1 to Physician # 2, states: "On a clinical level, in fact, he has never been seen in my office for a syncopal episode or angina. He functions very well, carries out all activities of daily living, and in fact, carries on two jobs, one which involves a significant amount of walking and climbing stairs to deliver newspapers." (Exhibit # 3 Page 10).

The Applicant described his job as a bus driver. He states that there is very little physical demands placed upon him. He transports between five to seven children, aged two to five years who have special needs. There are no wheel chairs at present, and he stated that the company has given these children to other drivers. He also stated that he had two high school students with him during his run in case of an emergency.

When asked why he stopped the stress tests after two and a half minutes, he said the technician told him everything was normal and he did not have to continue. He says that he felt fine to continue as he believes that he is fit and stated that he walks at least three miles per day, delivering newspapers, climbing numerous stairs.

The Applicant was asked if he has increased medication. He stated that in fact he has been reduced in the amount of medication and has his blood monitored on a monthly basis.

The Applicant expressed his deep desire to retain his class "B" licence and believed that he had fulfilled all of the requirements asked of him by the Ministry.

The Applicant was excused from the stand.

In the Respondent's closing remarks, Ms. Rowett submitted that section 17(1)(c) of Regulation 340/94 of the *Highway Traffic Act* specifically states "Qualifications required by a holder of a Class "B" driver's licence are that the holder has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency of thromosis". Ms. Rowett submitted that it is clear that the Applicant does not meet the standards of the *Highway Traffic Act*, which is why the Registrar offered a waiver under section 20 of the same regulation. However, the Applicant did not meet even the lower waiver standards set out in the National Safety Code. Therefore, when downgrading the Applicant's driving privilege, the Registrar relied on subsection 32(12)(b)(i) of the Act, which, Ms. Rowett submitted, allows for the downgrade of a driver's licence for any reasons deemed sufficient by the Registrar.

In this case, Ms. Rowett argued, the sufficient reason for the downgrade of the Applicant's driver's licence was that the Applicant suffers from Aortic Stenosis, and he did not meet the minimum requirements of the Stress Test as required under the National Safety Code ("NSC") sections 3.1,3.4,3.6. In downgrading the Applicant's driving privilege, the Registrar has acted in accordance with governing legislation/regulation and has applied the appropriate medical standards. While the Registrar recognizes that the NSC is a guideline and not legislation, it is important to note to the Tribunal that the NSC allows for lowering of the medical standards as imposed by the *Highway Traffic Act* and it is because of the NSC that the Applicant has been granted a class "G" licence instead of no licence at all. The medical evidence is clear and the actions of the Registrar were correct and within the scope of the authority granted in the *Highway Traffic Act*.

It is the position of the Registrar that the downgrade of the Applicant's driving privilege not be modified or set aside.

The Applicant presented his closing remarks. He restated his position that he felt he was healthy and his underlying medical conditions were very stable and that he had the full support of his Cardiologist, Physician # 2 and his family physician, Physician # 1. He also stated that the Cardiologist told him that his stress test was excellent and in his opinion, he was fit to drive with a class "B" licence, and he confirmed his belief by signing the Medical Waiver. The Applicant had nothing further to add and the hearing was adjourned.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;

- (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.

(12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,

....

(b) in the case of a person who holds a driver's licence,

(i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

....

Section 50 states:

(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The Registrar relied on subsection 32(12)(b)(i) of the *Highway Traffic Act* to downgrade the Applicant's licence to a Class "G". Under that subsection, a holder of a driver's licence "shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require...". Following this, "...the Minister may ... change the class of motor vehicles in respect of which the licence is issued in accordance with the results of the examinations." The downgrade of the Applicant's driver's licence was in accordance with the basic medical standards found in Regulation 340/94 made under the HTA. The Registrar relied on section 17(1)(c)(d) of that Regulation, which states that "the applicant or holder has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis". Section 17(1) (d) of the Regulations, requires that an applicant or holder has no established medical history of heart disease including arrhythmia or respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class.

The Registrar also relied on the NSC section 3.6.1 (a) aortic stenosis.

However, the Medical evidence presented by the Applicant, does not support a downgrade but, in fact, supports the Applicant's retention of his Class "B" driver's licence. By completing the medical waiver, Physician # 2 is of the opinion that the Applicant is medically fit and able to function normally.

The Tribunal finds that the evidence presented does not support the Respondent's position but supports the Applicant's position that he should retain his Class "B" licence and not be downgraded to a Class "G" driver's licence.

DECISION:

Upon the application by the Applicant to appeal the decision dated January 20, 2000, of the Minister (the "Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to section 32 (12) (b)(i) of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL, pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside and that the Applicant's Class "B" driver's licence be re-instated.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

Roy Melvin, M.D.
Member

RELEASED: *September 27, 2000*

0202/MED/00/023

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROSS BENNETT, M.D., Member

APPEARANCES: CLAIRE ROWETT, Respondent
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: September 19, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal, dated August 15, 2000

By the Respondent:

- a) Exhibit #2 Ministry of Transportation submissions – tabs 1 – 10
- received August 25, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a final written summation with respect to this matter.

FACTS:

The Applicant is appealing the suspension of her driving privileges effective "00/03/11" as set out in Exhibit # 1.

Unsolicited information in the form of a letter written 18 February, 2000, by Physician # 1, states *"...on 13 February 2000... had a grand mal seizure at the wheel of her car while traveling along the 401... she has been informed... she should no longer be driving..."*. (Exhibit # 2 Item 1)

A second unsolicited letter, undated, from Physician # 2 was received by the Ministry. Physician # 2 reports that *"...the Applicant has suffered an epileptic seizure and should have her driving licence suspended until reassessed by a neurologist..."*. (Exhibit # 2 Item 2)

A letter dated February 15, 2000, from Sr. Constable # 1 (badge no.), Central Traffic Management Unit for the Ontario Provincial Police, describes the incident that took place while the Applicant was driving. Sr. Constable #1 obtained information from an interview with the Applicant's daughter, as follows: *"...Applicant's daughter advised that her mother looked left and froze in that position then fell to her right across the driver's seat. The car then left the roadway through the snowbank and was slowed by the loose snow. The Buick stopped and the Applicant commenced convulsions. Applicant's daughter advised that she hadn't seen her mother have a seizure in about 11 years..."* (Exhibit # 2 Item 3)

The Ministry informed the Applicant on February 29, 2000 that the suspension would be reconsidered *"...upon receipt of a satisfactory, detailed neurologist's assessment... the results of... (EEG, MRI, CT SCAN)..."* (Exhibit # 2 Item 4)

A letter dated February 28, 2000, under the letterhead of the St. Joseph's Health Centre, executed by Physician # 3, Staff - Neurology Service Department of Medicine, establishes that the *"...neurological examination is normal... EEG shows a paroxysmal interictal discharge from the left temporal region... brain scan... arranged... on Tegretol... has been treated for alcoholic pancreatitis..."* (Exhibit # 2 Item 5)

In a letter dated March 27, 2000, Physician # 3, neurologist with the St Joseph's Health Centre, confirms that the *"...CT scan is normal... She states that she has observed complete abstinence from alcohol... takes Tegretol 200 mg. (She had a grand mal seizure... in my opinion...most likely due to alcohol excess with perhaps an element of withdrawal) neurological examination remains normal..."* (Exhibit # 2 Item 6)

Physician # 4 and Physician # 4 dictated but did not read the "CT Head" report dated "19-Mar-2000...". An "Unenhanced study was performed", the physician records *"...a normal examination... I do not see a cause for seizures...."* (Exhibit # 2 Item 6 A)

A report dated "Feb 21 2000" signed by Physician # 6 indicates "...Interictal discharges are seen from the left posterior temporal region. This would be compatible with a partial seizure disorder..." (Exhibit # 2 Item 6 A)

By letter dated April 6, 2000 the Ministry informed the Applicant that further consideration would be given to her suspension "...upon receipt of a report from a specialist in addiction medicine confirming successful completion of a treatment program for alcoholism, commitment to ongoing relapse prevention requirements of the program and one year totally abstinent from any form of alcohol...seizure free..." (Exhibit # 2 Tab 7)

ADMINISTRATIVE REVIEW - MEDICAL SUSPENSIONS dated "June 30/00" completed by Sandra Quadrini, details the Applicant's history as explained by the Applicant. Applicant states that "her ability to drive is not affected because of the seizure..." (Exhibit # 2 Tab 8)

A note from Physician # 7, St Joseph's Health Centre dated, "FEB/09/95" confirms "ERCP ...normal...bouts of pancreatitis..." (Exhibit # 2 Tab 8 C)

Exhibit # 2 Item 10, is a Ministry of Transportation driving Record for the Applicant since 1989 which shows no infractions.

At the hearing, the Respondent offered a re-iteration of the written summations and the material contained in exhibit # 2, tabs 1 through 10.

The Registrar relied "...on several sets of guidelines... The Physician's Guide to Driver Examination published by the Canadian Medical Association... National Safety Code – Medical Standards for Drivers published by the Canadian Council of Motor Transport Administrators."

In closing, the Respondent emphasizes that the Applicant "...suffers from a seizure disorder that is brought on by alcohol withdrawal... evidence is clear that this condition **has** significantly interfered with her ability to operate a motor vehicle."

The Applicant testified she firmly believes that the seizure occurred due to her drinking on an empty stomach the day before the incident. She supposes that her blood sugar level dropped and that is the reason she passed out. Nonetheless, the Applicant continues to take the Tegretol as prescribed by her physicians.

According to the Applicant, the Tegretol does not impair either her vision or her ability to drive.

The Applicant further attested that she is not an alcoholic and that she may have drank a bit much twelve years ago, but stopped drinking when advised she was suffering from pancreatitis due to excessive consumption of alcohol.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "*any...sufficient reason...*" The Registrar originally suspended the Applicant's driver's licence after receiving three independent unsolicited reports.

1. Physician # 1 via a letter written 18 February, 2000, notifies the Ministry that the Applicant "*...had a grand mal seizure...*". (Exhibit # 2 Item 1)

2. Physician # 2 reports that “... *the Applicant has suffered an epileptic seizure....* ”. (Exhibit # 2 Item 2)
3. Sr. Constable #1, (badge no.), Central Traffic Management Unit for the Ontario Provincial Police, describes the incident that took place while the Applicant was driving, and concludes “...*It might be prudent to suspend this subjects License...*” (Exhibit # 2 Item 3)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, in suspending the Applicant's driver's license, based on the information received.

At the present time the Respondent contends that the Applicant's license must remain under suspension pursuant to Sections 14 (a) and (b) of Regulation 390/94.

Section 14 (a) states that:

“An applicant for or a holder of a driver's license must not,

- a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely...”

The Respondent substantiates the position to suspend the Applicant's license for medical reasons, based on medical reports that support the opinion that the Applicant “...*suffers from a seizure disorder...*”. The Tribunal concurs and refers to the neurological reports by Physician # 3, “...*had a grand mal seizure...*” and Physician # 6 “...*This would be compatible with a partial seizure disorder...*” (Exhibit # 2 Item 6 and 6 A respectively)

The Applicant argues that her license should be re-instated, on the grounds that her seizures were not epileptic and that she is not addicted to alcohol.

Whether or not the seizures are brought on by alcohol withdrawal, it is evident that the Applicant suffers from a disorder that from time to time may cause her to have a seizure. This statement is corroborated by the fact that the Applicant suffered such a seizure while behind the wheel of her motor vehicle. The evidence supports the Respondent's premise that “...*it is clear that this condition **has** significantly interfered with her ability to operate a motor vehicle.*”

Based on the evidence before the Tribunal, with respect to the medical condition, it appears premature to overrule the Ministry's decision, at this time. The Tribunal is satisfied that the criteria described in Regulation 340/94 section 14(a) of the HTA apply to the Applicant.

The Tribunal notes that the Applicant may seek and provide new neurological evidence to the Ministry, at any time at her convenience.

The Tribunal will now proceed to review the evidence adduced with respect to Section 14 (b) of Regulation 340/94, which reads:

"An applicant for or a holder of a driver's license must not,

b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely."

On the basis of documentation before it, the Tribunal finds that there is inconclusive evidence to rule that the Applicant is addicted to alcohol and more particularly that said possible addiction has interfered or would interfere with her ability to safely operate a motor vehicle. Thus, at this time, the Tribunal determines that the criteria of Regulation 340/94 section 14 (b) of the HTA do not apply to the Applicant.

The weight of the evidence establishes sufficient cause for the suspension of the Applicant driver's licence. In particular, the evidence establishes that the criteria set out in section 14(a) of Regulation 340/94 section apply to the Applicant.

DECISION:

Upon the application by the Applicant to appeal the decision dated March 11, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

Ross Bennett, M.D.
Member

RELEASED: September 29, 2000

THE HIGHWAY TRAFFIC ACT
R.S.O. 1990, Chap. H.8 as amended

IN THE MATTER of the ORDER to IMPOUND a MOTOR VEHICLE Order # V0501349 OWNED BY: Enterprise Rent-A-Car Canada Limited of: 1790 Dundas Street, Unit #8, London, Ontario N5W 3E5 made pursuant to section 55.1 of the Highway Traffic Act, effective on: September 6, 2000.

AND IN THE MATTER of a requirement for a hearing respecting an appeal of the said Order to Impound, pursuant to section 50.2 of the Highway Traffic Act

ENTERPRISE RENT-A-CAR CANADA LIMITED

Applicant

-and-

REGISTRAR OF MOTOR VEHICLES

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Enterprise Rent-A-Car Canada Limited, Applicant, and by the representative for the Registrar of Motor Vehicles, for the issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22, and having reviewed the written settlement signed by the Applicant and the Registrar of Motor Vehicles as to the disposition of these proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the facts and on the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: September 20, 2000

Schedule "A"

LICENCE APPEAL TRIBUNAL

Between:

ENTERPRISE RENT-A-CAR CANADA LIMITED

Applicant

-and-

THE REGISTRAR OF MOTOR VEHICLES

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

1. The motor vehicle described in **Order to Impound # V0501349** was impounded in accordance with subsection 55.1(3) of the Highway Traffic Act, RSO 1990, c. H. 8 as amended, on September 6, 2000.
2. The applicant, **Enterprise Rent-A-Car Canada Limited**, whose name is shown on the vehicle portion of the permit for the impounded motor vehicle, is the owner of the said vehicle.
3. The applicant filed an appeal to the impoundment order, in accordance with the grounds permitted under clause 50.2(3)(a) of the Highway Traffic Act, stating **that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.**
4. Having received and reviewed the police information, the Registrar is satisfied that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made.
5. The applicant has had the opportunity to obtain independent legal advice with respect to consent to this Order.
6. The parties agree that this agreement does not bind the Ministry of Transportation or the Registrar of Motor Vehicles in any way, with respect to future hearings or consent orders.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 50.2(5) of the *Highway Traffic Act* that the Board set aside the order to impound.

McFADDEN

PREHEARING

TERRY McFADDEN

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT* R.S.O.
1990, Chapter R. 4 as amended

TO REVOKE REGISTRATION

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES: DAVID B. COUSINS, Counsel, representing the Applicant
TIM SNELL, Counsel, representing the Registrar, *Real Estate and
Business Brokers Act*

DATE OF
PRE-HEARING: September 29, 2000 Toronto

ORDER

FOLLOWING attendances on September 29, 2000 at a prehearing before this Tribunal of David B. Cousins, Counsel on behalf of Terry McFadden (the "Applicant"), and Tim Snell, Counsel on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m. on November 1, 2000, and thereafter, if necessary, to continue at 9:30 a.m. on November 2, and November 3, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario;

1. The parties recorded that there had been no resolution of any of the issues in this matter.
2. The parties to the hearing are the Applicant and the Registrar.
3. The issues to be dealt with at the hearing are contained in the Proposal of the Registrar.
4. The fact that the Applicant is on probation will not be an issue at the hearing.

5. The Applicant proposes to have the following persons testify on his behalf at the hearing:
 - (i) the Applicant
 - (ii) the Applicant's wife
 - (iii) three or four persons, as character witnesses for the Applicant
6. The Registrar proposes to have the following persons testify on his behalf at the hearing:
 - (i) the Registration Officer who had carriage of the file in the Registrar's office relating to the Applicant
 - (ii) the Registrar
 - (iii) possibly the complainant who made the complaint against the Applicant
7. Both parties to the hearing shall comply with the disclosure requirements as set forth in the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

RELEASED: October 2, 2000

KENNETH W. SMITH

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: K.M. BIEL
Representative for the Registrar of Motor Vehicles

KENNETH W. SMITH, Applicant
unrepresented

DATE OF HEARING: September 28, 2000

DECISION RELEASED: October 2, 2000 Orillia

REASONS FOR DECISION

A hearing was held on September 28, 2000, at Orillia, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Kenneth W. Smith (the "Applicant")
Motor Vehicle:	1993 Dodge RAM 350, plate #6696EE (the "vehicle")
Date of Appeal:	September 14, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on September 28, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

WRITTEN MATERIAL AS EVIDENCE TO SUPPORT APPEAL

This appeal of the Ministry's Impoundment order is based on two (2) grounds; 1. that the owner of the vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the vehicle was not then under suspension, and 2. that the order has and will continue to result in exceptional hardship.

1. Due Diligence

There was no reason to suspect that the driver (David Farmer) of the impounded vehicle did not have a valid drivers licence. In early August, one of our staff members, Sharon German, saw David driving a vehicle on 2 occasions, leaving our yard at Smith's Country Gardens at the end of the day (white car), and driving a different vehicle taking it from the Farm (parking area) to the yard (had to drive onto the highway).

Employee had ample time to inform us of having a suspended licence. In the 1 to 1.5 hour interview, owner, Ken Smith discussed with David the types of equipment he was able to operate. Within approximately one month of David being hired, he, without hesitation, drove Ken's vehicle occasionally, without informing Ken of his licence suspension.

Ken admits that, at no time was the driver asked the direct question "do you have a valid drivers licence, and may I see it?" It is however, standard practice at Smith's Country Gardens, to ask for driver's licence #'s for insurance purposes at 'start-up time' in early May. Unfortunately, this practice "fell through the cracks" at the time David was hired because he was hired in late June.

As a result on this situation, David Farmer was dismissed. Upon his termination, David admitted to Ken that "he took advantage of the situation to get a job".

2. Exceptional Hardship

We have and will continue to suffer hardship from this entire situation. Losing a staff member as well as a 'key' vehicle has set us back significantly. Issues such as increased risk of injury to staff members, and time delays on scheduled jobs resulting in financial loss, have developed. The loss of a staff member, who was part of a two man crew designated for a high profile landscape job, increases the workload of the one remaining crew member, which only increases the risk of injury to that person. Losing the 'key' vehicle, which holds significant value for the business, also increases the risk of injury to that person, and adds time delays in job completion.

It is the only vehicle (1 of 4) with 4 wheel drive and dump box combination, which is required for Landscaping jobs, (hauling stone and large amounts of soil). The remaining three vehicles are not suitable replacements. The vehicles on hand are as follows:

1. 1989 Ford F450 - Has dumping ability, but not 4x4.
2. 1990 Dodge F350 - Has 4x4 but no dumping ability.
3. 1986 Ford 1/2 ton - Too light duty for this type of work.

The impounded vehicle was scheduled for a landscape job on Monday, Sept. 11 & 12 for the purposes of hauling stone down a steep hill, unload stone and using 4 wheel drive to climb back up the hill. Due to the impoundment of the proper vehicle for the job, staff safety and time delays, became serious issues. The job was delayed by 2 days making it very inconvenient to the customer. Also, we had to postpone the Carry All rental machine.

The person doing this job had to handle heavy stone more than is normally necessary. The stone had to be lifted and placed on the ground, then lifted once again to move it to the designated mover machine. With the impounded vehicle, the stone would have been lifted directly from the truck into the designated mover machine. This additional work increases the potential risk of injury. Also, the owner, Ken Smith, who has a history of back problems which limits his ability to work on occasion, has had to step in and assume the duties of David Fanner (lifting stone, etc.). Other employees are not suitable as they are female employees and are not expected to lift such heavy material.

Within the next 2 to 4 weeks, the impounded vehicle is scheduled for at least 4 more on site loading/unloading tasks. The vehicles on hand for possible replacement are 'not' suitable for the job. Not having this vehicle will prove to be an incredible inconvenience, added to the loss of an employee.

We respectfully ask that you set aside the Ministry's Impoundment order.

NOTE: Upon terminating David's employment (Friday, Sept. 11/00), every attempt to find a replacement person was made, I immediately put up the 'Help Wanted' sign at the Garden Centre. On Monday, a 'Job Fax' was sent to Human Resources Development of Canada, and a classified ad was sent to the local paper. No candidates as of this date.

****PHOTO ENCLOSED

The Applicant testified that the vehicle was being driven at the time of the impoundment by Mr. David Farmer, who was an employee of the Applicant's landscaping company. The vehicle was being used to transport rocks that were part of a landscaping project that the Applicant was working on. Specifically, the four wheel drive and dumping features of this truck were to be used to transport the stone directly to the site where it was to be dumped into an on site carry-all transport vehicle.

The Applicant's company policy for all of its employees was to ask for their driver's licence at the time of the employment interview, and for the Applicant's insurance company to verify its status. The Applicant stated that he never suspected that Mr. Farmer's licence was suspended as he had seen him drive on other occasions, and that Mr. Farmer had ample opportunity to volunteer this information to the Applicant. The Applicant further testified that he never saw or asked to see Mr. Farmer's driver's licence at any time, though this was not his stated policy.

Since the loss of this vehicle, the Applicant's project has been delayed by several days. The Applicant has also been forced to manually unload the rock into the carry-all machine, and the carry-all has had to be rented for an increased period of time at an extra cost of \$85 per day.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David C. Farmer;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 21, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension as per section 50.2(3)(c) of the Act?

In this hearing, there was no evidence before the Tribunal that any actions could be considered due diligence, as described by section 50.2(3)(c) of the Act, were performed by the Applicant. In fact, the forthright testimony of the Applicant was that Mr. Farmer had not been subject to the normal company policy of the Applicant, and that his licence was never asked for or seen. Furthermore, the Applicant also stated that he normally relied upon his insurance company to verify the status of the licences of his prospective employees. The Applicant's stated reliance upon Mr. Farmer to volunteer information regarding the status of his licence can not be considered an act of due diligence on the part of the Applicant.

By failing to take any initiative to actually determine the status of Mr. Farmer's driver's licence, or to potentially leave this determination up to some third party such as the Applicant's insurance company, the Applicant in his own testimony has failed to meet the onus under the Act.

The Applicant has also appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself.

The Applicant has made specific claims of exceptional hardship as described by both sections 22(1)(a) and 22(2). The Applicant has stated that the loss of the use of this vehicle to transport rock directly to and dumping at the unloading site constitutes a threat to the health and safety of the workers on the project. Furthermore, the loss of this vehicle for this project has caused the Applicant to incur added expenses through the use of alternative means to transport and unload the rock.

The Applicant argues that the manual unloading of the rock from his other truck, that has been used to substitute for the impounded vehicle, constitutes a threat to the health and safety of him and his employees. Section 22(1)(a) of regulation 632/98 refers to exceptional hardship as a threat to the health and safety caused by the loss of this vehicle to any one normally transported by it. There was no evidence before the Tribunal that the Applicant and his employees were facing a threat to their health or safety as a result of not being able to have this vehicle for their own transportation. The Regulation does not refer to a threat to the health and safety of individuals being considered exceptional hardship, if the loss of the vehicle for any use other than individual transportation was to occur. In fact, there was no evidence before the Tribunal as to whom this vehicle normally transported, and how this loss could be considered exceptional hardship under the Act.

In order for the Applicant's claims to be considered under sections 22(1)(a) 22(2)(a), (b), and (c), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required by section 22(4) of the Regulation. Furthermore, no attempt was made by the Applicant to demonstrate to the Tribunal that no other alternatives to the impounded vehicle existed. In fact, the Applicant's testimony was that he has made use of alternatives to the impounded vehicle, including the use of other vehicles in his possession and the rental of other equipment.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *October 2, 2000*

GOODLUCK UGIAGBE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: K.M. BIEL
Representative for the Registrar of Motor Vehicles

JUNIOR EBAGUA
Agent for the Applicant

DATE OF HEARING: September 29, 2000

DECISION RELEASED: October 2, 2000 Toronto

REASONS FOR DECISION

A hearing was held on September 29, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Goodluck Ugiagbe (the “Applicant”)
Motor Vehicle: 1994 Jeep GRC, plate #AHAF 946 (the “vehicle”)
Date of Appeal: September 9, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on September 29, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

- I DID NOT KNOW THAT HIS LICENCE WAS SUSPENDED.
- I NEED MY CAR TO GO WORK
- I PROMISE IT WILL NOT HAPPEN AGAIN
- I DID NOT KNOW THAT THERE IS A 1 800 NUMBER TO CALL TO FIND OUT ONTARIO’S LICENCE VERIFICATION.

The Agent, being a cousin of the Applicant, under oath and to the best of his knowledge provided the following information.

The Applicant is a husband and father of three children ages three, five and nine years of age. He is employed full-time in a supervisory position at ATK Motor Parts Division located in Vaughan, Ontario. The Applicant's wife is also employed full-time at EJ Moving and Cleaning Services. The family currently resides in the area of Jane Street and Sheppard Avenue.

On the day the vehicle was impounded, the Applicant permitted his cousin, Junior Ebagua, to borrow the impounded vehicle. Mr. Ebagua then gave the above-mentioned vehicle to James Bartlett and his girlfriend to attend Mr. Bartlett's mother's wedding in Bancroft, Ontario. On a small side road in or near Bancroft, the vehicle apparently got lodged in some mud in a ditch in which the vehicle could not be released. Mr. Bartlett's girlfriend left Mr. Bartlett with the vehicle and went to call a tow truck. Shortly thereafter, a tow truck as well as an OPP cruiser was at the scene, wherein it was discovered that Mr. Bartlett was a suspended driver. The vehicle was then impounded.

Mr. Ebagua has been friends with Mr. Bartlett for approximately four years. Mr. Ebagua has seen Mr. Bartlett have care and control of numerous vehicles belonging to other mutual friends.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner (Exhibits 4 & 5);
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by James D. Bartlett (Exhibits 4 & 5);
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle (Exhibits 1, 4 and 5);
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of failing or refusing to provide breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 15, 2002 (Exhibits 4 & 5);
5. Certified copy of an abstract from Ministry of Transportation records relating to a 1995 Plymouth vehicle registered in the Applicant's name (Exhibit 6);
6. Certified copy of an abstract from Ministry of Transportation records relating to a 1986 Honda vehicle registered to Gladys Ugiagbe (Exhibit 7);

7. Certified copy of Gladys Ugiagbe's driving record together with past address history (Exhibit 8); and
8. Certified copy of the Applicant's driving record together with past address history (Exhibit 9).

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;

- (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS

The Applicant has requested an appeal on the grounds of “exceptional hardship” under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact “exceptional hardship” will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for his claim to be considered under section 22(2), the Agent must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

Prior to the vehicle being impounded, the Applicant's wife took the bus to work each day. The Applicant drove one child to elementary school in Etobicoke and two children to primary school located at Keele Street and Finch Avenue before going to work in Vaughan. He would also pick them up at the end of each day. On occasion, the Applicant's wife would pick up either the child in elementary school or the two children in primary school.

The Applicant has two vehicles registered in his name. The first vehicle is the impounded vehicle. The second vehicle is a 1995 Plymouth. In Mr. Ebagua's testimony, the 1995 Plymouth is being driven by a woman named Helen Hemelingua. Ms. Hemelingua would not be able to afford insurance coverage due to her poor driving record, if the Applicant had not registered the Plymouth in his name. Ms. Hemelingua is paying the Applicant for the lower insurance premiums.

Mr. Ebagua testified that the Applicant would not be in a position to ask Ms. Hemelingua for the use of her vehicle on occasion.

In further testimony, the Applicant is of the opinion that taking a taxi is cheaper than renting a vehicle during the impoundment period.

Because of timing during a business day, public transit would be extremely difficult in getting his children to their respective schools as well as getting to work in time. The family has made inquiries with friends and family for assistance, but to no avail. The Applicant's place of employment has no flex hours and there are no co-workers that live in his area.

The Applicant has not missed any days at work but has been warned on two occasions of his tardiness. All his vacation time has been consumed due to a recent trip to Africa.

Although Mr. Ebagua stated that he will be paying for the release of the impounded vehicle, evidence was heard that the Applicant may have incurred some financial hardship as a result of the loss of the vehicle and he may pursue compensation from the suspended driver, James Bartlett, as is stated in section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order".

The Applicant and its Agent have not presented the Tribunal with any evidence that would demonstrate that every reasonable option has been considered as contemplated by section 22(4) of the Regulation. The Applicant has not proven that the loss of the vehicle will be immediate, significant and lasting.

The Tribunal accordingly finds the Applicant has not established that it has or will suffer exceptional hardship as defined by Ontario Regulation 632/98, subsection 22.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: October 2, 2000

ADAMS

RANDOLPH M. ADAMS

APPEAL FROM A DECISION OF THE BOARD OF
TRUSTEES OF THE ONTARIO MOTOR VEHICLE
DEALERS COMPENSATION FUND

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

RANDOLPH M. ADAMS, appearing on his own behalf (the
"Applicant")
A. MITCHELL GOLDBLOOM, counsel representing the Ontario
Motor Vehicle Dealers Compensation Fund, (the "Fund")

DATE OF
HEARING: September 26, 2000
Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of the Ontario Motor Vehicle Dealers Compensation Fund (the "Fund") dated May 30, 2000.

The Applicant bases his appeal on the provisions of section 12(3)(1) of the Schedule to Regulation 801 R.R.O. 1990, as amended, pursuant to the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 as amended (the "Regulations").

The Fund refused the Applicant's claim.

THE EVIDENCE:

The only witness to testify on behalf of the Applicant, was the Applicant himself. The only witness to testify on behalf of the Fund, was Douglas R. Lamb ("Lamb"). Besides the testimony of the Applicant and Lamb there was documentary evidence tendered and accepted by the Tribunal.

The Applicant testified that on October 14, 1998, he purchased a 1992 Nissan Stanza motor vehicle (the "vehicle") from J.K. Motors Ltd. of Mississauga, Ontario. The Bill of sale signed by the Applicant and the Vendor of the vehicle indicates a purchase

consideration of \$6,324.50 that the vehicle had travelled a distance of 142,680 kms and that it was "sold certified". (Exhibit 3, Tab 1, page 6)

Applicant paid the Vendor the purchase consideration and took delivery of the vehicle.

Within two weeks of delivery of the vehicle the Applicant experienced, as he termed it, a vibration in the vehicle's engine as well as "a noise" from the engine. On occasions the engine would also "cut out". When the vibration occurred, Applicant would stop the vehicle and restart it ten minutes later whereupon it ran without problems for a day or sometimes a week. Applicant also found difficulty with the vehicle's gears in that he could not easily engage first gear and the vehicle, on occasions, "jumped" out of first gear.

Applicant took the vehicle back to the Vendor to have the problems rectified. Vendor was not able to correct the problems. Applicant then, in May 1999, took the vehicle to Tryman's Transmission Inc. ("Tryman's") of Oakville, Ontario at which time the vehicle had travelled a distance of 172,430 kms. The Applicant, since purchase of the vehicle, had continued to use it to go to and from work, to take his family to church and for recreational use.

Tryman's, according to their invoice of May 19, 1999, removed and inspected the vehicle's transaxle assembly and also overhauled the transaxle assembly (Exhibit 3, Tab 1, page 14). Tryman's invoice in respect of the parts and labour supplied amounted to the sum of \$1,225.44 which Applicant paid. The work done and materials supplied did not remedy the Applicant's complaints in that the vibration continued. In February 2000, Applicant took the vehicle back to Tryman's complaining about the vehicle's vibration and "not going into reverse sometimes". He was given an estimate of the cost of repair's which amounted to \$2,800.40. The repairs suggested by Tryman's were not carried out as Applicant could not afford the estimated cost. Applicant continued to use the vehicle and at present the vehicle has travelled a distance of about 210,000 kms. Presently the noise in the vehicle's engine is no longer there.

With his complaints unresolved, the Applicant contacted Nissan Canada Inc. and was advised by Nissan Canada Inc. that the vehicle was reported "as being a wreck on November 28, 1995".

Applicant filed a claim for damages against the Vendor in the Small Claims Court and obtained a default judgment for \$5,000.00 plus costs pursuant to that claim.

Applicant then filed a claim with the Fund who on May 30, 2000 wrote to Applicant as follows:

"On behalf of the Motor Vehicle Dealers Compensation Fund, I am forwarding a cheque in the amount of **\$1,225.44**, which represents the pecuniary loss you suffered in your transaction with J.K. Motors.

We note that you still have the vehicle and have put 50,000 kms on it since the time of purchase. The repairs, other than the transmission, are in the Board's opinion, normal wear and tear on a vehicle with over 200,000 kms."

The Applicant accepted the Fund's cheque for \$1,225.44 but did not accept the Fund's conclusions and accordingly appealed its decision to the Tribunal.

Lamb, testifying for the Fund, stated that he is presently employed by City Pontiac Buick as a general technician, has his interprovincial licence as an auto repair technician and is a member of General Motors Technician's Guild. He also stated that he has worked in the automobile industry for approximately thirty years.

Lamb referred to the Bill of Sale in relation to the vehicle's sale by J.K. Motors Ltd. to the Applicant and a statement on that Bill of Sale under "Remarks" which reads that the vehicle was "sold certified". (Exhibit 3, Tab 1, page 6)

Lamb stated that these words meant that the vehicle had been inspected prior to the sale and was in compliance with the legal requirements for the issuance of a Safety Standard Certificate. A Safety Standard Certificate is not a warranty as to the vehicle's condition but that it has been inspected and found to meet the requirements of the Highway Traffic Act and Regulations.

Lamb stated that when a vehicle, such as the vehicle involved in this hearing, is written off as a wreck or salvage it means that the insurer of that vehicle had found it uneconomic to repair having regard to the vehicle's retail value. A salvage vehicle written off by the vehicle's insurer does not mean the vehicle is "no good" but merely not worth repairing having regard to its retail value.

Lamb also stated that according to enquiries made by him, the approximate retail value, as at October 1998, of a 1992 Nissan Stanza which had travelled a distance of approximately 142,000 kms, would have been about \$6,000.00 if it was not written off or a salvage vehicle. If that same vehicle had been written off or was salvage, its retail value in October 1998 would have been approximately \$4,000.00.

Lamb further testified that from the enquiries made by him, a 1992 Nissan Stanza with approximately 210,000 kms on its odometer would today have a retail value of \$2,000.00 irrespective of whether the vehicle had been written off as a wreck or had suffered no damage at all.

Lamb testified, based upon repairs done by Tryman's as evidenced by its invoice of May 20, 1999 (Exhibit 3, Tab 1, page 14) that such repairs bear no correlation to the vehicle having been in an accident. The repairs are indicative, to a major degree, of normal maintenance expenses related to wear and tear which can reasonably be expected of a vehicle that had travelled a distance of about 142,000 kms. The payment by the Fund of this amount indicates, according to Lamb, a goodwill gesture and nothing more.

The items in the invoice of Tryman's for \$184.61 dated July 1999 (Exhibit 3, Tab 1, page 16) all relate to labour and parts required as normal routine maintenance of a vehicle.

The estimate for repairs given by Tryman's in February, 2000 indicates further wear and tear to the vehicle, which had by then travelled considerably further than in May of 1999. This estimate, according to Lamb, also appears to contain items that required redoing although apparently paid for by the Applicant in the May 20, 1999 invoice. Lamb stated that nothing in Tryman's estimate of February 2000, leads him to believe that the labour or parts required are as a result of the vehicle being involved in an accident.

FACTS FOUND PROVEN:

The Tribunal finds the following facts to have been proven.

1. Applicant and J.K. Motors Ltd. entered into a Bill of Sale on October 14, 1998 in terms of which Applicant purchased from J. K. Motors Ltd. certain 1992 Nissan Stanza vehicle for the sum of \$6,724.50.
2. The vehicle was sold to the Applicant with a Safety Standard Certificate.
3. The distance travelled by the vehicle, as at October 14, 1998 was 142,680 kms.
4. Shortly after Applicant took delivery of the vehicle he became aware of the vehicle vibrating, a noise emanating from its engine and difficulty, on occasions, in selecting a gear or gears.
5. J.K. Motors Ltd. did not satisfy the Applicant's above complaints.
6. The Applicant had work done on the vehicle by Tryman's and paid \$1,225.44 for such work. The Fund has reimbursed the Applicant for that sum of \$1,225.44.
7. Applicant obtained a default judgment in the Small Claims Court against J. K. Motors Ltd. in the sum of \$5,000.00 plus costs.
8. The vehicle was written off as being a wreck or salvage by its insurers in or about 1995.
9. The retail value of the vehicle as at October 1998, was approximately \$4,000.00. The retail value of the vehicle had it not been written off as a wreck in 1995, would have been approximately \$6,000.00.
10. The retail value of the vehicle at present is \$2,000.00 and its present retail value would be the same if it had not been the subject of a write off or if it had not been declared salvage.
11. The Applicant has used the vehicle since October 1998 to enable him to go to and from work and for recreational purposes. The vehicle has presently travelled a distance of approximately 210,000 kms.
12. The work done and materials supplied to the vehicle by Tryman's under its invoice dated May 20, 1999 for the sum of \$1,225.44 related to normal wear and tear and/or maintenance and are not related to accident damage that the vehicle may have suffered.
13. The work done and materials supplied to the vehicle by Tryman's in terms of its invoice of July 1999 for the sum of \$184.61 related to normal maintenance of the vehicle and is not related to accident that the vehicle may have suffered.
14. The estimate of Tryman's of February 7, 2000, for both labour and parts that are therein referred to, relates to normal wear and tear or maintenance associated with a vehicle regard being had to its age and distance travelled.

ISSUE:

The issue to be determined by the Tribunal is whether the Applicant's claim for damages amounts to a pecuniary loss arising out of the transaction involving a trade in a motor vehicle.

THE LAW:

The Applicant's claim is brought against the Fund pursuant to Regulation 801 to the Motor Vehicle Dealers Act, R.S.O. Chapter M.42.

The Schedule to Regulation 801 states:

1. In this Schedule,

.....

"claim" means a claim for pecuniary loss arising out of a transaction involving a trade in a motor vehicle;

.....

12(3) A customer may make a claim against the Fund where the customer gives written notice of the claim to the Registrar within two years of the participant's refusal or failure to pay, even if the motor vehicle dealer with respect to whom the claim is being made ceased to be a participant after the refusal or failure to pay, and where the claim meets one of the following requirements:

1. The customer has recovered in any court in Ontario a judgment in respect of the claim and the judgment has become final by reason of the expiration of the time for appeal or of having been confirmed by the highest court to which an appeal may be taken and the customer makes an application, supported by the judgment and statement of claim, for payment of the unsatisfied portion of the judgment and costs as assessed.

.....

In the matter of the Motor Vehicle Dealers Compensation Fund v. Maria Didaskalou, (1994) 26 CRAT 1034, the Divisional Court of the Ontario Court (General Division) stated as follows:

In our view, when a claim under this provision is made, the Board of Trustees cannot look behind the judgment to decide whether the judge erred in awarding damages or fixing the amount of those damages. Instead, pursuant to the definition of "claim" in s. 1 of the Schedule, the Trustees are simply required to decide (a) whether the damages awarded amount to a claim for a pecuniary loss and, if so, (b) whether they arose out of a transaction involving trade in a motor vehicle.

.....

In order to amount to a pecuniary loss under s. 12(3)1, the loss must simply be one which is capable of evaluation on a monetary basis. While such a loss would not, by way of example, include damages for pain and suffering, it would as the Tribunal found, include damages referable to the excessive price paid for a motor vehicle and the cost of repairs.

However, mere pecuniary loss will not of itself to a successful claim under s. 12(3)1. The loss must be shown to have arisen out of a transaction involving the trade in a motor vehicle.

In this case, we are satisfied that the amount of \$3,500.00, representing the excessive price which the respondent paid for the car, clearly met the second part of the definition of "claim" (supra).

We take a different view of the repair costs. In the particular circumstances of this case, we are not persuaded that those costs were sufficiently linked to the transaction such that they could be said to have arisen from it. To that extent, we are of the view that the Tribunal erred in allowing for those costs.

APPLICATION OF THE LAW TO FACTS:

The onus of proof in this matter rests upon the Applicant who must prove that he has suffered a pecuniary loss arising out of a transaction involving a trade in a motor vehicle.

The Applicant brought no evidence to prove he had suffered a pecuniary loss and the Tribunal, after considering the evidence of Lamb, finds that the Applicant did not suffer a pecuniary loss.

The Tribunal bases its finding on the following:

1. The work done and materials supplied by Tryman's under its two invoices for \$1,225.44 and \$184.61 related to normal and reasonable maintenance due to wear and tear associated with a vehicle of six years which had covered a distance of some 142,000 kms when such repairs were done.
2. The estimate of Tryman's for some \$2,800.40 related to further wear and tear on the vehicle that had, by the time the estimate was given, travelled in the vicinity of 200,000 kms.
3. The repairs effected by Tryman's under both its invoices were not associated with damage caused to the vehicle prior to the Applicant purchasing it.
4. The Applicant stated that during the time he owned and used the vehicle it had travelled a distance of approximately 68,000 kms and in doing so the Applicant had obtained a clear benefit from its use.
5. The present retail value of the vehicle, namely about \$2,000.00, has not been diminished by the fact that the vehicle, prior to Applicant purchasing it, was damaged. Even if the vehicle had not been "written off" in 1995 it would today be

worth no more than about \$2,000.00 due to its present age of about eight years and the high distance it has travelled.

6. Despite the fact that the Applicant may have paid \$2,000.00 in excess of the vehicle's retail value when he purchased it, the Applicant, in a period of some two years enjoyed the use and benefit of the vehicle and some 68,000 kms of travel. Additionally, the Applicant has been compensated by the Fund in the sum of \$1,225.44.

DECISION:

Accordingly, pursuant to the authority vested in it by section 15(3) of the schedule to Regulation 801 of the *Motor Vehicle Dealers Act*, the Tribunal confirms the decision of the Board dated May 30, 2000.

LICENCE APPEAL TRIBUNAL

DEREK ISRAEL
Vice-Chair

Released: October 3, 2000

MERLO-DUDI

RODRIGO MERLO

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JIMENA. MERLO, Representative for the Applicant

DATE OF HEARING: September 29, 2000

DECISION RELEASED: October 4, 2000 Toronto

REASONS FOR DECISION

A hearing was held on September 29, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Rodrigo Merlo (the “Applicant”)
Motor Vehicle:	1995 Plymouth Neon, plate #Q66 176 (the “vehicle”)
Date of Appeal:	September 14, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on April 26, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Representative for the Applicant, Jimena Merlo, presented the Tribunal with a letter from the Applicant which was entered into evidence with the consent of the Respondent as exhibit #5.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I live in Rodchester Hills in Michigan. My family owns three cars my car Mitsubishi has been in a Toronto shop for 9 weeks with Mechanical Problems. The vehicle that has been impounded is registered under my name, but my sister is the primary driver of the vehicle. Rodchester Hills does not provide Public transportation. As a result it is imposible for me to get to college since my mother has to get up at 5 am with my 2 siblings to drive my father to work then drive my 2 siblings to school, go to work then pick up my 2 siblings and my father and try to take me to school, pick me up then drive me to work and back from work.

Jimena Merlo, the representative for the Applicant, stated that her brother resides in Michigan with the rest of her family. At the time of the impoundment, a vehicle owned by the Applicant's father was in for repairs in Toronto, and the Applicant was on his way to see about arranging for another garage to do the repairs on that vehicle.

Since the loss of this vehicle, the Applicant's family has had to rely upon a third vehicle that they own in Michigan. Ms. Merlo further stated the impoundment has been difficult for her family, since they have been reduced to a single vehicle for transportation for the father, mother, and other siblings to their various places of employment and schooling. There is no public transportation system in their area. Taxi's and rental vehicles are too expensive. Although the Applicant's brother and sister have missed some after school activities due to a lack of transportation, no one has missed any work as a result of the impoundment.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Rodrigo J. Merlo;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 11, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself.

The Applicant's representative has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required by section 22(4) of the Regulation. Furthermore, no attempt was made by the Applicant to demonstrate to the Tribunal that no other alternatives to the impounded vehicle existed.

In fact, the Applicant's representative's statement was that though inconvenienced, her family has made use of alternatives to the impounded vehicle, including the use of a second vehicle. In this case, the Tribunal finds that for the Applicant's family to have to endure with a single vehicle, however inconvenient, it certainly constitutes an alternative to the impounded vehicle and can not be considered an exceptional hardship. In addition, once the Applicant's father's vehicle, that is being repaired in Toronto, is back on the road, the Applicant's father will have it to drive to work and will not have to rely upon being driven to the work by the Applicant's mother.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *October 4, 2000*

JASON AARON REFFLE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ELMER MERKLEY
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

JASON AARON REFFLE, Applicant
Unrepresented

DATE OF HEARING: October 2, 2000

DECISION RELEASED: October 4, 2000

REASONS FOR DECISION

A hearing was held on October 2, 2000, at Windsor, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: JASON AARON REFFLE (the "Applicant")
Motor Vehicle: 1990 Pontiac Sunbird, plate #AEXD 472 (the "vehicle")
Date of Appeal: September 11, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 2, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

**IN THE MATTER OF AN APPEAL OF
THE IMPOUNDMENT OF A 1990 PONTIAC SUNBIRD
VIN #1G2JB1LK5L7611484
PLATE # AEXD 472
REGISTERED IN THE NAME OF JASON AARON REFFLE
DATE OF BIRTH – JANUARY 20, 1980
OWNER'S POSITION AND APPEAL**

**SECTION 50.2 HIGHWAY TRAFFIC ACT, R.S.O. 1990
CHAPTER H.8 AS AMENDED BY O.REG. 632/98
(IMPOUNDMENT ORDER – DRIVER DRIVING WHEN
LICENCE UNDER SUSPENSION)**

The Owner's position on Appeal is that the Registrar's Order will result in exceptional hardship in that no alternative to the impounded motor vehicle is available and the loss to the Owner and his family will be immediate, significant and lasting. This impact will be upon the Owner and other members of his family ordinarily transported by the motor vehicle impounded and the impact of the loss will be upon a person other than the person who was driving while his license was under suspension resulted in the Order to impound the motor vehicle.

The Owner has considered every reasonable option that could eliminate or adequately mitigate any threat or loss to him and other members of his family. It is not possible for him and members of his family to do without the impounded vehicle or to obtain a replacement during the impound period. There is no other vehicle available to him and other members of his family who ordinarily have use of the impounded vehicle.

The Owner requests a written Hearing and further requests the Consent of the Board to a Hearing in writing.

The evidence in support of the Owner's Appeal will be the Affidavit of Marian Reffle sworn the 7th day of September, 2000.

All of which is respectively submitted.

The Applicant testified that he is employed full time at the Jose's Noodle Factory restaurant in Leamington, Ontario. The restaurant is situated approximately 20 minutes away from his residence outside of Kingsville, Ontario. During the impoundment period, he has been using his bicycle to travel to work for a 4:30 p.m. start and gets picked up by his mother around 3 a.m. at the end of his shift. The Applicant stated that the impounded vehicle was periodically used to transport his two sisters to and from their part time jobs at Tim Horton's in Kingsville. The loss of his automobile has placed a lot of pressure and stress on his mother as she must now get to and from her own receptionist position five days per week, transport his two sisters home from their part time jobs at Tim Horton's, as well as provide transportation for him and his bicycle from his job to his residence.

In his testimony, the Applicant stated that he did not ask his co-worker, Mr. Christopher Anson, the driver of the impounded vehicle, if he had a valid driver's licence as it was well known that Mr. Anson's licence was currently suspended under the Criminal Code of Canada for the offence of driving with more than 80 mg of alcohol in blood.

The Applicant admitted that he had not investigated the possibility of renting a vehicle during the impoundment period or using a taxi cab to travel from his work to his residence during hours of darkness. He stated that he never solicited a ride from any of his co-workers since it would be out of their way to provide transportation to his home near Kingsville.

The Applicant's mother testified that she is completely exhausted supplying rides for Jason and her two daughters as well as attending her full time receptionist job. Her husband, a Windsor Chrysler worker, has not assisted with the family transportation problems to date.

Mrs. Reffle stated that Jason earns about \$600.00 every two weeks, daughter #1 earns around \$220.00 weekly, daughter #2 earns approximately \$150.00 weekly, and she earns around \$450.00 per week. Her husband earns in the neighbourhood of \$600.00 weekly. While none of her family members have lost any workdays or missed school during the impoundment period, daughter #1 has had to delay her involvement in coaching the Ruthven Public School volleyball team. This delay will not impact her OAC program.

In her testimony, Mrs. Reffle stated that she investigated the possibility of renting a car for Jason and utilizing a taxi during the impoundment period, but both options were discarded due to the rental cost of \$25.00 per day and the \$9.00 one way taxi cab cost. None of the family members are willing to provide any financial assistance to Jason to help with any additional costs while his car is impounded. With the additional driving responsibilities, Mrs. Reffle has had to discontinue teaching power squadron (rules for boating) one night per week. She stated that Jason receives free room and board at home and is only required to purchase his own clothes and maintain his vehicle out of his salary.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Christopher D. Anson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 22, 2002.

The Respondent submits that the Applicant has not lost any work during the impoundment period or made any effort whatsoever to investigate any alternatives to the impounded motor vehicle.

In respect to the testimony provided by the Applicant's mother, it is clear that the impoundment is causing severe stress and inconvenience, but none of the family has lost any work or school days. Since no workdays have been lost, it is quite unlikely that anyone will be faced with loss of employment or an employment opportunity during the impoundment period.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the loss of the vehicle will result in exceptional hardship?

The onus of proof, based on the balance of probabilities, rests upon the Applicant.

The Applicant continues to attend work despite his motor vehicle having been impounded. This is due to the assistance provided by his mother.

The Applicant's mother admits that she is coping with the loss of her son's vehicle, providing rides for him and other family members in order that all work and school commitments can be met. Nevertheless, she testified that she is greatly inconvenienced and near the point of exhaustion with her current responsibilities.

The Applicant testified that he made no attempt whatsoever to investigate any alternative transportation arrangements other than using his bicycle and the rides provided by his mother during hours of darkness.

Therefore, the Tribunal finds that the Applicant has insufficient grounds for appeal under section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Elmer Merkley, Presiding Member

RELEASED: *October 4, 2000*

ALEXANDRA CORINNE THORKELSON

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: DEREK ISRAEL
Vice-Chair

APPEARANCES: F.C. ROWETT
Representative for the Registrar of Motor Vehicles

ALEXANDRA CORINNE THORKELSON, Applicant
(by teleconference call)

DATE OF HEARING: October 3, 2000

DECISION RELEASED: October 4, 2000 Toronto

REASONS FOR DECISION

A teleconference hearing was held on October 3, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Alexandra Corinne Thorkelson (the "Applicant")
Motor Vehicle: 1987 Dodge Dakota, plate #812 8CV (the "vehicle")
Date of Appeal: September 12, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 3, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit # 2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

OWNERS POSITION

Being the owner of the impounded vehicle, I wish to argue that the impoundment of my vehicle will result in exceptional hardship.

When my vehicle was impounded Andrew Scott Hummel was driving my vehicle. He and I have been together for some time and I have never allowed him to operate my vehicle before. He drove the vehicle in order to make some extra money drywalling a house.

His son Sebastien Darlison is an extreme special needs child and this incurs extra costs which is at times very difficult for us to cover, as it has been recently since recent cutbacks at my workplace. I was not able to drive him there myself, and the job was a very short notice thing. We're both very sorry that an attempt to maintain our quality life and that of Sebastien has resulted in consequences such as this.

I work at Fabrene Inc. which is in North Bay, approximately half an hour drive from my home. There is no public transit system between Powassan and North Bay, since Powassan is a rural community. A recent change in my work schedule from 12 hour shifts to 8 hour shifts makes it impossible for me to car pool, since my shifts rotate from days to evenings, to midnights. There is no one in my area with whom I can ride. Loss of my vehicle could result in the loss of my income which would be devastating to my family, needless to say.

As I am the only driver in the family, being without a vehicle makes everything from grocery shopping to doctors' appointments a near impossibility, since doing any of this requires a vehicle. Scott and I are getting Sebastien into a Daycare program in order to provide the structured care that he needs for improving his development. In doing so, over the next few months I will have to attend meetings with Infant Care Development workers, Speech therapists, Physiotherapists and Occupational Therapists, and resource teachers. Once this system is in place it is imperative that he is attended to by all these people to provide the optimum opportunities for his development. This means he must be driven daily to and from his day care providers.

REQUEST FOR A WRITTEN HEARING

I am also requesting a written hearing since doing so in person is severely cost prohibitive, since I am 4 hours away from Toronto and without a vehicle. I am requesting a written or telephone hearing for this reason. If you do wish to contact me please call (705) 752-5822 and leave a message.

Thank you for your consideration,
Yours truly,
Alexandra Thorkelson

The Applicant testified at the hearing of this matter and stated as follows:

She manages to get to and from work and states she spends \$250.00 per week on travelling expenses. Since the impound of the vehicle, she has not missed work but has been late for work on six to eight occasions. She takes home about \$400.00 per week from her employment. Her monthly expenses are approximately as follows:

Mortgage	\$550.00
Heating oil and furnace rental	268.00
Hydro	150.00
Groceries and food	<u>300.00</u>
	\$1268.00

She lives alone in her house. She intends to share accommodation in the future with Andrew Scott Hummel, whose four-year-old son lives with him. At present, she does not live with Hummel or his son. Hummel's son is a special needs child who needs to be in a special needs program. At present, he is not yet in this program. However, although not the child's primary care giver, she gives care and attention to him and he used to be transported in her car which is now impounded. She does not help support the child financially. Mr. Hummel "does the lions share of taking care of his son." Hummel's son will start in the special needs program in the next 14 days and has lost

no education due to the vehicle's impoundment. Further, there is no threat to Hummel's son's health or safety due to the vehicle's impoundment. She also stated that she looked into renting a vehicle while her vehicle is in impoundment but is not able to afford the cost of renting a vehicle.

The Applicant finally stated, referring to the vehicle's impoundment, that she "has managed but it will hurt for a while."

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation's records indicating that, the driver of the vehicle at the time of its impoundment was Andrew Scott Hummel who has been convicted of the of impaired driving under the *Criminal Code of Canada* pursuant to which his licence was suspended until March 24, 2001;
2. Copy of the Ministry of Transportation's records indicating that the impounded motor vehicle herein is registered in the name of the Applicant as the owner;
3. Copy of the Notice to Registrar indicating, among other things, that the motor vehicle at the time of its being detained was being driven by Andrew Scott Hummel;
4. Copy of the Order of Registrar of Motor Vehicles to impound the vehicle for 45 days, dated August 30, 2000;
5. Copy of the Applicant's Notice of Appeal together with her position in appeal.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the

impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Facts Found Proven:

The following are the facts found by the Tribunal to have been proven:

1. The Applicant is the owner of the motor vehicle that is the subject of the impoundment order.
2. At the time of the impoundment order, the Applicant's motor vehicle was being driven by Andrew Scott Hummel.
3. At the time of impoundment of Applicant's motor vehicle, Andrew Scott Hummel's driver's licence was under suspension due to a conviction under the *Criminal Code of Canada* for impaired driving.

To succeed in this appeal, the Applicant must establish that the loss of the vehicle will result in exceptional hardship.

In determining whether exceptional hardship will result from the order to impound, consideration must be given to section 22 of Regulation 574, R.R.O. 1990, as amended. In considering this section, the Tribunal is of the opinion that alternatives are available to the impounded vehicle as the Applicant, based on her own testimony, is able to get to and from her employment. There has been no loss of employment and the Applicant continues to earn. There has been inconvenience to the Applicant, but no exceptional hardship. Inconvenience may not, however, be considered by the Tribunal in its determination.

Mr. Hummel's child is the primary responsibility of Mr. Hummel himself and is not the responsibility of the Applicant. On the Applicant's testimony, the child's educational needs are not being interfered with as a result of the impoundment and his health and safety is not in jeopardy.

The Tribunal, accordingly, finds the Applicant has not established that she has or will suffer exceptional hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair

RELEASED: October 4, 2000

0212/MED/00/025

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROY MELVIN, M.D., Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: September 26, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated August 23, 2000
- b) Exhibit #2 Applicant submissions – 47 pages – received September 14, 2000

By the respondent:

- a) Exhibit #3 Ministry of Transportation submissions – tabs 1 – 10
- received September 8, 2000

- b) Exhibit #4 Original Driver Record of the Applicant
- received September 26, 2000
- c) Exhibit #5 Supplementary materials – Tabs 11 – 12
- received September 26, 2000

PRELIMINARY MATTERS:

The Representative of the Ministry provided the Tribunal with a certified copy of the Applicant's driver's record, not available at the time of disclosure. Said record was entered in evidence, as there was no objection from the Applicant.

Also submitted by the Representative of the Ministry, to both the Tribunal and the Applicant, was an itemized list summarizing the documents on file.

FACTS:

The Applicant is appealing the suspension of driving privileges effective '00/02/09" as per Exhibit # 1.

An unsolicited letter written August 31 1999, Physician #1, states "*...had single event of unconsciousness etiology uncertain...*". (Exhibit # 3 Item 1)

A full report from Physician #1, to Physician #2, dated August 31 1999, relates the blackout episode suffered by the Applicant, results of medical examinations and tests. Physician #1, concludes that the Applicant had: "*...no abnormal neurological findings...*". (Exhibit # 3 Item 1 A)

Physician #1, attached to his letters, a further report dated '08/16/99" pertaining to the Applicant's check in on "08/12/99" to the York Country Hospital. In summary, Physician #1, reiterates "*...normal record... no evidence of a focal or lateralizing process. No epileptiform activity... recorded.*" (Exhibit # 3 Item 1 B)

A MEDICAL ADVISORY COMMITTEE CASE STUDY, dated October 12, 1999, reinstated the Applicant's driving privileges *'With a follow-up neurologist's report in 6 months.'* (Exhibit # 3 Item 2)

An unsolicited letter, dated December 7, 1999, from Physician #1, confirms that the Applicant "*...had an event which is not clear cut but might have been a seizure...*". (Exhibit # 3 Item 4)

An unsolicited Medical Condition Report, dated "*Feb 9/00*", from Physician #3, advises that the Applicant had a "*...Collapse - LOC -? seizure...*". (Exhibit # 3 Item 5)

In a letter addressed to the Ministry, dated April 20, 2000, the Applicant offers a history of both incidents as well as a possible explanation "*...due to lack of food, water and or salt...*". The Applicant suggests that she is "*...now eating a better breakfast and having a mid morning snack...*" and requests to have her "*...driver's license re-instated...*". (Exhibit # 3 Item 7)

The Applicant attaches several medical reports to her letter referring to neurological and cardiac examinations she underwent in 1999.

A MEDICAL ADVISORY COMMITTEE CASE STUDY, dated June 19, 1999, upheld the suspension requesting *"AN UP TO DATE NEUROLOGIST'S ASSESSMENT INDICATING ONE YEAR FREE FROM EPISODES OF LOSS OF CONSCIOUSNESS..."* (Exhibit # 3 Item 9)

Physician #4, a neurologist, prepared a report for Physician # 2 on March 17, 2000. Physician #4 confirms all neurological tests are normal and that the Applicant *"...probably does have an underlying seizure disorder... in view of age of onset... suspect that these are secondary generalized seizures cryptogenic... she should not be driving a motor vehicle at this time..."* (Exhibit # 2 & 5 Item 11 C)

A letter executed by L. T., Comptroller of (place of employment), states that the Applicant *"...has not missed any time from work due to illness in the past eight months ... work has not suffered in any way..."* (Exhibits #2 & 3 Item 11 F)

Under the letterhead of (place of employment), J. M., Human Resources Managers explains the loss of consciousness episodes suffered by the Applicant. (Exhibits #2 & 5 Item 11 G)

A letter, dated September 11, 2000, signed by Physician # 2, under the letterhead of Dixon Medical Centre, informs that the Applicant *"...started on Tegretol... complete physical examination... on March 7, 2000... found to be in excellent physical health...exercises and has improved her diet... followed all medical advice and has not had an episode of loss of consciousness since February 9th, 2000"* (Exhibit # 2 & 5 Item 11 H)

A MEDICAL ADVISORY COMMITTEE CASE STUDY, dated September 18, 2000, upheld the suspension. (Exhibit # 5 Item 12)

The Applicant's Driver's Record with the Ministry of Transportation shows no infractions. (Exhibit # 4)

Applicant submitted Internet information regarding seizures. (Exhibits # 2)

The Carswell, 1999 Annotated Ontario Highway Traffic Act by Murray D. Segal were presented by the Respondent as precedents.

At the hearing, the Respondent offered a re-iteration of the written material contained in exhibits # 2, tabs 1 through 10, and exhibit #5 tabs 11 through 12.

At this time, the Representative of the Ministry furnished the Tribunal with copies of Exhibit # 5, tabs 11 through 12. Save and except for a decision contained therein from the Medical Advisory Committee, this information was a copy of the document provided by Applicant and filed as exhibit #2.

In closing, the Respondent, asked the Tribunal to support the decision of the Ministry based particularly on section 8.1 of the Physicians' Guide to Driver Examination.

The Applicant read from a prepared statement and made spontaneous comments during her evidence. In summary, the Applicant feels that the loss of consciousness episodes occurred due to poor nutrition and excessive physical demands on her body. The Applicant runs an average of five miles per day, has a career as an accountant as is the mother of four children.

The Applicant has been told by her physician that all tests have proven negative and that “...these things happen...”.

The Applicant does not feel that her driving was affected or will be affected. Both episodes happened prior to noon hour in her office.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for *"any...sufficient reason..."*. The Registrar originally suspended the Applicant's driver's licence after receiving an unsolicited Medical Condition Report. On "Feb 9/00", from Physician #3, advises that the Applicant had a *"...Collapse - LOC - ? seizure..."*. (Exhibit # 3 Item 5)

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, in suspending the Applicant's driver's licence, based on the information from Physician #3.

The Applicant argues strongly that her licence should be re-instated. The Applicant appears as a credible witness and her evidence is compelling. On the surface, there does not appear to be any neurological or cardiac cause for the Applicant's loss of consciousness.

The Tribunal must consider all relevant guidelines available. The Tribunal acknowledges that section 8.1 of the Physicians' Guide to Driver Examination, alluded to by the Respondent is strictly policy and not legislation. Notwithstanding, it seems pertinent in this matter as it reads: *"...A single episode is of little cause for concern provided a neurological and cardiovascular assessment reveals no abnormality. However a person who has had several fainting spells should not be allowed to drive... until the cause has been determined..."*. The Applicant has suffered two episodes of loss of consciousness, approximately nine months apart. As no diagnosis has been determined, there is the risk of a possible re-occurrence. The prescription drug Tegretol, being taken by the Applicant may prevent further episodes, but it is premature, at this time, to assume that the condition has been halted.

The Tribunal recognizes that all tests are negative, nonetheless, the evidence of two physicians cannot be ignored. In February 2000, Physician #3, reported the Applicant to the Ministry. In March, Physician #4, a neurologist, emphasizes that the Applicant *"...probably does have an underlying seizure disorder... in view of age of onset... suspect that these are secondary generalized seizures cryptogenic... she should not be driving a motor vehicle at this time..."* (Exhibit # 2 & 3 Item 11 C)

Based on the evidence before the Tribunal, it appears hasty to overrule the Ministry's decision, at this time. The Tribunal notes that the Applicant may seek and provide new neurological evidence to the Ministry, any time at her convenience.

The Tribunal is satisfied that the criteria described in the Regulation 340/94 section 14 (a) of the Highway Traffic Act apply to the Applicant. Thus the Tribunal concurs that the Applicant's driver's licence remain under suspension.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 9, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend her driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Roy Melvin, M.D.,
Member

RELEASED: *October 3, 2000*

HASSAN

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
HASSAN KASSEM HASSAN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: July 7th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

HASSAN KASSEM HASSAN

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 18 and 19, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Wednesday, May 23, 2001 and to continue May 24, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 6th, 2000

PAQUETTE

DOUGLAS PAQUETTE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

DOUGLAS PAQUETTE, Applicant
unrepresented

DATE OF HEARING: October 5, 2000

DECISION RELEASED: October 6, 2000 Toronto

REASONS FOR DECISION

A hearing was held on October 5, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Douglas Paquette (the “Applicant”)
Motor Vehicle: 1986 Ford, plate #AHBY 403 (the “vehicle”)
Date of Appeal: September 18, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 5, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal.

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

To Whom It May Concern

I Douglas Paquette throw myself on the mercy of the tribunal. I plead guilty for not asking my new acquaintance, Jennifer Hamilton, when she asked to drive that evening, if she had a licence. I desperately need my vehicle due to my job delivering pizza at Shillelagh's which is causing me to miss shifts and income. I am forced to stay in Sarnia away from my residence in London, at a friend's on a couch. (I need my truck to move my belongings and get a new place in Sarnia.)

Now just starting a new job with LamSar requires me to be in court right daily.

The Applicant testified that on the night of the impoundment of his vehicle, he had given the keys to Jennifer Hamilton, an acquaintance that he had met that evening, so that she could drive himself and another friend home. At some time during the evening, the vehicle was stopped, and it was found that Ms. Hamilton's driver's licence was under suspension, and the vehicle was subsequently impounded. The Applicant currently resides at a temporary residence in Sarnia, where he also has a full time and part time job.

The Applicant stated that he requires his vehicle for transportation of his belongings from his permanent residence in London, for commuting to his full time job, and for use as a delivery vehicle for his part time pizza delivery job. Since the impoundment, the Applicant testified that he has been unable to perform his part time job delivering pizza, though he has managed to find rides to his full time work with other employees. He further testified that he expects to resume his job delivering pizza once his vehicle is released from impoundment.

The Applicant has also had to rely upon an alternate older vehicle that he owns, however he stated that it is unreliable and in need of repairs. He also owns a second older vehicle that was purchased just after the impoundment, however he lacks the financial resources to make it road-worthy. The Applicant had made no other enquiries as the availability of other alternatives such as renting a vehicle as he believes that they would prove to be too costly for him.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jennifer M. Hamilton;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence driving with more than 80 mgs. alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 17, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself.

The Applicant's representative has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required by section 22(4) of the Regulation. Furthermore, no attempt was made by the Applicant to demonstrate to the Tribunal that no other alternatives to the impounded vehicle existed.

In fact, the Applicant's testimony was that though inconvenienced, he has managed to maintain his attendance at his full time job through the assistance of his co-workers, and he does have a second vehicle available to him.

Though the Applicant has been unable to maintain his part time delivery job as a result of the impoundment, there was no evidence before the Tribunal to indicate that this situation was permanent. The Tribunal does consider this loss to be immediate, however there is no evidence before the Tribunal that can allow it to find this loss to be significant and lasting as prescribed by the Regulation.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *October 6, 2000*

STRACHAN

WAYNE AND ELIZABETH STRACHAN

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: TERENCE A. WARDROP Q.C., VICE CHAIR

APPEARANCES:

WAYNE STRACHAN AND ELIZABETH STRACHAN, appearing on
their own behalf, Applicants
KAREN JONES and NETANUS RUTHERFORD, Counsel, on
behalf of the Ontario New Home Warranty Program, Respondent
No One appearing for Tri-Brook Homes Ltd., Added Party

DATES OF HEARING: June 26, 27, 28, 29, 2000 and at Toronto
July 10, 11, 12, and 13, 2000

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Wayne Strachan and Elizabeth Strachan (the "Applicants") pursuant to their Request for a Hearing dated December 21, 1999, to the Commercial Registration Appeal Tribunal which, as of April 1, 2000, is known as the Licence Appeal Tribunal (the "Tribunal"), from a decision of the Respondent, Ontario New Home Warranty Program (the "Program").

The Applicants in this appeal base their claim on the provisions of section 13 and section 14(1)(b) of the Ontario New Home Warranties Plan Act (the "Act"), R.S.O. 1990. Chapter 0.31.

The Applicants' claim was denied by the Program in its Decision Letter dated December 10, 1999, (the "Program's Decision") and the Applicants are appealing pursuant to section 16 of the Act.

Upon the application made by the Program to the Registrar of the Tribunal dated February 24, 2000, Tri-Brook Homes Ltd. (the "Builder") was joined in this Appeal as the Added Party by the Order of the Chairman of the Tribunal dated February 29, 2000, and the appropriate notice of application and notice of the Order were served upon the Added Party.

In order to expedite a trial of the many issues contained within the Applicants' claim as denied by the Program as aforesaid, a prehearing with notice to all Parties was held by the Tribunal on March 21st and 22nd, 2000, and the Order of the Tribunal was issued dated March 30, 2000, (the "Prehearing" and the "Prehearing Order", respectively). The Prehearing and the Prehearing Order dealt with the settlement of some of the many issues so contained in the Applicants' claim and restricted this hearing of the Tribunal to those issues of the said claim which remained unsettled.

With respect to the Prehearing Order, a clerical error was made relating to the date of the work schedule as being "dated March 3, 1999" both in the first paragraph of the second page of the Prehearing Order and in Schedule "A" attached to the Prehearing Order. Notwithstanding that the individual pages of the said work schedule, from page 2 of 15 to 15 of 15 inclusive, note the date "March 03, 1999", both references to the date of the work schedule in the Prehearing Order and Schedule "A" thereto should have read "dated May 27, 1999" and such clerical error is formally corrected by this Order. The Program's Decision likewise contains the equivalent clerical error.

ISSUES:

The Applicants claim that the Builder is in breach of its several warranties to construct the new home which it contracted to build for the Applicants in a workmanlike manner and free from defects in material, as part of the Agreement of Purchase and Sale entered into between the Applicants and the Builder (the "Agreement").

The Applicants, accordingly, requested conciliation services from the Program and compensation for the defective work and materials. In response to the Applicants' request therefor, the Program provided conciliation services between the Applicants and the Builder on two occasions and issued two Conciliation Reports dated September 8, 1998, and March 31, 1999, respectively (the "First Conciliation Report" and the "Second Conciliation Report", respectively). Whilst all Parties to this Appeal were present at the first conciliation on June 18th, 1998, and thus were affected by the First Conciliation Report, the Builder chose not to respond to the notice of the second conciliation convened on March 3rd, 1999, and accordingly such was not a true 'conciliation' between all such Parties. Nevertheless, out of the Second Conciliation Report was generated the work schedule heretofore noted dated May 27, 1999, (the "Work Schedule") being a listing of all issues claimed by the Applicants which the Program ruled were either deficient or compliant with respect to the several warranties made by the Builder to the Applicants under the Act.

The Program's Decision was made with reference to the First Conciliation Report, the Second Conciliation Report and the Work Schedule as follows:

"It is the decision of the ONHWP (the Program), pursuant to Section 16 of the Act, that your claim must be denied for the reasons indicated within the following reports:

1. All items addressed on Conciliation Report dated September 08, 1998
2. All items addressed on Conciliation Report dated March 31, 1999
3. All items that appear on the Work Schedule dated March 03, 1999"

Each of the many issues claimed by the Applicants were thus referenced as items within these two Conciliation Reports and the Work Schedule, and some of such issues

were dealt with therein on more than one occasion or reference on a sequential basis due to the passage of time. The last reference to each issue, therefore, must be considered as the final position taken by the Program. Accordingly, this Tribunal will deal with each issue contained within the Applicants' claim separately and refer to the item numbers as such appear in the two Conciliation Reports and the Work Schedule, and thus, in the Program's Decision.

More specifically, at this hearing the Applicants' claim consisted of some twenty-seven issues which remained unsettled subsequent to the Prehearing and not dealt with in the Prehearing Order. In addition to these twenty-seven issues, the Applicants have brought to the attention of the Tribunal for consideration at this hearing, some twelve supplemental items of deficiencies by the Builder which they claim were included in their list of claims to the Program but were thence omitted by the Program from the First Conciliation Report, the Second Conciliation Report and the Work Schedule. The Applicants, in presenting their case for consideration by this Tribunal, dealt with these unsettled issues and supplemental items in the order of financial importance to the Applicants from the greatest to the least. A listing of the said issues and items which remain unsettled and which are still in issue are summarized as follows:

1. FRONT ELEVATION of RESIDENCE
 - use of parging over concrete blocks replacing warranted brickwork
 - unwarranted substitution of brick for keystones without consent
2. PONDING of BACK YARD
 - water accumulation from upstream drainage
3. LOWER DECK CONSTRUCTION
 - incomplete columns and unworkmanlike railing construction
4. BATH TUB in MASTER ENSUITE BATHROOM
 - substitution of inferior grade and size of bath tub and incorrect installation
5. SEPTIC SYSTEM
 - inappropriate siting and/or failure to obtain required municipal approval
 - unworkmanlike construction and/or installation
6. PLACEMENT of RESIDENCE on LOT
 - change of agreed placement of residence from street line without consent
7. GRADING
 - insufficient grading and/or top soil
 - failure to obtain required municipal approval
8. CARPETING
 - unwarranted substitution of lower grade of carpet without consent
9. AGREED FLOOR PLAN of SECOND FLOOR (SCHEDULE "Z")
 - incorrect hanging of doors
 - entry doors to bedroom not angled as agreed
10. EXTERIOR PAINT
 - unworkmanlike exterior paint application and mismatched colours
11. WATER LEAK in COLD ROOM
12. DAMAGE to OIL PAINTING
13. KITCHEN TILE
 - unwarranted substitution for agreed floor tiles without consent
14. FOYER MARBLE
 - unwarranted substitution for agreed marble tiles without consent
 - cracked/damaged marble tile
15. UPPER DECK FLOORING and RAILING
 - inappropriate substitution of inferior flooring treatment without consent

- unworkmanlike railing construction
- 16. METAL INSULATED DOOR
 - unwarranted substitution of inferior door without consent
- 17. DECORATIVE MIRROR
 - unwarranted substitution of inferior mirror without consent
- 18. GAS LEAK at BARBECUE LINE
- 19. SECURITY SYSTEM
 - incomplete and/or inadequate security system as agreed
- 20. EXTERIOR LIGHT FIXTURES
 - unwarranted substitution of inferior brass fixtures without consent
- 21. CROWN MOLDING
 - incomplete and/or inadequate crown molding as agreed
- 22. EXTERIOR POT LIGHT FIXTURES
 - unwarranted substitution of inferior pot light fixtures without consent
- 23. EFFLORESCENCE
- 24. DEDICATED ELECTRICAL OUTLET for BUILT-IN VACUUM
 - incorrect placement of electrical outlet
- 25. REFRIGERATOR WATER LINE
 - incorrect installation of, or nonstandard water line for refrigerator
- 26. BASEMENT FLOOR
 - cracks in basement floor
- 27. ROOFING SHINGLES
 - shingles raised and buckling

Supplemental item number 1

- windows dirtied by grout and construction debris

Supplemental item number 2

- ducts not cleaned of construction materials and debris

Supplemental item number 3

- excess glue around ceiling medallions

Supplemental item number 4

- corner bead separating on dining room wall

Supplemental item number 5

- eaves troughs are bent and not serviceable

Supplemental item number 6

- corner bricks not used and do not match similar treatment elsewhere

Supplemental item number 7

- mud on bricks above rain splash

Supplemental item number 8

- uneven and messy masonry and brickwork

Supplemental item number 9

- brand of paint specified substituted by inferior brand

Supplemental item number 10

- hardwood flooring not in "swept clean" condition

Supplemental item number 11

- cosmetic light-bar electric fixture not installed as agreed

Supplemental item number 12

- drywall installation in master bedroom not workmanlike and with ridges

Each of these said issues and items require to be determined separately with distinct factual treatment and little commonality exists between them. However, there are some

general matters which are extant in all the circumstances of this claim which must be addressed.

In particular, the Program's Decision states that some of the issues contain warranties which are or were neither agreed to by the Builder in the Agreement nor subsequent thereto due to the absence of the signature or initials of an authorized officer or agent of the Builder on documentation submitted to the Program by the Applicants or the Builder. Also, the Program contends that a breach of warranty in this particular case is the subject of a valid claim against the Program only when measured against the standards in the industry or compliance with the Building Code, notwithstanding that the Applicants contracted for a higher standard upon accepting the invitation of the Builder in this regard, and to which higher standard the Builder would be bound. Finally, there is a generic issue between the Program and the Applicants in almost all of the said issues and items respecting the quantum of damages which will compensate the Applicants for the alleged breach of warranties of the Builder.

EVIDENCE:

Each of the Applicants, Wayne Strachan and Elizabeth Strachan, testified as to the said issues and items claimed by the Applicants as a breach of warranty with respect to their new home at 6 Golfway Court, Bolton, constructed by the Builder pursuant to the Agreement and situate on Lot 21, Plan 43M-919 in the Town of Caledon, Province of Ontario (the "residential dwelling" and the "residential premises", respectively). It is expedient in this Decision of the Tribunal to deal with the evidence given by the Applicants, and the Program, on the specifics of each of these issues and items at such time as each specific issue and item is itself referenced and decided by this Tribunal. Evidence not specific to any one such issue or item and which by its nature is generic to the events which took place and the contractual relationships between the Parties follows herewith.

The Agreement was originally an offer by one of the Applicants, Wayne Strachan, to Tri-Brook Homes (Bolton) Ltd. dated October 14, 1996, but there is no record of the date of acceptance by the Builder, and as such it is noted by the Program to be "undated". Nevertheless, there is sufficient evidence of dates subsequent to October 14, 1996 on documentation presented at this hearing indicating ongoing negotiations between the stated purchaser or the Applicants and the Builder, and which documentation suggests that a meeting of minds on the essential elements of the Agreement was reached on November 15, 1996. The said documentation also indicates that negotiations continued to take place subsequent to November 15, 1996, and further agreements were made between the Applicants and the Builder with respect to "extras and upgrades" and other modifications

to the Agreement during the construction of the residential premises and almost right up to the dates of closing and/or possession. It is alleged by the Applicants that all such "extras and upgrades" and such other modifications became part of the Agreement by way of the verbal assurances of the Builder on many occasions, by subsequent agreement and/or by part performance on its part.

The evidence of the Applicants, corroborated by evidence presented by the Program, is clear that the once amicable relationship between the Builder and the Applicants deteriorated markedly during the latter stages of this period of construction and became adversarial, abusive and even threatening on the part of the Builder. Indeed, at the

meeting between the Applicants and the Builder on November 24, 1997, the purpose of which was to agree upon and execute the pre-delivery inspection report, the Builder absolutely refused access to the remainder of the residential dwelling beyond the kitchen area.

Completion of the residential premises and closing of the transaction of purchase and sale was originally scheduled in the Agreement to be February 28, 1997, but this, too, appears to be inaccurate as the said documentation indicates that notice of various extensions were accepted by the Applicants, which in turn postponed the closing date to April 30, May 30, July 4, October 20, and to November 25, 1997. The pre-delivery inspection report is dated November 24, 1997, and occupancy was finally achieved by the Applicants on November 28, 1997, exactly nine months later than scheduled.

The Applicants engaged the services of Steve Balshin, a Registered Home Inspector, of Majestic Home Inspection Service to make a report respecting quality assurances, workmanship and/or the deficiencies of their residential premises and his report (the "Majestic Report") is dated April 4, 1998. The Applicants thence gave notice to the Program on April 14th, 1998, (the "April 14 Notice") of all deficiencies of workmanship and materials in the construction of the residential premises of which they were aware as of that date.

A further report was commissioned by the Builder to Zaretsky Consulting Engineers Inc., with respect to quality assurances, workmanship and/or the deficiencies of the Lower Deck erected by subcontractors of the Builder as part of the residential dwelling. This report (the "Zaretsky Report"), which included construction drawings, was dated January 12, 1999.

The evidence for the Applicants was limited to the Applicants themselves as no expert testimony was submitted on their behalf and no other witnesses were called.

The Respondent called two witnesses, Robert Rosset, a Warranty representative of the Program, and Dwight Lawrence, the Operations' Manager of the Central Unit of the Program. Both witnesses testified as to their various visits to and formal inspections of the residential premises carried out by them.

These visits and inspections lead directly to the First Conciliation Report, the Second Conciliation Report and the Work Schedule. Indeed, Mr. Rosset upon completion of each of these three documents consulted with Mr. Lawrence, as was usual in the circumstances of a difficult decision by the Program in order to obtain a second opinion prior to issuance. Thus, all of these said documents when issued were the product of a discussion and joint decision of these two witnesses due to the importance of the issues raised by the Applicants.

The Tribunal was impressed with the conscientious efforts made by the Program and the great amount of time spent respecting the Applicants' claim. The evidence was given by Messrs. Rosset and Lawrence in a straightforward manner, as indeed was the evidence of each of the Applicants. Thus, the facts in this matter as stated by all witnesses are consistent with virtually no differences and give the Tribunal very little difficulty in ruling as to the veracity of the evidence given over the course of the seven days of testimony.

The Tribunal was equally impressed with the time and efforts of the Applicants to investigate all material evidence and search for and obtain documentation in order to be of assistance to the Tribunal. Not only were the photographs taken by the applicants helpful, but the orderly presentation of their case facilitated an understanding of the issues inherent in the Applicants' claim under the Act.

However, the conclusions which are to be reached from the evidence submitted on the issues, are much more difficult. Before making any findings on the factual evidence given at this hearing, the Tribunal proposes now to turn to the legal matters which must be addressed.

ISSUES OF LAW:

The Applicants are appealing the Program's Decision to the Tribunal under Section 16(2) of the Act and this hearing and this decision of the Tribunal is issued pursuant to Section 16(3) of the Act.

"Section 16(2) A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

Section 16(3) Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purpose the Tribunal may substitute its opinion for that of the Corporation."

The Applicants in their submissions to the Tribunal made it clear that the aesthetics of the completed residence represented by the Builder were important to them prior to executing the Agreement and such representations by the Builder as to the quality of workmanship and materials were essential parts of the Agreement as agreed to by the Builder. The residential dwelling was an expensive house situate on one of the fairways on a golf course and would, when completed, be matched and compared with the neighbouring dwellings in the complex and situate within the real estate development, including incidentally the personal home of one of the principals of the Builder. This was the competitive environment of quality and price within which the Builder was operating and offering for sale and construction such a dwelling.

The Program, on the other hand, was consistent during and prior to the conciliations and in its submission to the Tribunal that the workmanship and materials supplied by the Builder were within the general standards of the industry and measured against the Building Code or otherwise the minimum standards of workmanship and adequacy. Indeed, one of the Applicants was heard by the Tribunal to say that she never wished to hear the word "adequate" again. What, then, is the measurement standard against which the quality of workmanship and materials should be judged in this particular case?

This question and the differing views taken by each of the Parties was the essential element why this case was not settled prior to its submission to this hearing. This decision of the Tribunal has been made after considering the many decisions cited by the Parties and other prior decisions of the Licencing Appeal Tribunal and its predecessor Tribunal.

Section 13(1) of the Act specifies certain warranties and sets out a list of circumstances in Section 13(2) in respect of which such specified warranties do not apply.

"Section 13(1) Every vendor of a home warrants to the owner,

- (a) that the home,
 - (i) is constructed in a workmanlike manner and is free from defects in material,
 - (ii) is fit for habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in material, design and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;

(g) alterations, deletions or additions made by the owner;

(h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;

(i) damage resulting from an act of God;

(j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;

(k) damage caused by municipal services or other utilities;

(l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession."

.....

It is notable that provision is made in Section 13(1)(c) of the Act for these specified statutory warranties to be expanded by regulation, and Part IV of Ontario Regulation 892 (Sections 14 to 24, inclusive) provides for such additional specific warranties by regulation together with terms, conditions, exceptions and exclusions which attach to these regulatory warranties. Such terms, conditions, exceptions and exclusions set forth in Part IV of Regulation 892 can only apply to these additional regulatory warranties and do not affect those specified statutory warranties set out in Section 13(1)(a) and (b) of the Act. As pointed out above, these statutory warranties are, and can only be, modified by the statutory provisions contained in the Act in Section 13(2) and elsewhere in the Act.

Section 13(6) of the Act not only provides that all such specified statutory warranties and specified regulatory warranties apply despite any agreement or waiver to the

contrary, but also recognizes that the owner may have other rights and other agreed warranties in addition to the warranties specified in Section 13(1) of the Act and the regulatory warranties prescribed in Section 13(1)(c).

"Section 13(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon."

This latter provision of Section 13(6) is inconsistent with the Program's submissions at this hearing, since under Section 14(1)(b) these additional rights of the owner and additional agreed warranties can also be the subject of a cause of action by an owner against a vendor for damages resulting from a breach of warranty and thence be paid out of the guarantee fund the amount of such damage. The right to make a claim is set out in Section 14(1) in the Act.

"Section 14(1) Where,

(a).....;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c).....,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by regulations.

A warranty is a defined term under the Act. Section 1 provides:

"1. In this Act,.....

"warranty" means a warranty set out in section 13."

If the case were otherwise, Section 14(1)(b) would have been specific in limiting its scope to breaches of those warranties specified in Subsection (1) of (emphasis added) Section 13 and likewise the definition of "warranty" in Section 1 of the Act would contain an equivalent limitation. But neither is the case, from Section 13(6) it is thus clear that the warranties in subsection (1) of Section 13 of the Act are not exclusionary and that the Applicants in this particular case may have in addition other rights and other agreed warranties, and specifically the right to claim damages therefor under Section 14(1)(b) of the Act.

Counsel for the Program argued that Section 13(6) provides for all the common law rights of breach of warranty claims to be in addition to the statutory warranties set out in Section 13(1) and that these latter warranties were not intended by the legislation to usurp such common law rights. Pursuant to Section 14(1)(b), all breaches of such warranties would thence afford an owner, as defined under the Act, the opportunity to resort to the guarantee fund as opposed to a fundamental breach of contract under Section 14(1)(a), which was available to a person and not to such an owner. Counsel argued that the use of the words "owner" and "person" in the Act were distinctive and one could not be an owner and a person at the same time under the scheme of the Act. Where the Act used the two words conjunctively, "person or owner", it was intended by the legislation to include both capacities. But where only one of the words was used to the exclusion of the other,

such reference could only mean a single capacity to the exclusion of such other. However, the cases cited by Counsel to support this contention appear to be indecisive and in some instances in conflict. Nevertheless, the Tribunal agrees with Counsel in this case as to the distinctive use of the words "person" and "owner" and that it was the intention of the legislators of the Act to deal with two separate and distinct situations, a fundamental breach of contract for a person not yet an owner on one hand, and a breach of a warranty in the case of an owner as defined on the other.

The Applicants in the case before this Tribunal are owners as defined and as such have no claim against the guarantee fund as persons since there was no fundamental breach of contract in this instance. The residential dwelling was supplied by the Builder and accepted as such by the Applicants and they took possession of it. This is not to say, however, that in some other circumstances the cumulative effect of many breaches of essential warranties in providing a home for an owner would not be tantamount to a total failure of consideration from a builder, and as such a fundamental breach of contract for that owner as a person notwithstanding that such a person took possession of the home and thereby became an owner too, consecutively.

The Applicants, as stated above, are owners and the Tribunal finds them so to be as a fact. As such, they are entitled to compensation or remedies from the assets of the guarantee fund for any and all breaches of warranties as defined in the Act by virtue of Section 14(1)(b) thereof, subject only to the limitation of amount as set out in the regulations thereto. Warranties are defined in the Act as set out in Section 13, and Section 13(6) includes all agreed warranties between the Applicants and the Builder in addition to the warranties set out in Section 13(1). Unreasonable or exorbitant agreed warranties are curtailed and limited by the regulatory monetary limitation provided for in the Act and as such it cannot be argued that common law breaches of agreed warranties under Section 13(6) were not intended to be included in the definition of warranty under the Act with consequent access to the guarantee fund.

During the negotiations between the Applicants and the Builder that led up to the Agreement as noted previously, and thereafter in undertakings, representations and discussions between these parties, an enhanced quality of workmanship was agreed upon for many of the items and/or applications of construction of the residential dwelling. Such negotiated agreements, undertakings, representations and discussions were clear in the uncontroverted evidence of the Applicants and were well corroborated by documents or confirming correspondence. Thus it is appropriate, in many cases in the construction of this particular residential dwelling, that the enhanced quality of workmanship agreed upon and required should thence be judged against that enhanced standard of workmanship and not just measured against the basic industry standard. Such an agreement for a high or higher quality of workmanship than the industry standard is equally the subject of a breach of warranty claim and remedied by damages and equivalent to the unwarranted substitution of materials of lesser quality. "Adequate" workmanship cannot measure up against quality workmanship in cases where the latter is represented and agreed upon and thence becomes a warranty itself.

Thus, it is the decision of this Tribunal that the quality of workmanship in some of the issues in this case do not measure up to the quality of workmanship promised by the Builder. As such, it is, of itself, an agreed warranty under Section 13(6) of the Act in addition to the statutory and regulatory warranties in Section 13(1), and as such the subject of a proper claim for damages pursuant to Section 14(1)(b) of the Act. This Tribunal cannot agree with the Program in the Program's Decision that such claims are

the personal preferences of the Applicants and thus neither actionable in law nor claimable under the Act.

FACTS FOUND PROVEN:

As hereinbefore stated, all witnesses testified in a consistent manner as to the issues and items claimed by the Applicants and there appears to be little dispute between the Parties appearing at this hearing as to the facts of this matter. It was unfortunate that the Tribunal did not have the benefit of any evidence from the Builder, which chose not to appear at the hearing, for many unanswered questions remain and the Tribunal was denied a full understanding of the matters before it. It is notable that both the Program and the Applicants chose not to subpoena any of the officers of the Builder whose evidence would have been helpful to the Tribunal. However, in all other respects the evidence presented was uniform.

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

- (1) the Agreement was reached on November 15, 1996 as noted in the evidence of the Applicants;
- (2) further agreements between the Applicants and the Builder with respect to "extras and upgrades" and other modifications to the Agreement during the construction of the residential premises were reached as alleged by the Applicants prior to the date of closing, and all such "extras and upgrades" and such other modifications became part of the Agreement;
- (3) the pre-delivery inspection report dated November 24, 1997, was executed by the Applicants in circumstances of duress;
- (4) completion of the residential dwelling and occupancy thereof were achieved on November 28, 1997;
- (5) subsequent to the receipt by the Applicants of the Majestic Report, they gave the April 14 Notice to the Program on April 14, 1998, respecting of all deficiencies of workmanship and materials in the construction of the residential premises of which they were aware as of that date;
- (6) the Zaretsky Report was delivered January 12, 1999;
- (7) the Program made numerous visits and inspections of the residential premises which led to the First Conciliation Report, the Second Conciliation Report and the Work Schedule;
- (9) the Program's Decision was issued by the Program on December 10, 1999;
- (10) the request by the Applicants for a hearing before the Tribunal was made on December 21, 1999; and
- (11) the other facts as hereinafter noted relating to specific issues and items of the Applicants' claim.

DECISION:

With respect to the Prehearing Order, the clerical error made relating to the date of the work schedule as being "dated March 3, 1999" both in the first paragraph of the second page of the Prehearing Order and in Schedule "A" attached thereto is hereby corrected to read "dated May 27, 1999", notwithstanding that the individual pages of the work schedule, from page 2 of 15 to 15 of 15 inclusive, note the date "March 03, 1999".

With respect to the following issues and items and pursuant to the authority vested in it by section 16(3) of the Act, the Tribunal orders and directs the Program as follows:

1. FRONT ELEVATION of RESIDENCE

(i) The first part of this issue was the most complex and difficult of the Applicants' claim, and involved the use of a mortar parging over concrete blocks of approximately twenty-one (21") inches in height of the lower portion of the front elevation of the residential dwelling. This parging-concrete-block treatment replaced brickwork as required and shown in documents attached to the Agreement. Such a substitution by the Builder from grade level to where the brickwork actually begins is not only an improper substitution without notice or consent, but also a clear breach of the Builder's warranty of workmanship. The Tribunal cannot agree with the Program that such is a personal preference and thus beyond the scope of the Program's responsibilities under the Act.

(ii) There is no explanation why the Builder chose this application of parging on top of concrete blocks for the lower portion of this exterior face of the wall since the evidence disclosed it was a non-supporting part of the structure of the residential dwelling and took the place of the veneer brickwork. This is the most glaring deficiency of workmanship on the part of the Builder and affects the aesthetics of the appearance of the whole residential dwelling.

(iii) This part of this issue is referenced in the Program's Decision as item #35 of Schedule A(2) of the First Conciliation Report and item #33 of Schedule A(2) of the Second Conciliation Report. The Program's Decision was based upon the concrete blocks beneath the parging being part of the supporting structure as stone brick could not be utilized for a weight supporting wall. On cross-examination and after viewing the photographs submitted in evidence by the Applicants (Exhibit #15), Mr. Rosset agreed that the concrete blocks and parging were evidently put in place **after** the framing of the house was complete, and as such, were **not** part of the supporting structure but rather a concrete block veneer substitution for the warranted brickwork.

(iv) It is the decision of this Tribunal that the Program should arrange or contract for the replacement of the offending concrete blocks and parging treatment of the front elevation of the residential dwelling with matching stone brickwork or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of thirteen thousand, eight hundred (\$13,800.00) dollars as damages for this defect in workmanship and this improper substitution.

(v) The second part of this issue is the substitution of brick for keystones over the windows of the garage as an improper substitution without notice or consent. This part of the Applicants' claim requires an understanding of the agreed alterations to the front

elevation of the residential dwelling. Not only was the front elevation reversed from left to right, and visa versa, but also the garage structure was to be placed sideways as opposed to a frontal siting. There was some suggestion that out-dated plans were utilized by the Builder in adapting the original style of the house to the residential dwelling as agreed to be altered, but such was not placed in evidence at the hearing in a way that could be determined as factual. Whether or not these agreed alterations caused a difficulty to the floor height of the garage with respect to the exterior grading would be speculative, and without the evidence of the Builder unexplainable.

(vi) Nevertheless, pursuant to the evidence of all witnesses, it is and was apparent that there was insufficient height above the garage windows to the underside of the soffit of the revised front elevation of the residential dwelling as constructed to accommodate the inclusion of key stones without raising the whole roof of the garage, which the Tribunal finds as a fact. However, the Tribunal finds that any such remedial remedy is an unwarranted expense to correct this improper substitution and agrees with the Program's Decision in the peculiar circumstances of this issue that payment by the Program out of the guarantee fund to the Applicants of seventy (\$70.00) dollars is appropriate as compensatory damages for the missing key stones, and the Tribunal so orders.

(vii) This second part of this issue is referenced in the Program's Decision as item #38 of Schedule A(1) of the First Conciliation Report and item #38 of the Work Schedule.

2. PONDING of BACK YARD

(i) The Applicants gave evidence of a serious water accumulation issue affecting the rear yard of the residential premises as it slopes away from the dwelling towards the low point of the conservation area to the south and south-west. This flooding issue was the second most important issue of the Applicants' claim, but on the evidence presented at the hearing must be disallowed.

(ii) This issue was included in the April 14 Notice in the following terms:-

"The house is 118 feet from the creek in the back yard. After rain fall or Spring run-off the creek swells 68 feet over the bank towards the house, creating ponding that is only 26 feet from the end of the deck. Thus, this area can not be landscaped as we had planned. If the weather is more severe in the future, the ponding could rise enough to flood the walk out basement. According to the Town of Caledon, this occurs as a result of the run-off from 92 acres north of the property. The purchasers [Applicants] were in no way advised of this important re-occurring situation."

(iii) The Program made no mention of this issue in the First Conciliation Report, the Second Conciliation Report or in the Work Schedule, and therefore it does not form part of the Program's Decision with respect to which the Applicants are appealing to this Tribunal. It is admitted by the Applicants that this issue is not referenced in the Program's Decision and the Program takes the position that not only is it beyond the scope of the Act, but also it is not the subject of any statutory or regulatory warranty, nor has there been any representation or agreed warranty by the Builder to the Applicants [purchasers] with respect thereto.

(iv) This issue must be warranted to be the subject of a breach on the part of the Builder in order for the Applicants to make a claim against it and against the Program under the Act. With respect to this issue, the Tribunal can find, on the evidence given at

the hearing, no basis for an actionable damage claim against the Builder for a breach of warranty or otherwise.

(v) Recent photographs placed in evidence are quite dramatic in showing the extent of the flooding of the residential premises. As unfortunate as this flooding may be, there is no evidence that insufficient grading of the land on the part of the Builder was the proximate cause of the water accumulation, albeit that the grading of the lot and the insufficient application of topsoil were and are the subject matter of another issue claimed by the Applicants and dealt with at this hearing.

3. LOWER DECK CONSTRUCTION

(i) An important and costly issue to the Applicants is the way in which the Builder constructed a custom wooden deck connected to the residential dwelling as provided for in the Agreement. The evidence presented at the hearing establishes that a two-level, pressure-treated-wood deck of approximately 900 square feet was to be constructed by the Builder at the rear of the residential dwelling off the main floor breakfast/family room area in accordance with a permitted design thereof by the Applicants (the "Lower Deck").

(ii) There is no issue as to the completion of the Lower Deck by the Builder's two sequential subcontractors according to the design, except only as to the unsatisfactory workmanship and incomplete brickwork as specified in the Agreement. More particularly, the columns which support the main frame of the Lower Deck were completed by one of the said subcontractors in a clumsy fashion without the agreed brickwork covering and the railing was constructed in an unworkmanlike manner and a resulting unsafe condition.

(iii) The issue is referenced in the Program's Decision as item #12 of Schedule A(1) of the Second Conciliation Report, repeated as item #14 of Schedule A(2) of the said Second Conciliation Report, and as item #19 of the Work Schedule and repeated again as item # 12 on page 13 of 15 of the Work Schedule. Due to the fact that the Lower Deck was only under construction subsequent to the date of possession in the late Spring of 1998, it is just noted without complaint in the April 14 Notice and referenced as item #19 in Schedule A(1) of the First Conciliation Report.

(iv) The Zaretsky Report, complete with drawings respecting construction detail, deals with that part of this issue which concerns poor workmanship and the unsafe condition of the beams, wall-header, wood posts, railing and perimeter trimmer. It is the decision of this Tribunal that the Program should arrange or contract for the remedial work to the Lower Deck specified in the Zaretsky Report or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of six thousand (\$6,000.00) dollars as damages for these defects in workmanship.

(v) With respect to the incomplete brickwork covering the columns as specified in the Agreement, the Tribunal does not accept the reasons in the Program's Decision that this is either an "issue of design" only, or that the Applicants contracted separately with "the deck installer for additional work", and as such, is "beyond the scope and mandate" of the Act or "can not be covered by warranty". Extra money was paid by the Applicants, as admitted by them, to one of the subcontractors of the Builder to expedite the completion of the Lower Deck as agreed with the Builder, and as an accommodation to the Builder, but such extra payment can hardly be deemed the equivalent of entering

into a contract with the payee to construct the Lower Deck in any different manner than that which had already been agreed with the Builder.

(vi) It is the decision of this Tribunal that the Program should arrange or contract for the incomplete brickwork surrounding the columns of the Lower Deck as agreed between the Applicants and the Builder or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of fourteen thousand, five hundred (\$14,500.00) dollars as damages for this breach of warranty.

4. BATH TUB in MASTER ENSUITE BATHROOM

(i) This issue involves the installation of a five (5') foot, hourglass-shaped, jetted, acrylic, corner bathtub in the master en-suite bathroom on the second floor of the residential dwelling as an improper substitution without notice or consent for a six (6') foot, oval-shaped, four-jetted porcelain whirlpool tub as specified in the Agreement. It is also claimed by the Applicants that the substituted bathtub was installed by the Builder backwards, in that one of the jets is situated below the water tap instead of at the other end of the bathtub where one would normally recline with one's back facing the jet. Finally, there is a claim by the Applicants that the substituted bathtub is incorrectly installed such that it creaks and allows water accumulation between the marble tiled ledge which surrounds the bathtub and the bathtub itself.

(ii) This issue is referenced in the Program's Decision as item #4 of Schedule A(1) and item #37 of Schedule A(2) of the First Conciliation Report, item #16 of Schedule A(1) and repeated as item #28 of Schedule A(2) of the Second Conciliation Report, and as item #4 of the Work Schedule and repeated again as item #16 on page 15 of 15 of the Work Schedule.

(iii) There is evidence to suggest that the Applicants latterly agreed to the substitution of a "Mirolin Eden IV" bathtub conditional upon receiving a credit or cheque equivalent to the difference in price between that which was specified in the Agreement and the said agreed substitution. This was an appropriate compromise to solve part of the issue since the space available in the bathroom would not, in any event, accommodate the larger six foot, oval-shaped, four-jetted porcelain whirlpool tub as specified in the Agreement without a reconfiguration of, and loss of space to, the already installed shower and adjoining vanity counter. This compromising solution was not concluded as the Builder insisted on an extra payment to cover its costs of possible remedial work to the marble tiled ledge should such be necessary.

(iv) It is the decision of this Tribunal that the Program should arrange or contract for the replacement of the existing five (5') foot, hourglass-shaped, jetted, acrylic, corner bathtub in the master en-suite bathroom on the second floor of the residential dwelling with a "Mirolin Eden IV" bathtub, including appropriate brass fixtures, and pay out of the guarantee fund to the Applicants a sum equivalent to the difference between the cost of the said "Mirolin Eden IV" bathtub and nine thousand, two hundred and seventy-three (\$9,273.00) dollars. In the alternative and at the option of the Applicants, they may choose to retain the said existing bathtub and be paid by the Program out of the guarantee fund a sum equivalent to the difference between the cost of a "Mirolin Eden IV" bathtub and nine thousand, nine hundred and twenty-four (\$9,924) dollars as damages for this improper substitution of inferior material by the Builder without notice or consent.

(v) In the event that the Applicants choose to retain the said existing bathtub as their option in the preceding paragraph, it is the further decision of this Tribunal that the Program should arrange or contract for the proper installation thereof, if necessary, so as to ensure that the water accumulation and claimed creaking of the existing installation is not the fault of poor workmanship or otherwise lacking proper support and/or leveling.

5. SEPTIC SYSTEM

(i) The evidence given by the Applicants respecting their claim for deficiencies or poor workmanship in the siting and/or installation of the septic system is vague at best, and seems to stem from the absence of the required municipal approval and the lack of any information from the Builder as to the exact location of the septic leaching bed. These two concerns are understandable given these failures on the part of the Builder, but such hardly give rise to a cause of action for damages for a breach of warranty. There was no expert evidence, including that given by the Program, upon which the Tribunal can make any award or find as a fact that the septic system installed at the residential premises was in any way deficient, save for the understandable anxiety of the Applicants.

(ii) This issue is referenced in the Program's Decision as item #23 of Schedule A(1) of the First Conciliation Report, items #33 and #35 of Schedule A(2) of the Second Conciliation Report, and as item #23 of the Work Schedule.

(iii) In dealing with this issue, the evidence is that there was a variety of problems with the septic system subsequent to possession of the residential premises by the Applicants, not the least of which was the deployment of the septic alarm on several occasions due to the failure of the pump and/or soil contamination. The Builder admitted that it was aware of these problems in a letter dated May 25, 1998 to Acchione Construction Co (a copy of which letter was sent by the Builder to the Applicants) and it addressed these problems during the Spring of 1998. According to the Program all such problems with the septic system seem to have been resolved except for the Applicants' anxiety and lack of information as aforesaid.

(iv) The evidence also indicates that the Applicants were not made aware of certain matters contained within a report to the Builder by Shaheen & Peaker, Geo-environmental and Construction Materials Engineers, dated March 13, 1997, (the "Shaheen & Peaker Report"), respecting the particular design and concerns of the septic system to be installed at the residential premises. This report states in part that;

"The Certificate of Approval and the New Home Warranty Program require inspections by the design engineer and certification that the system was properly installed. ...we will inspect exposed surfaces and materials, sample and analyze materials, where appropriate, and advise ... where there are deficiencies. Unless full time supervision is requested, [we] cannot ensure that the contractor will carry out work to design."

There is no evidence from the Program that any such inspection by the design engineer of the septic system was carried out nor is there any evidence that the septic system was installed as designed.

(v) On March 18, 1997, an application to the Regional Municipality of Peel, Health, for a certificate of approval for a Class 2 - 6 Sewage System pursuant to the Environmental

Protection Act of Ontario, respecting these residential premises, was made by the Builder (and apparently signed by its agent, Shaheen & Peaker Ltd.) and evidently approved subject to conditions attached, as follows;

"The installation of this private sewage disposal system is proposed to be located within the maintained fairway area of the golf course. The private sewage disposal system must be protected from public golf cart use and care must be taken to prevent any damage from golf club maintenance and grass cutting equipment. The home purchaser (owner and landowner) **shall be made aware of the sewage system easement prior to purchase** (emphasis added) of the house. In addition the owner is to meet with the tenant (Bolton Golf and Country Club Incorporated) to ensure right of access for the purpose of constructing, maintaining, repairing, replacing, inspecting and reconstructing the private sewage system as outlined under the Subdivision Agreement and Land Lease Agreement dated March 1989 between Albion Fairways Limited (Landlord) and Bolton Golf and Country Club (tenant). The reason for this condition is to ensure that a prospective homeowner **is aware of the sewage system location** (emphasis added) and ..."

The Tribunal finds as a fact that the Applicants were never notified of these conditions, and in fact, in a request for access to records under the Municipal Freedom of Information and Protection of Privacy Act of Ontario in October of 1998, they were denied "access to the cross sectional drawing of your house [due to the Builder's refusal to the Town's] request to release these drawings". There is a valid reason why Health Authorities place these words in these conditions. The Tribunal sees no basis for the Builder not only to ignore the purport thereof, but also to defeat the purpose of awareness by denying access to documents to which the Applicants have a right.

(vi) It is the decision of this Tribunal that the Program should arrange or contract for the inspection of the septic system of the residential premises as contemplated in the Sheehan & Parker Report, and for the correction of any deficiencies advised in such inspection at the cost of the guarantee fund. If such an inspection fails to locate the "sewage system location" as required by the conditions attached to the approval of the Regional Municipality of Peel, Health, it is the further decision of this Tribunal that the Program should arrange or contract for such steps as may be necessary to so locate the said system.

6. PLACEMENT of RESIDENCE on LOT

(i) This issue involves the lack of consent to the siting of the residential dwelling seven (7') feet closer to the street line than requested by the Applicants and agreed to by the Builder. It was noted by the Applicants in the April 14 Notice but does not appear to have been dealt with in the First Conciliation. It is, however, referenced as item #1 of Schedule A(2) of the Second Conciliation Report.

(ii) The evidence of the Applicants is that this variance of the agreed setback of the residential dwelling was discovered by the Applicants on or about August, 1997, subsequent to the completion of the house excavation in July, 1997, and at that time "nothing could be done so we accepted the situation".

(iii) It is the decision of this Tribunal that the Applicants acquiesced to this variance during the early stages of the amicable relationship with the Builder, noted the variance in the April 14 Notice and only made such variance an issue at the time of the Second Conciliation in the absence of the Builder. The Tribunal finds that in the overall context of the situation, the seven (7') foot variance to the agreed setback of the residential

dwelling from the street line is a minor variance with no consequential claim for damages.

(iv) The Tribunal agrees with the position taken by the Program that neither the Builder nor the Program has any jurisdiction with respect to the placement of building structures within the limits of the lot but such is the sole decision of the municipality. As such, this issue is beyond the scope of the Act.

7. GRADING

(i) Of necessity, this issue is, in part, related to the previous issues already dealt with respecting the front elevation, the ponding of the back yard, the septic system and the house placement within the lot. Municipal authority and its approval to grades and levels are the paramount consideration in all these issues and cannot be separated. The Applicants claim that insufficient attention by the Builder to grading and to the application of top soil is the root cause to the unsightly appearance of the residential dwelling, the accumulation of run-off water from adjoining lands and the unsatisfactory performance of the septic system. In all of these issues, the Program takes the position that only the deficiencies of the Builder are within the scope of the Act.

(ii) This issue is referenced in the Program's Decision as item #28 of Schedule A(1) and item #28 of Schedule A(2) of the First Conciliation Report, and items #17, #32 and #33 of Schedule A(2) of the Second Conciliation Report.

(iii) As with the septic system, the evidence of the Applicants is once again sketchy and vague due principally to relying on reports from outside parties without providing direct proof of any deficiencies. This has the understandable result of dissatisfaction and complaints without any real substance to the Applicants' claim for damages under the Act. No expert witness was called to assist this Tribunal in making any findings of fact that there was a breach of warranty on the part of the Builder. It is equally clear that the Builder performed a minimum of grading and top soil application having regard to the worsening of the builder-owner relationship at this late stage of construction.

(iv) It is the decision of this Tribunal that although the Applicants have failed to satisfy the onus of proof with respect to the actual grading of the residential premises, they do have a right to have the grading of the residential premises by the Builder approved by the municipality authority, as the Builder ought to have done. It is therefore the further decision of this Tribunal that the Program should arrange or contract for obtaining the approval by the municipality of the grading of the lot, including all necessary work and materials required by the municipality before issuing such approval.

8. CARPETING

(i) The Agreement, in the extras and upgrades specification schedule, specified that "fifty (50 oz) ounce carpet and high density underlay" was to be utilized in certain areas of the residential dwelling. The colour chart, as that part of the Agreement wherein the Applicants were enabled to make certain selections, further specified "4504 Rose Taupe 50 oz - High Density Underlay" in the selection process of the carpeting and underlay from those choices or samples available to the Applicants from the Builder. The evidence suggests that "4504 Rose Taupe" carpeting was only available in the grade of thirty-two (32 oz) ounce carpeting and such was only discovered by the Applicants as the carpeting was in the course of being laid. The Applicants allege that subsequent to

the carpet installation and upon extensive research done by them, they discovered further that the carpet chosen by them from the Builder's samples was not manufactured in the 50 ounce grade in spite of the representations by the Builder's agent on its behalf. Hence, the Applicants in this issue claim that the Builder made an improper substitution of the lower grade of carpet without notice to the Applicants and without their knowledge, and certainly without their consent. This issue is, however, complicated in that no direct evidence was produced either by the Applicants or by the Program to identify positively what grade of carpeting was, in fact, installed in the residential dwelling.

(ii) This issue is referenced in the Program's Decision as item #26 of Schedule A(2) of the Second Conciliation Report.

(iii) It is the decision of this Tribunal that the Applicants have failed to satisfy the onus of proof with respect to this issue of the installation of an inferior grade of carpeting, and the Tribunal confirms the Program's Decision on this issue.

(iv) This issue was not noted in the April 14 Notice but was only brought to the attention of the Program in October of 1998, and as such was not part of the First Conciliation. Hence, the Program does not have the benefit of the Builder's position on the matter, nor indeed, does this Tribunal.

(v) The Applicants allege that an equivalent carpet to "4504 Rose Taupe" in a 50 ounce grade would, at current prices, be nine (\$9.00) dollars more expensive for a square yard, and for five hundred and three (503 sq. yd.) square yards the aggregate increased cost would amount to \$4,527.00. Again, this Tribunal has no direct evidence of the price differential between the carpet and underlay that was installed in the residential dwelling, whatever it is or they are, and "4504 Rose Taupe 50 oz - High Density Underlay" specified in the Agreement. There is likewise no direct evidence as to the total area in the residential dwelling to be covered by the specified carpet. The Tribunal cannot therefore assess the damages suffered by the Applicants, even if their claim of an inferior material substitution was proved, and nor can the Program.

9. AGREED FLOOR PLAN of SECOND FLOOR (SCHEDULE "Z")

(i) This issue arises due to the left to right reversal or visa versa, of the configuration of the residential dwelling hereinbefore noted and the consequent adjustment to the floor plans and footprint of the actual building.

(ii) The evidence reveals that during the negotiations leading up to the Agreement, the Applicants were invited to customize the first and second floor layout within limits, and Mr. Strachan responded by the preparation of three sketches which were thence annexed to the Agreement as "Schedule Z 2" and referred to on the front page of the Agreement. In effect, these sketches modified the front elevation of the residential dwelling shown in its original configuration in "Schedule Z 1" to the Agreement, but, as pointed out by Mr. Rosset, these first and second floor sketches were hardly detailed floor plans. Such sketches were more akin to rough design layouts with but few actual measurements to guide the Builder's work force beyond approximations.

(iii) The result complained about by the Applicants was the placement of the entry doorway and doors of the master bedroom on a ninety degree plane to the upstairs hallway just outside the master bedroom, or squarely thereto, rather than on an angle

as apparently depicted in Mr. Strachan's second floor sketch. Such sketch clearly borrows some space from the adjoining "BEDROOM 2" and incorporates it into an enlarged "MASTER BEDROOM" and thereby turns the former into a "WALK IN LINEN" room. Window placement is also altered in the said sketch as are other enlargements and subtractions of space allocation. The total effect of these alterations to the original reversed second floor plan affords an opportunity to angle the entry doorway to the master bedroom.

(iv) The question for this Tribunal to determine is whether or not the "Schedule Z 2" sketch prepared by Mr. Strachan is clear enough to show the Builder's work force that the second floor entry doorway to the master bedroom should be angled as apparently depicted in the said sketch, or installed squarely as shown in the reversed second floor plan of "Schedule Z 1". Conversely, was there a duty put on the Builder's work force utilizing the sketch to make an enquiry before commencing the installation of the entry doorway in a 'square' manner, or a lack of supervision by the Builder?

(v) Before determining this question, it is expedient to turn to the second complaint of the Applicants in this issue of the second floor layout depicted in "Schedule Z 2", and that is the incorrect hanging of several doors.

(vi) Both in the reversed second floor plan of "Schedule Z 1" and in the "Schedule Z 2" sketch prepared by Mr. Strachan, the doors to the "HIS" and "HERS" closets between the master bedroom and the "ENSUITE" bathroom open outwards, whereas the evidence discloses that the Builder has installed such doors opening inwards thereby robbing the use and utility of already limited space in such closets.

(vii) The hanging of the "FRENCH DOORS" to the "BALCONY" depicted in the "Schedule Z 2" sketch prepared by Mr. Strachan clearly open outward, whereas the evidence discloses that the Builder has installed such doors opening inwards thereby changing the aesthetics of outward opening doors to the "BALCONY". These "FRENCH DOORS" are in replacement to sliding doors in the reversed second floor plan of "Schedule Z 1".

(viii) This issue is referenced in the Program's Decision as item #6 of Schedule A(2) of the First Conciliation Report, item #15(c) of Schedule A(1) and repeated as items #29(c) and 33 of Schedule A(2) of the Second Conciliation Report, and as item #15(c) on page 14 of 15 of the Work Schedule.

(ix) It is the decision of this Tribunal that the Program should arrange or contract for the proper installation of the closet doors and the "FRENCH DOORS" as depicted in the "Schedule Z 2" sketch prepared by Mr. Strachan so that all such doors open outward.

(x) As to the first complaint of the Applicants' in this issue, it is the decision of this Tribunal that, at the option of the Applicants, the Program should arrange or contract for the installation of the second floor doorway to the master bedroom on an appropriate angle as apparently depicted in the "Schedule Z 2" sketch prepared by Mr. Strachan, but without any cost to the Program of any remedial work made necessary by such installation to the flooring, carpeting, painting or otherwise, the cost of such remedial work to be borne by the Applicants should they avail themselves of this option. Should the Applicants choose not to avail themselves of this option, the second floor doorway to the master bedroom shall remain as installed by the Builder at no cost to the Program.

10. EXTERIOR PAINT

(i) The Applicants complain of unworkmanlike exterior paint application and mismatched colours in this issue.

(ii) This issue is referenced in the Program's Decision as item #15 of Schedule A(1) and item #24 of Schedule A(2) of the First Conciliation Report, items #13 and 33 of Schedule A(2) of the Second Conciliation Report, and as item #15 of the Work Schedule.

(iii) The evidence discloses that the Agreement provides "All doors & Windows to try & match EAVESTROUGH" and the Applicants further allege that the Builder's agreement "to match" the eavestroughing is evidenced in the Pre-Delivery Inspection Report (the "PDI") which was never submitted in evidence at this hearing by either the Applicants or the Program. There was also a suggestion that an incorrect paint sample was suspect in that the specified "slate grey" exterior paint selected was mismatched with the exterior "purple-tinged" paint actually applied as shown in the photographic evidence produced by the Applicants.

(iv) Once again, it is clear that the Builder's performance fell far short of its promises made during the early amicable relationship and evaporated in the later adversarial circumstances. The Tribunal cannot find any agreement to support these promises on the part of the Builder and nor, evidently, could the Program in its decision.

(v) It is the decision of this Tribunal that the Applicants have failed to satisfy the onus of proof with respect to this issue of the mismatched colours of exterior paint applied by the Builder and the allegation of poor workmanship in the application of paint primer. The Tribunal therefore confirms the Program's Decision on this issue.

11. WATER LEAK in COLD ROOM

(i) This issue is referenced in the Program's Decision as item #8 of Schedule A(1) of the First Conciliation Report, item #3 of Schedule A(1) of the Second Conciliation Report, and as item #8 and item #3 on page 11 of 15 of the Work Schedule.

(ii) From the evidence of all witnesses, there is no dispute as to the facts of this issue involving the cold room in the residential dwelling. As disclosed in the Program's Decision, there are two parts to the Applicants' complaint of faulty workmanship. One part deals with the water leakage through the foundation, and the other part deals with a half inch gap between the door frame and the foundation wall. These need not be elaborated herein as both parts are described in detail in the respective items contained in the Work Schedule, together with a description of the remedial work necessary to rectify the poor workmanship.

(iii) It is the decision of this Tribunal that the Program should arrange or contract for the remedial work necessary to rectify the poor workmanship in both parts of this issue as described in the Program's Decision or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of three thousand, five hundred (\$3,500.00) dollars as damages for these breaches of warranty.

12. DAMAGE to OIL PAINTING

(i) The evidence of the Applicants is that a work of art owned by the Applicants was damaged by one of the Builder's subtrades, notably the floor finisher, in that floor stain was dripped over the painted canvass and the work of art was thus destroyed. This issue is not referenced in the Program's Decision. The Applicants allege that the work of art was purchased by them for \$1,590.00 in currency of the United States of America.

(ii) During cross-examination of Mr. Strachan, it became apparent to him that this claim was beyond the scope of the Act since there could be no breach of warranty on the part of the Builder in the circumstances but rather a claim against his or the Builder's insurance, if any. During the hearing, no further mention was made of this issue nor, indeed, was any argument addressed to me by either party on the matter. The Tribunal therefore finds that this issue was abandoned by the Applicants during the course of this hearing.

13. KITCHEN TILE

(i) This issue is referenced in the Program's Decision as item #3 of Schedule A(2) of the First Conciliation Report, item #11 of Schedule A(1) and items #5 and #33 of Schedule A(2) of the Second Conciliation Report, and as item #11 of the Work Schedule.

(ii) The Agreement required 10" x 10" ceramic tiles to be installed in the kitchen of the residential dwelling but the Builder, without notice or consent, substituted 13" x 13" tiles instead, all as noted in item #3 of Schedule A(2) of the First Conciliation Report. The issue also involves alleged deficient workmanship in the completed installation due to the appearance of the grout.

(iii) This Tribunal finds that the Builder consistently ignored the specifications of material in the Agreement, or otherwise did not pay attention to the written words therein and to which it had agreed. Without having the evidence of the Builder as to why it made the substitution, the Tribunal finds that the Builder is in default of its warranty as agreed with the Applicants in this issue. The Tribunal finds no merit in the Program's Decision that the "tile installation in the kitchen is not of a lesser quality ... [and as such] is not warranted". An elaborate selection process was initiated by the agent of the Builder at the time of negotiations for the purchase which would become a sham if the Builder could ignore the purchaser's selection and do as it pleased. Surely, such representations (or warranties) made to entice purchasers to its product must be enforceable against the Builder and against the corporation charged with administering this consumer protection legislation for the benefit of purchasers who have paid into its guarantee fund.

(iv) It is the decision of this Tribunal that the Program should arrange or contract for the replacement of the 13" x 13" ceramic tiles in the kitchen of the residential dwelling by the tiles specified in the Agreement or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of two thousand, one hundred (\$2,100.00) dollars as damages for this breach of warranty. The subordinate part of this issue respecting the complaint concerning the grout thence becomes of no import.

14. FOYER MARBLE

(i) This issue is almost identical to the immediately preceding issue in that it likewise involves the substitution by the Builder of 12" x 12' marble tiles in the front entrance foyer of the residential dwelling instead of the marble tiles specified in the Agreement without notice to or the consent by the Applicants. The issue also involves alleged deficient workmanship due to cracks appearing in the marble tile of the completed installation.

(ii) This issue is referenced in the Program's Decision as item #29 of Schedule A(2) of the First Conciliation Report and items #33 and #34 of Schedule A(2) of the Second Conciliation Report.

(iii) Without repeating the Tribunal's remarks in the preceding issue, it is the decision of this Tribunal that the Program should arrange or contract for the replacement of the 12" x 12" marble tiles in the front entrance foyer of the residential dwelling by the tiles specified in the Agreement or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of two thousand, (\$2,000.00) dollars as damages for this breach of warranty. Without any evidence as to the cause of the cracked marble tiles, the subordinate part of this issue thence becomes of no import.

15. UPPER DECK FLOORING and RAILING

(i) The Applicants claim that the flooring treatment of the second floor deck leading from the master bedroom (the "Upper Deck") was dissimilar in appearance to that which was agreed to and expected by them, and as such, was an inappropriate substitution of inferior flooring without the consent of or notice to them. This complaint also involves the condition of the railing of the Upper Deck due to poor workmanship in its construction.

(ii) The only references to this issue in the Program's Decision would appear to be item #19 of Schedule A(1) of the First Conciliation Report and item #19 of the Work Schedule.

(iii) The evidence discloses that a black, rubber-like membrane was utilized by the Builder as the floor of the Upper Deck which was not only dissimilar to the flooring treatment of the Lower Deck immediately beneath the Upper Deck, but also was unusable by the Applicants due to the sticky residue which attached itself to footwear or stockings of persons who walked on the floor. In spite of the Program's position that this type of membrane was commonly used in the building industry for such a floor, the Tribunal finds as a fact that this flooring treatment is unsatisfactory and unfit for the purpose of the Upper Deck of the residential dwelling.

(iv) Since the Upper Deck railing does not match the railing of the Lower Deck beneath it and such should be consistent, the Tribunal finds that the Builder has breached its warranty due to the poor workmanship or lack of supervision with respect to the construction of the railing of the Upper Deck.

(v) It is the decision of this Tribunal that the Program should compensate the Applicants in the amount of five hundred (\$500.00) dollars out of the guarantee fund, being the equivalent of the amount expended by the Applicants to have a proper floor constructed

as contemplated by the Agreement. The Program should also pay to the Applicants the sum of nine hundred and sixty (\$960.00) dollars out of the guarantee fund in order that the Applicants might arrange or contract for the replacement of the existing Upper Deck railing of the residential dwelling with a railing which matches the Lower Deck railing as contemplated by the Agreement.

16. METAL INSULATED DOOR

(i) This issue involves the substitution by the Builder of a wood slab door in an exterior location in the place and stead of a metal insulated and weather stripped door as specified in the Agreement.

(ii) This issue is referenced in the Program's Decision as item #1 of Schedule A(2) of the First Conciliation Report and items #30 and #33 of Schedule A(2) of the Second Conciliation Report.

(iii) The Program takes the position that since this particular door provides ingress and egress for persons from or to the exterior to or from the unheated area of the garage, it does not require to be insulated for effectiveness in spite of the representations of the Builder and the clear specifications in the Agreement.

(iv) It is the decision of this Tribunal that the Program should arrange or contract for the replacement of the exterior wood slab door providing ingress and egress for persons to the garage with a metal insulated and weather stripped door as specified in the Agreement or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of seven hundred (\$700.00) dollars as damages for this breach of warranty.

17. DECORATIVE MIRROR

(i) This issue involves the substitution by the Builder of a reflective glass mirror in the powder room on the main floor of the residential dwelling in the place and stead of a decorative mirror as specified in the Agreement.

(ii) This issue is referenced in the Program's Decision as item #2 of Schedule A(2) of the First Conciliation Report and item #33 of Schedule A(2) of the Second Conciliation Report.

(iii) It is the decision of this Tribunal that the Program should pay out of the guarantee fund to the Applicants the sum of five hundred (\$500.00) dollars as damages for this improper substitution by the Builder of an inferior mirror without notice or consent.

18. GAS LEAK at BARBECUE LINE

(i) This issue involved a gas leak in the barbecue line installed by the Builder and its immediate repair by the Applicants on a Friday afternoon in the late Spring or Summer of 1998 at a cost of three hundred and sixty-three (\$363.00) dollars.

(ii) This issue is referenced in the Program's Decision as item #16 of Schedule A(2) of the Second Conciliation Report.

(iii) It is alleged by the Applicants that this gas leak was caused by a loose fitting installed by the Builder which did not enable the shut-off valve to stop the flow of gas and, in turn, resulted in a dangerous condition and an emergency. Upon consulting with the Program on the telephone, the Applicants were advised to have the dangerous condition rectified immediately. The allegation of the Applicants was the only evidence before this Tribunal and the Tribunal finds it to be factual.

(iv) It is the decision of this Tribunal that the Program should pay out of the guarantee fund to the Applicants the sum of three hundred and sixty-three (\$363.00) dollars as damages for this deficient workmanship.

19. SECURITY SYSTEM

(i) This issue involves the installation by the Builder of an alleged inadequate security system in the residential dwelling and not as represented and specified in the Agreement.

(ii) This issue is referenced in the Program's Decision as item #4 of Schedule A(2) of the First Conciliation Report and item #33 of Schedule A(2) of the Second Conciliation Report.

(iii) The Agreement provide for a "security alarm system for your family protection" and such is upgraded to include "smoke detectors provided with home to be hard wired" and "security system to include window contacts on lower level and adequate motion detectors".

(iv) The evidence discloses that in addition to the specified window contacts, a single motion detector was installed by the Builder on the main floor. The Applicants claim that the Agreement specified for more than one motion detector and, on the advise of the installer, paid an extra three hundred and twenty-six (\$326.00) dollars to the installer/alarm company for additional motion detectors in the walk-out area of the basement and on the second floor, together with a key-pad in the master bedroom so that the system might be armed and disarmed from the said bedroom for security during night-time use whilst the residential dwelling is occupied. The Program takes the position that the Builder had fulfilled the intent of the Agreement without these additions.

(v) Domestic security systems today require a level of sophistication in order to be effective and a motion detector on each level of the home is appropriate to meet the specification of "adequate motion detectors" as agreed by the Builder in the Agreement. The Builder's interpretation of "security ... for your family's protection is too restrictive and the Program's endorsement thereof is thence inappropriate.

(vi) It is the decision of this Tribunal that the Program should pay out of the guarantee fund to the Applicants the sum of three hundred and twenty-six (\$326.00) dollars as compensatory damages for this breach by the Builder of its specific warranty.

20. EXTERIOR LIGHT FIXTURES

(i) This issue involves the installation by the Builder of five exterior brass-plated carriage lights on the outside of the residential dwelling, the finish of which the

Applicants claim deteriorated rapidly subsequent to the date of possession and became pitted.

(ii) This issue is referenced in the Program's Decision as item #31 of Schedule A(2) of the Second Conciliation Report.

(iii) The Agreement is silent as to the standard of exterior light fixtures to be installed at the residential dwelling and although the particular exterior light fixtures installed by the Builder seem to have tarnished somewhat within a shorter period of time than might be anticipated, the Tribunal is unable to find a breach of any warranty which the Builder has made to the Applicants in this issue.

(iv) It is speculative to suggest that a program of maintenance on the part of the Applicants might have protected the said exterior light fixtures from this more rapid deterioration, yet such can not be dismissed as a cause. The Tribunal finds that the Applicants, therefore, have not satisfied the onus of proof required in this issue, and it is not appropriate to claim a better standard or grade of light fixture with a "lifetime finish" as the only solution to this unattractive condition.

(v) The Tribunal confirms the Program's Decision on this issue.

21. CROWN MOLDING

(i) This issue is solely dependent upon the interpretation of the words "the entire span" as used in the Agreement to describe that which was intended with respect to the installation of the "deluxe crown molding [for] all 3 dining room walls". The exact phrase utilized in one of the EXTRAS & UPGRADES SPECIFICATIONS SCHEDULES of the Agreement states "Deluxe crown molding as noted in #0659-19 will be at least 6" and run the entire span of all 3 dining room walls." The Builder, or its work force, have concluded that the words "entire span" modify the words "dining room" and the latter words are dominant. The resulting installation has the completed crown molding terminate along the length of the wall which corresponds to the dining room area and thus ends abruptly before completing the entire span of that particular wall.

(ii) This issue is referenced in the Program's Decision as item #5 of Schedule A(2) of the First Conciliation Report and item #33 of Schedule A(2) of the Second Conciliation Report.

(iii) The Tribunal can not agree with the interpretation placed on these words by the Builder and endorsed by the Program. The words "dining room" are adjectival to describe only the walls requiring the installation of the crown molding. The words "entire span" must be given that meaning with reference to the walls so described otherwise they become meaningless. Certainly these words do not modify the words "dining room".

(iv) It is the decision of this Tribunal that the Program should arrange or contract for the replacement of the installed crown molding with deluxe crown molding "for the entire span of the dining room walls" as specified in the Agreement or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of three hundred (\$300.00) dollars as damages for this breach of warranty on the part of the Builder.

22. EXTERIOR POT LIGHT FIXTURES

(i) The Applicants claim that the two exterior pot-light fixtures were installed incorrectly by the Builder. Specifically, two pot-lights in the soffit above the exterior of the front entrance were located of necessity at such a height above the surface intended to be illuminated so as to require either a remote device, such as an extension pole, in order to replace a failed light bulb, or otherwise a large step ladder or extension ladder to accomplish the purpose. The issue complained about was not the situation of the great height of the installation, but rather the more intricate fitting of the retaining collar to hold the whole fixture together as a unit and its critical spring mechanism. On the occasion of such a failed-bulb replacement, the Applicants reported to the Program on November 1, 1998, that each of the pot-light fixtures came apart and accordingly they allege that such were incorrectly installed by the Builder.

(ii) This issue is referenced in the Program's Decision as item #19 of Schedule A(2) of the Second Conciliation Report.

(iii) The evidence disclosed some damage to the springs required to hold together as a unit each of the two pot-light fixtures, and it is speculative to decide whether such damage was due to incorrect installation of the respective fixtures or was caused by excessive force applied thereto in the course of bulb replacement. The Applicants engaged an electrician in August of 1999 to repair the said fixtures but neither the electrician nor any other expert witness was called by the Applicants to give evidence to this Tribunal as to the proximate cause of the alleged failure of the said pot-light fixtures.

(iv) This Tribunal finds that the Applicants have not satisfied the onus of proof required in this issue, and agrees with the Program's Decision that "responsibility for the damage can not be determined." Accordingly, the Tribunal confirms the Program's Decision in this issue.

23. EFFLORESCENCE

(i) The Applicants produced in evidence photographs of the exterior wall of the residential dwelling which showed a noticeable condition of efflorescence on the exterior face of the brickwork proximate to the two-storey-glass-block window of the dining room area. This efflorescent condition was noted in the Majestic Report as a deficiency of workmanship and in spite of this issue not being noted in the April 14 Notice, the Applicants allege that such was brought to the attention of the Program during conversations with Mr. Rosset and Mr. Lawrence. The issue is one of relative insignificance in that it can be cured by an application of muric acid to clean the affected area of brick at an estimated cost of two hundred (\$200.00) dollars.

(ii) This efflorescent condition is not referenced in either of the Conciliation Reports nor in the Work Schedule, and as such is not part of the Program's Decision.

(iii) The evidence of the Program and its position on this issue is that the efflorescent condition was never brought to the attention of the Program as an issue for which the Applicants were making a claim against the Builder or the Program. On several occasions the representatives of the Program requested that the Applicants provide a complete list of all claims and in each case this issue was not included.

(iv) Due to the insignificance of this issue and the correct position taken by the Program, it is the Decision of this Tribunal to deny the Applicants' claim for the offending efflorescent condition of the exterior wall of the residential dwelling.

24. DEDICATED ELECTRICAL OUTLET for BUILT-IN VACUUM

(i) The evidence given at this hearing discloses that the rough-in outlet for the built-in vacuum system installed by the Builder was located/installed on the left side of the door from the garage into the home but that the dedicated electrical outlet for the vacuum system was later installed on the right side of the said door. This awkward placement of these related installations would thus require either an electrical extension cord from the outlet to circumvent the door-frame in order to connect to the remote vacuum system, or that the vacuum system be placed proximate to the electrical outlet with an extended vacuum tubing (or conduit) likewise to circumvent the door-frame in order to connect to the vacuum rough-in. The latter solution would, of course, have the effect of reducing markedly the efficiency of the whole vacuum system.

(ii) The Applicants chose the former solution in order to preserve the efficiency of the whole built-in vacuum system only to have the Hydro Utility disapprove of the use of the necessary electrical extension cord and require a proper electrical conduit to an outlet proximate to the installed vacuum unit and its rough-in installation by the Builder. The Applicants thence claimed this expense as damages for the deficient workmanship of the Builder or otherwise its lack of supervision in the remote installation of the dedicated electrical outlet.

(iii) This issue is referenced in the Program's Decision as item #7 of Schedule A(2) of the Second Conciliation Report.

(iv) The Tribunal finds as fact that the Builder installed the dedicated electrical outlet for the central built-in vacuum system on the wrong side of the door from the garage into the home having regard to the positioning of the rough-in for the said system (also installed by it) on the other side of the said door. The Applicants contracted for the rectification of this error as required by the Electrical Inspection Unit of Ontario Hydro at a cost of one hundred and fifty-nine (\$159.00) dollars.

(v) It is the decision of this Tribunal that the Program should pay out of the guarantee fund to the Applicants the sum of one hundred and fifty-nine (\$159.00) dollars as damages for this breach of warranty on the part of the Builder.

25. REFRIGERATOR WATER LINE

(i) This issue involved the installation by the Builder of a water line for attachment to a refrigerator, which required the subsequent fitting of an adaptor for attachment to the Applicants' appliance.

(ii) This issue is referenced in the Program's Decision as item #26 of Schedule A(2) of the First Conciliation Report and item #33 of Schedule A(2) of the Second Conciliation Report.

(iii) The evidence discloses that, on the occasion of the First Conciliation, the Builder agreed to reimburse the Applicants eighty (\$80.00) dollars for their cost of having the

adaptor attached to the water line due to this uncompleted part of the Builder's installation of the said water line.

(iv) It is the decision of this Tribunal that the Program should pay out of the guarantee fund to the Applicants the sum of eighty (\$80.00) dollars as damages for this deficient workmanship.

26. BASEMENT FLOOR

(i) This issue is referenced in the Program's Decision as item #44 of Schedule A(2) of the First Conciliation Report.

(ii) From the evidence of all witnesses, there is no dispute as to the facts of this issue involving cracks in the concrete basement floor and the description thereof in the Program's Decision.

(iii) It is the decision of this Tribunal that, in the absence of any further technical or expert evidence to support the allegation by the Applicants of deficient workmanship on the part of the Builder respecting this issue, the Applicants have failed to satisfy the onus of proof, and the Program's Decision as noted above is therefore confirmed.

27. ROOFING SHINGLES

(i) This issue is referenced in the Program's Decision as item #18 of Schedule A(2) of the Second Conciliation Report as follows:

18. Complaint: Roof shingles raised and buckling

Observation/Comment: The Homeowner claims that 12 shingles are buckling and that the corners of the tabs are curling upwards. No report of water penetration through the roof was noted by the homeowners.

Reason: Shingles will display some amount of curling which is caused by expansion and contraction due to exposure to seasonal elements. This complaint is not warranted, as there is no defect in workmanship or material. This complaint is considered normal wear.

(ii) From the evidence of all witnesses, there is no dispute as to the facts of this issue involving buckling of roof shingles and the description thereof in the Program's Decision.

(iii) From photographic evidence produced by the Applicants, it is apparent that this shingle buckling condition of the roof of the residential dwelling has been established by the Applicants. It is the decision of this Tribunal that the Program should arrange or contract for the inspection of this condition by a qualified roofing contractor and complete any remedial work necessary to remedy this condition if so advised by such contractor.

28. SUPPLEMENTAL ITEMS

(i) The Applicants submitted to the hearing before this Tribunal twelve additional items of complaint against the Builder as breaches of warranty claims and, therefore, charges against the guarantee fund administered by the Program under the Act. The Program, on the other hand, states that many of these supplementary items have been dealt with in the Programs' Decision and resists all other of such items as being claims not noted

or identified in the April 14 Notice or otherwise brought to the attention of the Program by the Applicants at the time of taking possession of the residential premises. Accordingly, these latter supplementary items were neither referenced in either of the two Conciliation Reports nor in the Work Schedule and are thence omitted from the Program's Decision against which this appeal has been taken by the Applicants.

(ii) This Tribunal is of the view that those supplementary items which were part of the Program's Decision should be addressed and dealt with at this time so as to obviate the need for further discussions between the Parties or another hearing before the Tribunal, and does so pursuant to the jurisdiction given to this Tribunal in Section 16(3) of the Act to substitute its decision for that of the Program.

(iii) From the perspective of an over-view of the Act and the administration of the guarantee fund by the Program, it is the opinion of this Tribunal that warranties identified, noted alleged by the owner to be breached by a builder or vendor **at the time of possession** of the new home are the subject matter of a valid claim for damages under the Act subject only to the onus of proof thereof. Included with such warranties are latent deficiencies in workmanship or materials and/or remedial work as are discovered subsequent to possession and such are covered for the duration of one year from the date of possession or such longer period of time under such conditions as prescribed by the regulations. It is not the purport of the Act as consumer protection legislation to provide an ongoing maintenance service program for an owner from time to time subsequent to occupation of the premises and many of the supplementary items claimed by the Applicants fall into this latter category. The Tribunal notes the concerted efforts of the Program to achieve that elusive objective of a definitive list of issues or claims in this case.

(iv) It is the Decision of this Tribunal that the supplementary items number 6, 7 and 8 which are dealt with in the Program's Decision respecting the non-matching utilization of corner bricks, mud or bricks and uneven or messy masonry and brickwork of the residential dwelling have been proved by the Applicants as breaches as warranties for poor workmanship and materials on the part of the Builder. The Program should therefore arrange or contract for the necessary remedial work to be performed to correct these deficiencies in addition to the arrangement or contract ordered by the Tribunal under Section 1(iv) hereof. In the even that the Program takes the option of remitting monetary damages under Section 1(iv) hereof, the Program shall reimburse the Applicants out of guarantee fund for their costs of such remedial work.

(v) It is the further Decision of this Tribunal that all other supplementary items are hereinbefore described and claimed by the Applicants have either not been proved by the Applicants or have otherwise been included in the Program's Decision with which this Tribunal agrees and hereby confirms.

ORDER:

Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Program to have work completed or to make payment to the Applicants as set out below.

Issue 1 - Front Elevation of Residence

(a) Replace as identified in this decision the offending concrete blocks and parging treatment of the front elevation of the residential dwelling with matching stone brickwork or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of thirteen thousand, eight hundred (\$13,800.00) dollars.

(b) Pay to the Applicants seventy (\$70.00) dollars for the missing key stones.

Issue 3 - Lower Deck Construction

(a) Arrange for the remedial work to the Lower Deck specified in the Zaretsky Report or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of six thousand (\$6,000.00) dollars.

(b) Arrange or contract for the incomplete brickwork surrounding the columns of the Lower Deck or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of fourteen thousand, five hundred (\$14,500.00) dollars.

Issue 4 - Bath Tub in Master Ensuite Bathroom

(a) Replace the existing five (5') foot, hourglass-shaped, jetted, acrylic, corner bathtub in the master en-suite bathroom on the second floor of the residential dwelling with a "Mirolin Eden IV" bathtub, including appropriate brass fixtures, and pay out of the guarantee fund to the Applicants a sum equivalent to the difference between the cost of the said "Mirolin Eden IV" bathtub and nine thousand, two hundred and seventy-three (\$9,273.00) dollars. In the alternative and at the option of the Applicants, they may choose to retain the said existing bathtub and be paid by the Program out of the guarantee fund a sum equivalent to the difference between the cost of a "Mirolin Eden IV" bathtub and nine thousand, nine hundred and twenty-four (\$9,924.00) dollars.

(b) In the event that the Applicants choose to retain the said existing bathtub as their option in the preceding paragraph, the Program shall arrange or contract for the proper installation thereof, if necessary, so as to ensure that the water accumulation and claimed creaking of the existing installation is not the fault of poor workmanship or otherwise lacking proper support and/or leveling.

Issue 5 - Septic System

(a) Arrange or contract for the inspection of the septic system of the residential premises as contemplated in the Sheehan & Parker Report, and correct any deficiencies advised in such inspection at the cost of the guarantee fund. If such an inspection fails to locate the "sewage system location" as required by the conditions attached to the approval of the Regional Municipality of Peel, Health, the Program shall arrange or contract for such steps as may be necessary to so locate the said system.

Issue 7 - Grading

(a) Arrange or contract for obtaining the approval by the municipality of the grading of the lot, including all necessary work and materials required by the municipality before issuing such approval.

Issue 9 - Agreed Floor Plan of Second Floor

(a) Arrange or contract for the proper installation of the closet doors and the "FRENCH DOORS" as depicted in the "Schedule Z 2" sketch prepared by Mr. Strachan so that all such doors open outward.

(b) Arrange or contract for the installation of the second floor doorway to the master bedroom on an appropriate angle as apparently depicted in the "Schedule Z 2" sketch prepared by Mr. Strachan, but without any cost to the Program of any remedial work made necessary by such installation to the flooring, carpeting, painting or otherwise, the cost of such remedial work to be borne by the Applicants should they avail themselves of this option. Should the Applicants choose not to avail themselves of this option, the second floor doorway to the master bedroom shall remain as installed by the Builder at no cost to the Program.

Issue 11 - Water Leak in Cold Room

(a) Arrange or contract for the remedial work necessary to rectify the poor workmanship in both parts of this issue as described in the Program's Decision or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of three thousand, five hundred (\$3,500.00) dollars.

Issue 13 - Kitchen Tile

(a) Arrange or contract for the replacement of the 13" x 13" ceramic tiles in the kitchen of the residential dwelling by the tiles specified in the Agreement or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of two thousand, one hundred (\$2,100.00) dollars.

Issue 14 - Foyer Marble

(a) Arrange or contract for the replacement of the 12" x 12" marble tiles in the front entrance foyer of the residential dwelling by the tiles specified in the Agreement or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of two thousand, (\$2,000.00) dollars.

Issue 15 - Upper Deck Flooring and Railing

(a) Pay to the Applicants the amount of five hundred (\$500.00) dollars, being the equivalent of the amount expended by the Applicants to have a proper floor constructed as contemplated by the Agreement, and pay to the Applicants the sum of nine hundred and sixty (\$960.00) dollars for the Applicants to replace the existing Upper Deck railing of the residential dwelling with a railing which matches the Lower Deck railing.

Issue 16 - Metal Insulated Door

(a) Arrange or contract for the replacement of the exterior wood slab door providing ingress and egress for persons to the garage with a metal insulated and weather stripped door as specified in the Agreement or, in the alternative and at the option of the Program, pay to the Applicants the sum of seven hundred (\$700.00) dollars.

Issue 17 - Decorative Mirror

(a) Pay to the Applicants the sum of five hundred (\$500.00) dollars.

Issue 18 - Gas Leak at Barbeque Line

(a) Pay to the Applicants the sum of three hundred and sixty-three (\$363.00) dollars.

Issue 19 - Security System

(a) Pay to the Applicants the sum of three hundred and twenty-six (\$326.00) dollars.

Issue 21 - Crown Molding

(a) Arrange or contract for the replacement of the installed crown molding with deluxe crown molding "for the entire span of the dining room walls" as specified in the Agreement or, in the alternative and at the option of the Program, pay out of the guarantee fund to the Applicants the sum of three hundred (\$300.00) dollars.

Issue 24 - Dedicated Electrical Outlet for Built-In Vacuum

(a) Pay to the Applicants the sum of one hundred and fifty-nine (\$159.00) dollars.

Issue 25 - Refrigerator Water Line

(a) Pay to the Applicants the sum of eighty (\$80.00) dollars.

Issue 27 - Roofing Shingles

(a) Arrange or contract for the inspection of this condition by a qualified roofing contractor and complete any remedial work necessary to remedy this condition if so advised by such contractor.

28 Supplemental Items

With respect to supplemental items of 6, 7 and 8, arrange or contract for the necessary remedial work to correct these deficiencies in conjunction with Issue #1. In the event that the Program takes the option of remitting monetary damages under Issue #1, the Program shall reimburse the Applicants further costs of such remedial work if undertaken by the Applicants.

Pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Program to disallow the balance of the Applicants claim.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop
Vice-Chair

Released: October 6, 2000

Vajda

BEATA VAJDA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: F. CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

BEATA VAJDA, Applicant
unrepresented

DATE OF HEARING: October 5, 2000

DECISION RELEASED: October 6, 2000 Hamilton

REASONS FOR DECISION

A hearing was held on October 5, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Beata Vajda (the "Applicant")
Motor Vehicle: 1991 Ford TAL, plate #AJRL 309 (the "vehicle")
Date of Appeal: September 18, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 5, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

The Applicant, Beata Vajda, testified that on the day she purchased her car (September 9, 2000) her father, Laszlo Vajda, was driving it and was stopped by the Ontario Provincial Police. His licence had been suspended for impaired driving and failing or refusing to provide a breath or blood sample. (Exhibit 4). She was unaware that his licence was under suspension. Ms. Vajda said she purchased the car so she could use it to transport her handicapped daughter to therapy at St. Joseph's Hospital. She stated prior to buying the car she relied on friends to drive them, but that she could not ask them everyday.

Applicant's written submission filed with the Tribunal in support of appeal states:

When OPP took my car, it was the first day that I bought it. I did not know that my father cannot drive. I bought my car because my daughter is handicapped, and I have to bring her every day for therapy. This is why I need my car. I do not have anybody to bring me everyday.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Laszlo Vajda;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of failing or refusing to provide breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until June 26, 2001.

The Respondent relied upon The Ministry of Transportation's written submissions.

In cross examination it was established that the Applicant did not have a vehicle prior to the purchase of the one impounded, that her daughter rode a school bus to school, and could ride on public transit. Ms. Vajda had not investigated special needs public transit services, and had talked to some volunteer groups two years previously regarding transportation for her daughter.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to whether the evidence established "exceptional hardship," the Tribunal finds Ms. Vajda failed to satisfy the conditions under section 22 of the *Highway Traffic Act* in that:

1. Alternative means of transportation were not explored by her. ie: car rental, taxi, public transit, Darts etc.
2. There is no threat to the health or safety of anyone normally transported by the vehicle.
3. The loss will not be immediate, significant or lasting.
4. As well, the vehicle in question was never actually used to transport Ms. Vajda or her children as it was impounded the same day as it was purchased.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: *October 6, 2000*

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED;**

IN THE MATTER of an application by 1006525 Ontario Ltd.
d/b/a Flamborough Auto Wreckers and Winston Ross
Prescod to appeal the Notice of the Director of Vehicle
Inspection Standards dated May 24th, 2000 to revoke the
Motor Vehicle Inspection Station Licence and to revoke the
registration as a Motor Vehicle Inspection Mechanic
pursuant to section 91(8)(e) and section 93(a) and (c) of the
Highway Traffic Act;

**1006525 ONTARIO LTD. D/B/A FLAMBOROUGH AUTO WRECKERS AND
WINSTON ROSS PRESCOD**

APPLICANTS

and

THE DIRECTOR OF VEHICLE INSPECTION STANDARDS

RESPONDENT

ADJOURNMENT

WHEREAS a hearing was scheduled to be held on October 18, 2000 in Toronto in the
above matter.

AND WHEREAS a letter was filed dated September 15, 2000 on behalf of the
Applicants, requesting an adjournment.

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard on **November 17, 2000 at 9:30 a.m.** at the
**Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto,
Ontario.**

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and
place, the Tribunal may make a Decision in your absence and without further notice to
you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

BEAUVAIS

GINNETTE BEAUVAIS

IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, c.H.8 as amended, section 50.2;

AND IN THE MATTER of a motion by Ginnette
Beauvais seeking an extension of the time
requirements for this Applicant to commence
this appeal from an impoundment order of the
Registrar under section 55.1 of the *Highway
Traffic Act*;

AND IN THE MATTER of

GINNETTE BEAUVAIS

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: KIM BEINTEMA,
Representative for the Registrar of Motor Vehicles

GINNETTE BEAUVAIS,
Applicant by teleconference call

DATE OF
MOTION: October 5, 2000

ORDER

A motion was heard by teleconference on October 5, 2000, at Toronto, Ontario, to consider the Applicant's request for an extension of time to appeal the impoundment order of the Registrar affecting the Applicant's motor vehicle. The motion is brought pursuant to section 20(7) of Ontario Regulation 632/98 amending Regulation 574 of the Revised Regulations of Ontario, 1990 made under the *Highway Traffic Act*, R.S.O. 1990. c.H.8 amended ("HTA").

Submissions of Written Material

The Applicant submitted the following documents:

1. Copy of Impound Order dated August 2, 2000 relating to the impoundment of the motor vehicle for 180 days. (Exhibit # 1)
2. Original Notice of Appeal dated September 13, 2000 received by the Tribunal on September 15, 2000. (Exhibit # 2)
3. Statement of the Applicant's position under the heading "Summarization of Owner's Position". (Exhibit # 3)

The Facts

The Applicant testified that she was unable to submit the application for her appeal of the Order to impound her vehicle in the prescribed 15 days after the impoundment due to financial reasons. The Applicant is a student who relies upon the Ontario Student Assistance Program for her income. She resides in a rural area, and relies upon her vehicle for transportation to school and work. The Applicant testified that she was to begin a new job on a trial basis just after her vehicle was impounded, yet was unable to commence work since she had no transportation to her job. As result of not being able to get to her new work, she lost her job to another Applicant.

The Tribunal heard from one witness, Johnny Blinston, who testified that he loaned the Applicant the \$100 for the filing fee following the 15-day submission period. Mr. Blinston also testified that he loaned the Applicant the fee for the release of the vehicle from the impound facility.

The Law

Section 20(1) of Regulation 632/98 states:

20. (1) An appeal to the Board under section 50.2 of the Act shall be commenced by filing a notice of appeal with the Board within 15 days of the issuance of the order to impound, together with a fee of \$100 payable to the Minister of Finance.

Section 20(7) of Regulation 632/98 states:

20. (7) Despite subsection (1), the Board may extend the time for commencing an appeal if the owner establishes that the owner, acting in good faith, was unable through accident, illness, or other cause beyond the owner's control to bring the appeal within the prescribed 15 days.

Section 7 of the Licence Appeal Tribunal Act, 1999 states:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
 - (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions that it considers proper as a result of extending the time.

The Order

THE BOARD RULED TO REFUSE TO GRANT an extension of the time to commence this appeal for the reasons that follow.

REASONS FOR ORDER

Pursuant to section 20(1) of Regulation 632/98, the Applicant's Notice of Appeal should have been filed with the Tribunal within 15 days of the issuance of the order to impound the motor vehicle. The date of the issuance of the order to impound was August 2nd, 2000 and the notice of appeal to the Tribunal should accordingly have been filed by August 13th, 2000. The notice of appeal was in fact filed with the Tribunal on September 15th, 2000 a significantly longer period than permitted by the Regulations. Section 20(1) of Regulation 632/98 is clear and unambiguous. It states that the filing of notice of appeal with the Tribunal shall be within 15 days of the issuance of the impound order.

Section 20(7) of Regulation 632/98 gives the Tribunal power to extend the time for commencing an appeal provided the Applicant establishes that "the owner, acting in good faith was unable through accident, illness or other cause beyond the owner's control to bring the appeal within the 15 days". Accident and sickness have no application in this matter. "Other cause beyond the owner's control" may apply depending on the circumstances.

Apart from section 20(7) of the above quoted regulation, section 7 of the *Licence Appeal Tribunal Act, 1999* gives the Tribunal the power to grant an extension if it is of the opinion there are reasonable grounds for applying for an extension and granting relief to the Applicant.

The onus of proof that there are reasonable grounds for the granting of an extension falls upon the Applicant.

The Applicant testified that she was aware of the requirements for filing her appeal within the legislated 15 day filing period, however she failed to do so as a result of lacking the necessary \$100 filing fee required under Section 20(1) of Regulation 632/98. The lack of the \$100 for filing her appeal is the only reason given by the Applicant for failing to file within the 15 day period. The Applicant is asking the Tribunal to consider this a cause beyond her control, and a reasonable ground, for her motion to extend the filing period under the Regulations and rules of the Tribunal.

The \$100 filing fee has been established pursuant to legislation, as are the other aspects of the filing requirements, and the Tribunal must therefore consider it to be a reasonable requirement for filing an appeal. The Tribunal finds that since paying a filing fee is a reasonable requirement for filing an appeal, not paying the filing fee is not a reasonable ground for extending the time in which to file an appeal. The Tribunal cannot grant an extension to an Applicant for lacking what it finds to be a reasonable requirement for filing an appeal.

Accordingly, the Tribunal refuses the Applicant's motion for an extension of time to appeal the impoundment order of the Registrar regarding the vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Member

RELEASED: *October 12, 2000*

FORD CREDIT CANADA LEASING LIMITED

FORD CREDIT CANADA LEASING LIMITED

IN THE MATTER of the *Highway Traffic Act*,
R.S.O. 1990, c.H.8 as amended, section 50.2;

AND IN THE MATTER of a motion brought by
the Registrar of Motor Vehicles seeking an
order by the Tribunal dismissing the Applicant's
ground of appeal of exceptional hardship
pursuant to section 50.2(4) of the *Highway
Traffic Act*;

AND IN THE MATTER of

FORD CREDIT CANADA LEASING LIMITED

APPLICANT

-and-

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TRIBUNAL: STUART CORK, Vice-Chair

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

LAWRENCE JONES,
Agent for the Applicant by teleconference call

DATE OF
MOTION: October 12, 2000

ADJOURNMENT ORDER

A motion was heard by teleconference on October 12, 2000, at Toronto, Ontario, to consider the Registrar's request for an order to dismiss the Applicant's ground of appeal of exceptional hardship pursuant to section 50.2(4) of the *Highway Traffic Act*.

WHEREAS, the agent for the Applicant, Lawrence Jones, had not received notice of the motion;

AND WHEREAS with the consent of both parties, the Tribunal adjourned the motion;

NOW THEREFORE the Tribunal Orders that:

- 1) The motion scheduled for October 12, 2000 is adjourned to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 1:30 p.m., on Tuesday, October 17, 2000 by teleconference call.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Released: October 12, 2000

LAWRENCE

PATRICK T. LAWRENCE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

LAWRENCE T. PATRICK, Applicant
unrepresented

DATE OF HEARING: October 3, 2000

DECISION RELEASED: October 12, 2000 Toronto

REASONS FOR DECISION

A hearing was held on October 3, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Lawrence T. Patrick (the "Applicant")
Motor Vehicle:	1992 Chrysler Lebaron, plate # DOL TOC (the "vehicle")
Date of Appeal:	September 13, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3)(c) of the Act.

This matter came before this Tribunal on October 3, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The Tribunal made its ruling on the preliminary issue which follows.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"Son Jeremy drove my vehicle with a suspended driver's licence. Not made aware of his licence suspension until after the car was impounded. Was out of London at the time at cottage. Impounded vehicle at our home in London."

Dr. Lawrence Patrick did not have very much to add to his written submission. He advised that Jeremy had his own car and that he was very much aware that he should not, drive his father's car. Dr. Patrick advised that because of a medical condition, Jeremy sometimes makes impromptu decisions, but that this did not excuse his behaviour, and that Jeremy should take responsibility for his actions.

Dr. Patrick was at the family cottage when Jeremy took the car. Since he trusted his son, he had no reason to check the validity of his driver's licence.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jeremy L. Patrick;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until August 8, 2001.

The Respondent asked Dr. Patrick only one question, and that was whether he had in fact exercised due diligence in ascertaining whether Jeremy's licence was in good standing before he used the car. Dr. Patrick replied that of course he had not because he was not there when Jeremy took the car. The Respondent rested its case.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5)

of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The evidence has established that due diligence was not exercised. The son knew he should not drive the car. His father trusted him, had no reason to check the validity of Jeremy's driver's licence, and took no steps to do so.

Due diligence, the required ground of appeal, has not been established.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: *October 12, 2000*

HUGHES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PETER CHARLES HUGHES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 13th, 1999

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PETER CHARLES HUGHES

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Peter Charles Hughes, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 3, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Peter Charles Hughes
C/O Lax, O'Sullivan Conk
Barristers & Solicitors
The Sun Life Tower
Suite 2509, 150 King Street West
Toronto, Ontario, M5H 1J9
Attention: Brooke Shulman

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Peter Charles Hughes hereafter the ("Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) I agree not to transfer my registration as a motor vehicle Salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 2) I acknowledge that my registration will not prevent the Registrar from taking administrative action, including a proposal to revoke my registration, arising from matters that may have occurred or may occur in the future related to my financial circumstances and honesty and integrity.
- 3) I acknowledge that my registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 4) I acknowledge that the disclosure provided by me to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of my disclosure in entering into these terms and conditions.
- 5) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.
- 6) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.

- 7) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- 8) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.
- 9) I acknowledge that I have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 2000.

Witness

Salesperson, Peter Charles Hughes

These Terms and Conditions are accepted by the Registrar, *Motor Vehicle Dealers Act*.

Carl Compton, Registrar.

Date:

BERK, ALAN and COUTURE, CLIFFORD and 1236795 ONTARIO INC. AND DEALERPLAN
ACCEPTANCE CORPORATION

ALAN BERK, CLIFFORD COUTURE, 1236795 ONTARIO INC. AND DEALERPLAN
ACCEPTANCE CORPORATION

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES: ALAN BERK, and CLIFFORD COUTURE, appearing on their own
behalf
MITCHELL GOLDBLOOM, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: August 3, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Alan Berk, Clifford Couture, 1236795 Ontario Inc. and Dealerplan Acceptance (the "Applicants") to the Commercial Registration Appeal Tribunal (which as of April 1, 2000 is known as the Licence Appeal Tribunal) from a Notice of Proposal of the Registrar, *Motor Vehicle Dealers Act*, dated July 14, 2000 to revoke the Applicants' registration under the *Motor Vehicle Dealers Act*, R.S.O. 1990, Chapter M.42 (the "Act") and regulations as amended. In the Notice of Proposal dated March 23, 2000 the Registrar stated as grounds for the revocation that the Applicants both individually and as corporations (Berk and Couture being officers of the corporate Applicants) failed the requirements of the Act to carry on business in a financially responsible manner.

The circumstances leading up to the proposed revocation are straightforward and not in dispute. A Mr. Jarnes Gray of Toronto purchased a 1993 Honda Civic from the Applicant 1236795 Ontario Inc. on August 1, 1998. Subsequent to the purchase on November 7, 1998 the automobile was stolen. The police were successful in recovering the vehicle, only to discover that it had been stolen prior to coming into the possession of the 1236795 Ontario Inc.

The vehicle was turned over to Allstate Insurance as it had legal title having paid the original owner under the theft provisions of their policy. Mr. Gray's insurers took the position that they were under no legal obligation to pay as Mr. Gray could have no insurable interest in stolen property.

By Statement of Claim dated February 23, 1999 issued in Ontario Court (General Division) Mr. Gray claimed as against the Applicant 1236795 Ontario Inc. damages in the amount of \$18,794.00. No successful defense being raised against the claim, a

default judgment was entered on June 23, 1999. The judgment remained unsatisfied, and Mr. Gray sought reimbursement from the Compensation Fund established under Regulation 801 of the Act. Mr. Gray's submission, dated October 8, 1999 was reviewed and as he was a customer of a dealer registered under the Act in possession of an unsatisfied judgment against that dealer, his claim was approved. The approved amount was \$15,000, the maximum payable under the Act plus \$1,500.00 in costs.

As part of the settlement procedure, the rights of the claimant Mr. Gray are subrogated to the compensation fund. Accordingly, payment was sought from the Applicants Berk and Couture. None being forthcoming, the Registrar issued the Licence Revocation proposal which is the subject of this hearing.

ISSUES:

The issues before the Tribunal in this case can be stated as follows:

- 1) Having regard to the financial position of the Applicants can they reasonably be expected to carry on business in a financially responsible manner.
- 2) On the facts before the Tribunal did the Registrar act unreasonably in issuing the proposal for revocation which is the subject of this hearing.
- 3) Should there be any exercise of the Tribunal in allowing the Applicants to maintain their registration subject to terms

THE LAW:

Section 5(1)(a) of the *Motor Vehicle Dealers Act* states:

5(1) An Applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business.

.....

Section 5(2) of the Act states:

.....

5(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 7(5) of the Act states:

.....

7(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

The Tribunal was directed to the decision of Southy J. in the case of Brenner and the Registrar of Motor Vehicle Dealers and Salesman (orally) heard March 9, 1983. (Brenner). The case came to the Divisional court on appeal from the Commercial Registration and Appeal Tribunal. The Registrar had revoked Mr. Brenner's Licence on a review of Mr. Brenner's criminal record. The Registrar concluded that, in accordance with Section 5(1)(b) Mr. Brenner would not... "carry on business in accordance with the law and with honesty and integrity".

The Tribunal in reviewing the Registrar's decision accepted evidence to the effect that Mr. Brenner was on the road to rehabilitation and overturned the Registrar's ruling directing the Registrar to grant Mr. Brenner a conditional registration.

The Court allowed the Appeal and ordered a new hearing stating its reasons as follows:

"The Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the Applicant afforded reasonable grounds for the belief that he would not carry on business in accordance with law and with honesty and integrity."

The Court went on to say that rather than reviewing the grounds upon which the Registrar had made his finding, the Tribunal had preoccupied itself with evidence evincing the desirability of giving Mr. Brenner a second chance. The matter was ordered back to the Tribunal for re-hearing. The proper question at the re-hearing was to be whether the past conduct of Mr. Brenner afforded reasonable grounds for the Registrar to conclude that Mr. Brenner would not carry on business in conformity with Section 5(1)(b) of the Act stated above.

Here the facts of the inability of the Applicants to satisfy the judgment against them or to reimburse the Fund are not in dispute. The Tribunal did hear evidence from the Applicants that they were innocent of any wrongdoing and that it is extremely difficult for dealers and salesperson to avoid getting stuck with stolen cars. It appeared to them that they were unprotected.

Keeping in mind the legislation and the reasons of Southy J., the Tribunal must decide whether the Registrar had no reasonable grounds for his proposal to revoke the Licences of the Applicants.

To that end the Tribunal was directed to the case of Josef Reznisik (1990) 20 CRAT 65 referred to in Udell (re)(l 995) CRAT No. 4, which held that judgments against an applicant which remain unpaid provide evidence that the applicant is not capable of satisfying the test of financial responsibility set forth in Section 5(1)(a).

Counsel for the Registrar submitted that the Tribunal consider terms and conditions on the Applicants' registration as a middle ground between revocation and continued registration. In essence these submissions were that while the Compensation Fund cannot be seen to be an insurer of dealers it is not the intent of the Registrar in all circumstances of the present nature to deny the Applicants the opportunity to make a living.

The middle ground suggested by Counsel for the Registrar was a continued registration of the Applicants subject to a strict regime of the repayment amount paid out to Mr. Gray

APPLICATION OF LAW TO FACTS:

In the present case, the Tribunal finds that the Registrar did not act unreasonably in issuing his Notice of Proposal to Revoke the Registration of the Applicants. Their inability to satisfy the judgment for which they were responsible was in light of the case law sufficient grounds for the Registrar's decision.

In line with the discretion allowed the Tribunal under the Act and submissions on behalf of the Registrar, the Tribunal is not averse to the suggestion of counsel that the registration of the Applicants continue subject to a strict regime of repayment of the amount paid out, being \$15,000.00 plus \$1,500.00 costs for a total of \$16,500.00. On the question of a repayment schedule the Tribunal, after hearing submissions, believes an amount of \$500.00 quarterly for which Berk and Couture will be jointly and severally liable is reasonable.

DECISION:

Pursuant to the power vested in it by Section 7 of *the Motor Vehicle Dealers Act*, the Tribunal directs that the Registrar refrain from carrying out his proposal herein provided that the Applicants collectively make quarterly payments of \$500.00 to the Registrar of the *Motor Vehicle Dealers Act* commencing on January 1, 2001, and continuing on the first day of April, July and October, such payments to take the form of certified or post dated personal cheques with a grace period of 3 days to make good any default in the amount owing, with the payments to continue until such time as the amount owing of \$16,500.00 is retired.

In the event the Applicants default in making these payments to the Registrar, the Registrar may revoke the registration of Alan Berk, Clifford Couture, 1236795 Ontario Inc. and Dealerplan Acceptance Corporation under the Act.

Provided further, this decision of the Tribunal is without prejudice to the Registrar proceeding to issue a proposal respecting one or more of the Applicants on any other ground than that specifically dealt with in this decision.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: October 16, 2000

BECK

HEATHER LYNNE BECK

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

HEATHER LYNNE BECK, Applicant
unrepresented

DATE OF HEARING: October 13, 2000

DECISION RELEASED: October 16, 2000 Toronto

REASONS FOR DECISION

A hearing was held on October 13, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Heather Lynne Beck (the "Applicant")
Motor Vehicle: 1990 Plymouth Voyager, plate #ADZT 118 (the "vehicle")
Date of Appeal: September 21, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 13, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Sept 15/00

To Whom It May Concern

I am writing to you as the owner of the said vehicle above on the grounds of hardship. I am presently a single mom with three children age 7 yrs, 6 yrs, and 20 months old, we reside at the above mentioned address which is about an ½ hr. – 45 minute drive (one way) to the town of Bancroft. The nearest corner convenience store is about 10-15 minute drive away. We live in a pretty secluded area, I do not know any of my neighbours nearest one being about 5 minutes pass my home down in a valley. I am presently on

social assistance, there is absolutely no money for another vehicle no matter how cheap the price. My vehicle is my only means to go to town for doctor app's, grocery shopping, banking and to pay bills. I have had health problems in the past (3 lung surgery, ASD repair, asthma, bad nerves and also have signs of a small leaky valve) I am presently on anti-depressant medication. I occasionally have to travel to Peterborough to see a lunge specialist due to a past health problems. My 6 yr old son is awaiting a doctor's app. to decide on surgery for a hernia. In case of an emergency the nearest hospital is Bancroft. There is no bus service at all up here. The driver of the impounded vehicle is presently incarcerated and will be for some time. I have monthly payments on the vehicle impounded till April/2001. Our family doctor's name is Dr. R. Kamerman (telephone number was inserted here) and may be contacted to verify my health past/present problems. I have enclosed a support letter as evidence to confirm my location and situation from Pastor Michael West. I wish to waive the 10-day disclosure period.

Yours truly,
Heather Beck

The Applicant, once affirmed, provided the following testimony.

She is a mother of three children, ages seven, six and 20 months old. She is unemployed and on social assistance. She and her family reside in a remote and secluded area approximately 70 km, one way, to the town of Bancroft. Her husband, the driver of the impounded vehicle, has been incarcerated and will be for the next two years.

There are no local conveniences, banks, doctors or bus routes in her area. Since the impoundment, she has only been able to get into Bancroft once and had to pay someone to take her. The impounded vehicle was used to travel to Bancroft at least twice per month, on the 1st and 20th, to pay bills and grocery shop.

On the day the vehicle was impounded, the Applicant testified that she had gone to the barn to feed the animals. On her return, she realized that vehicle was gone and her husband had taken it. She was aware that her husband was a suspended driver and did not give him permission to take the vehicle.

In the Applicant's defence, her Pastor, Michael West, provided corroboration to some of her testimony. The Pastor has known the Applicant and her family for about one year. She and her family used to attend regularly. He confirmed that she does live "in the middle of nowhere" and resides approximately three-quarters of an hour from his church. To a significant degree, the Pastor is aware of the Applicant's financial constraints. In attending the Applicant's home today, he brought her some food from a food bank. He also confirmed that the driver of the impounded vehicle has been incarcerated.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 4 & 7):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as

owner;

2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Alexander J. Beck;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified or prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until July 16, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a

community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardship as described by section 22(2). In order for her claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met.

As previously mentioned, the Applicant is collecting social assistance. In her written submission and oral testimony, she has "absolutely no money for another vehicle no matter how cheap the price". She is still making monthly payments on the impounded vehicle until April 2001. There is very little money left after the 1st and 20th of each month and relies on a food bank for help. Prior to the impoundment and Mr. Beck being incarcerated, Mr. Beck was unable to hold a job for an extended period of time and therefore put much hardship on the family.

The Applicant does not live in a close-knit community that has neighbours close by to lend a hand. She lives on a farm far from anyone or anything. There is no means of

public transit. She does have 911 access, but in the event of a life-threatening emergency, it would take 1 ½ hours to get to the hospital in Bancroft [45 minutes for the ambulance to be dispatched from Bancroft and drive to her home; and 45 minutes to transport the patient to the hospital in Bancroft].

With regard to the safety and well-being of the children, the Applicant is constantly providing a vigil over her 20 month old child since she has a recurring and unexplainable bleeding nose. The Applicant has been advised by a physician that on the next instance of her child experiencing a bleeding nose, the child should be brought to the hospital in Bancroft.

The Applicant's six year old son is scheduled to see a surgeon at the end of the month with regard to repairing a hernia. The threat of this child getting hurt and rupturing his hernia is a constant pre-occupation of the Applicant.

The Applicant's own health is a factor since she has had three lung surgeries as well as heart surgery.

Therefore, there is a threat to the health of these children who are ordinarily transported by the impounded motor vehicle.

The Applicant has presented the Tribunal with evidence that would demonstrate that every reasonable option has been considered as contemplated by section 22(4) of the Regulation. The Applicant has proven that the loss of the vehicle will be immediate, significant and lasting, and in this member's opinion, the Applicant will be unable to provide the necessities of life for her three young children.

The Tribunal accordingly finds the Applicant has established that she has and will suffer exceptional hardship as defined by Ontario Regulation 632/98, subsection 22.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: October 16, 2000

BERES

ELIZABETH BERES

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

ELIZABETH BERES, Applicant
unrepresented

DATE OF HEARING: October 19, 2000

DECISION RELEASED: October 20, 2000 Hamilton

REASONS FOR DECISION

A hearing was held on October 19, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Elizabeth Beres (the "Applicant")
Motor Vehicle: 1990 Ford EGT, plate #AJCD 779 (the "vehicle")
Date of Appeal: September 29, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 19, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent submitted a set of original certified documents, copies of which had been previously filed with the Tribunal

The documents tendered by the Applicant and the Respondent were entered into evidence as exhibits with the consent of both parties.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To Whom It May Concern,

September 21, 2000

I would like to appeal my vehicle's impoundment on the grounds that it will cause personal hardship. I fear I will lose my current position with Ford if I am not able to regain use of my vehicle. Ford is located in Oakville and being that I live here in Hamilton the distance is too great to substitute a may be led too seek Government assistance.

Unfortunately my mother is severely diabetic and depends on me for transportation. She frequently visits doctors and needs transportation to and from her doctor's office. I am also her means of transportation for daily needs such as groceries. She is unable to walk or take a bus due to problems with the orthopedic make up of her feet. My mother has had surgery on more than one occasion and has been advised to stay off her feet as often as possible.

Therefore as you can see the loss of my vehicle is not only of hardship to me, but also to a dependent.

Sincerely,
Elizabeth Beres

The Applicant stated that she had asked her boyfriend, John Pimentel, to drive her vehicle home one evening. It was subsequently stopped by police, who found the driver to be then under suspension, and the vehicle was impounded.

The Applicant stated that she relies upon her vehicle for transportation from her residence in Hamilton to the Ford Motor Company plant in Oakville, where she is employed in the parts receiving yard. Since the loss of her vehicle, she has missed six days of work as a result of not being able to secure transportation to her job. The Applicant also stated that she has occasionally taken rides with friends, and her father, but these alternatives could not be relied upon. The Applicant has not made inquiries into taxis or rental vehicles, as she can not afford them.

The Applicant feels that she could be in jeopardy of losing her job if she is unable to maintain her hours at her job. The Applicant also stated that she has had to drive her mother to various medical appointments, but she does not believe that her mother has missed any appointments since the impoundment.

Jason Ramsay testified that he is employed at the Ford Oakville facility with the Applicant, and serves as her union steward. He stated that the Applicant does not have a contract at this time, and that her inability to arrive on time for her shift could jeopardize her employment situation. He testified that there is a bus service from Hamilton, however it does not stop near the Ford plant. Furthermore, taxis from the bus stop are not reliable at rush hour. He also stated that there are no other co-workers available that live near the Applicant.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by John Pimentel;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until March 7, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;

- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or

- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if exceptional hardship under the Act will result from the impoundment. The Tribunal is precluded from considering other factors not arising from or directly related to the impoundment itself.

The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides that the Applicant demonstrate that every reasonable option has been considered for an alternative to the vehicle.

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required by section 22(4) of the Regulation. Evidence was heard at this hearing that the Applicant has made use of alternative means of transportation to her job. Though these alternatives may have been sporadic, inconvenient and costly, they do represent some form of an alternative to the impounded vehicle for the Applicant. There was also evidence heard that a bus and taxi service to her job exists. Notwithstanding the fact that there may be delays in getting a taxi from the bus stop to the Ford plant, this alternative does exist and must be considered as such under the regulations by the Tribunal.

The Tribunal finds that the Applicant has failed to meet the onus under the section 22(3) and 22(4) of the Regulation, and the Tribunal is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: *October 20, 2000*

SYLVAIN

PATRICIA SLYVAIN

APPEAL FROM A DECISION OF THE BOARD OF
DIRECTORS OF THE ONTARIO TRAVEL INDUSTRY
COMPENSATION FUND CORPORATION UNDER
THE *TRAVEL INDUSTRY ACT*

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH

APPEARANCES:

PATRICIA SLYVAIN, appearing on her own behalf
FRANK WILLIAMS, Counsel, representing the Board of Directors of
the Ontario Travel Industry Compensation Fund Corporation

DATE OF
HEARING: October 11, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a decision of the Board of Directors of the Ontario Travel Industry Compensation Fund Corporation (the "Fund") denying the Applicant's claim for reimbursement in the amount of \$1,065.00. The Fund confirmed the refusal of the Applicant's claim by letter dated July 6, 2000.

The Applicant brings the appeal pursuant to the section 62 of Regulation 806/93 under the Travel Industry Act (the "Act"), and bases her claim on the provisions of section 50(1) of that Regulation.

THE EVIDENCE:

The Applicant paid by personal cheque the sum of \$1,065.00 to one Kamral Khan in payment for airline tickets for her sons from Georgetown, Guyana to Toronto. Although Mr. Khan appears as the payee on the cheque, the receipt for the payment was issued by Sunkiss Travel Agency. The Applicant stated that she knew Mr. Khan personally and had done business with him in the past. She simply assumed he and Sunkiss Travel were still bona fide travel agent and agency, respectively. Her sons arrived at the airport in Georgetown, but no tickets for the flight to Toronto had been purchased in their name by Sunkiss Travel. The Applicant was forced to purchase alternative travel arrangements.

The Applicant sought restitution from Mr. Khan but none was forthcoming. Accordingly, the Applicant sought compensation from the Fund by a claim received by the Fund March 20, 2000.

The Fund first responded to the Applicant by letter of May 4, 2000. In that letter, over the signature of Ms. Lori Furlan, Claims Coordinator, the Fund pointed out that Sunkiss Travel had voluntarily terminated its registration as a Travel Agent with the Travel Industry Council of Ontario in September of 1999, some three months prior to the Applicant's payment to Mr. Khan. This being the case, the Fund informed the Applicant that in the past claims such as hers were not honoured in that the legislation provided no means by which the compensation requested could be paid. The Claims Coordinator went on to say that should the Applicant wish her claim to be presented to the Board for its further consideration, it would be done.

This step was taken, and by letter of July 6, 2000 the Fund, over the signature of Dorian Werdia Manager, Administration and Claims, sent the Applicant a formal rejection of her claim, stating as grounds that Sunkiss Travel was not a registered travel agent under the Act. As required, the letter informed the Applicant of her right to appeal the Fund's decision. That appeal constitutes the matter before the Tribunal.

Counsel for the fund took no issue with the facts as given in evidence by the Applicant and relied upon the provisions of the Act to justify the Fund's refusal to compensate her. As evidence that neither Mr. Khan nor Sunkiss Travel were registered under the Act for the provision of travel services at the time of the transaction, a certificate to that effect was entered into evidence pursuant to Section 26 of the Act.

In addition, counsel for the Fund entered into evidence through Lori Furlan, the above noted Claims Co-ordinator, her calculation of the amount owing to the Applicant in the event that the Tribunal allowed the appeal. That amount is stated as \$986.00 being the amount paid by the Applicant to Mr. Khan less applicable taxes for which the Fund is not responsible.

ISSUES:

A review of the evidence reveals no dispute as to the fact that the Applicant paid for travel services which were not provided. There is no dispute that neither Mr. Khan nor Sunkiss Travel were registered travel agents under the Act at the time of the transaction for those services. The sole issue for determination is whether the Act provides for compensation to be paid to the Applicants in these circumstances.

THE LAW:

The relevant portion of section 50(1) of Regulation 806/93 under the Travel Industry Act states:

50(1) A customer is entitled to be reimbursed for travel services paid for but not provided if,

- (a) the customer made payment for the travel services directly to or through a registered travel agent;

(b) the customer has made a demand for payment from the registered travel agent or the appropriate registered wholesaler; and

(c) the customer has not been reimbursed by,

- (i) the registrant because the registrant is unable to pay by the reason of bankruptcy or insolvency,
- (ii) any other person who has received the customer's money, or
- (iii) any other person who may be legally obliged to reimburse or compensate the customer, including a person obliged under a contract of insurance.

APPLICATION OF LAW TO FACTS:

Pursuant to section 26 of the Act, the Tribunal was provided with Certificate evidence that neither Mr. Khan to whom the Applicant made her payment for the provision of travel services nor Sunkiss Travel which issued the receipt for the payment were at the time of the transaction complained of registered under the Act.

The Tribunal was directed to a number of cases where the issue of whether the Tribunal has jurisdiction to allow compensation to be paid in circumstances where the travel services were purchased from or through an unregistered travel agent. All of these, despite the Tribunal's expression of the unfairness to the customer, have held that no such jurisdiction exists.

In the case of *Di Cianna* 2 August 1994 the Tribunal denied an appeal with similar facts. In its decision it quoted from the previous decision of the Tribunal released January 10 1992:

"Ms. Byron at the time that she purchased her ticket, did not make an inquiry as to whether the vendor of the travel services was a travel wholesaler or a travel agent. The tribunal feels that she cannot in any way be blamed for not making that inquiry as it is not reasonable to expect the average consumer to know the difference, much less know that entitlement to compensation from the Compensation Fund somehow hinged upon that distinction. It is apparent to the Tribunal that Ms. Byron is a victim of circumstances who, in fairness, deserves to be compensated. However, the Tribunal has no jurisdiction to award such compensation to Ms. Byron. The Regulation clearly states that compensation can only be given where the consumer purchased travel services from a participant who is a travel agent."

The Compensation Fund was never intended to be a broad form of indemnity covering losses to the travelling public regardless of the type of occurrence giving rise to the loss. It is a scheme of reimbursement established by statute to compensate purchasers of travel services only in certain delineated circumstances.

In the present case, there is a condition precedent to the awarding of compensation contained in section 50(1)(a) set forth above; namely, the purchase of the travel services must be from a travel agent registered under the Act. That condition has not been met here, and the Tribunal cannot expand its jurisdiction under the statute to cover the present case regardless of its unfortunate nature.

DECISION:

Accordingly, pursuant to the authority vested in it by the *Travel Industry Act* and Regulations thereunder, the Tribunal denies the Applicant's appeal and upholds the decision of the Board of Trustees of the Travel Industry Council of Ontario outlined in their letter to the Applicant of July 6, 2000 denying her claim.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: October 18, 2000

FORD CREDIT CANADA LEASING LIMITED

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*,
R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FOR AN ORDER
OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION
55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES: KIM GROSSKURTH,
Representative for the Registrar of Motor Vehicles

LAWRENCE JONES,
Agent for the Applicant by teleconference call

DATE OF
MOTION: October 17, 2000 Toronto

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H. 8 as amended, Ford Credit Canada Leasing Limited (the "Applicant") appealed a decision of the Registrar of Motor Vehicles (the "Registrar") made under section 55.1 of the Act to impound a certain 1998 Ford F150 motor vehicle, plate number 103 8DT;

UPON MOTION, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's ground of appeal of exceptional hardship as a ground to be heard at a hearing;

UPON READING the exhibits and hearing submissions of the representative of the Registrar as well as submissions by Lawrence Jones, agent for the Applicant, this Tribunal finds that the ground of exceptional hardship [section 50.2(3)(d)] upon which the Applicant relies in this appeal, does not apply by virtue of section 50.2(4) as a previous order to impound under section 55.1 was made with respect to another motor vehicle then owned by the Applicant;

THIS TRIBUNAL grants the motion of the Respondent and orders that the ground of exceptional hardship be dismissed.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: October 18, 2000

REID

ANN and NORM REID

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

ANN REID on behalf of herself and NORM REID
LUCY McSWEENEY, Counsel for the Ontario New Home Warranty
Program from April 3 to 7, 2000
CAROL STREET, Counsel for the Ontario New Home Warranty
Program from August 21 to 25, 2000
DAVID VIGEON, Agent for KIRKOR COLLEGE GATE LTD., the
Added Party

DATES OF HEARING: April 3, 4, 5, 6, 7, &
August 21, 22, 23, 24, 25, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by Ann and Norm Reid (the "Applicants") to the Licence Appeal Tribunal (which prior to April 1, 2000 was known as the Commercial Registration Appeal Tribunal) from the decisions of the Ontario New Home Warranty Program (the "Program") dated October 7, 1999 and January 20, 2000, wherein the Applicants' claim for damages for a breach of the Vendor's warranty was disallowed. The claim was for the repair of the alleged defects in workmanship, materials, and for non compliance with the Ontario building Code. The Tribunal found that the Applicants are not entitled to succeed in their claims against the Program for the reasons hereinafter set out.

FACTS:

It is not disputed by the parties that the Applicants' home is a Townhome built by the Vendor, and sold to the Applicants. The warranty period under the Ontario New Home Warranties Plan Act (the "Act") began September 10, 1997. A Conciliation Request Form was filed March 30, 1998 together with an explanatory letter dated April 6, 1998. A Conciliation Inspection took place on June 26, 1998, and a Conciliation Report was issued the same day. The Program's first Decision letter was issued and dated October 7, 1999. A second Conciliation meeting was held December 10, 1999 and the second Decision letter was issued, dated January 20, 2000. The number of claims by the

Applicants has been reduced, with the remaining claims involving assertions of defects in workmanship, materials, and breaches of the Ontario Building Code (the "Code").

The Program disputes the entitlement of the Applicants on the basis that there is no breaches of warranty under section 13(1) of the Act, and therefore no claims under section 14(1)(b) of the Act. The Program's grounds are that there are no defects in workmanship or materials, there has been compliance with the Ontario Building Code requirements, and if not, the Applicants have suffered no damages and have no cause of action against the builder.

WITNESSES FOR THE APPLICANT

Evidence was called by the Applicants, and testimony was given by Ron Tremblay, John Steven, Yancy Ambing, Ann Reid, and Rocky Chew.

The Applicants' first witness, Ron Tremblay, testified that he has been the Chief Building Inspector for the town of Newmarket since 1985. He had some recollection of meetings with various people in relation to the Applicants' home and attended on site on one occasion.

In Mr. Tremblay's opinion there was compliance with the Ontario Building Code, and there were no 'equivalencies' granted according to his file. The building inspectors for the Town of Newmarket had inspected the property as construction went along, and although different inspectors carry out inspections, there are notes and communications between them. The Fire Department carried out the inspection of 'fire separation' compliance. Mandatory inspections were carried out, and he testified that the inspectors may review the drawings at the site depending on how complicated the inspection is expected to be. If there was a major change from the construction drawings, he testified that the builder was expected to notify them so that they could determine if there was compliance with the Ontario Building Code.

On the issue of the substitution of the wooden beam for a steel beam, he stated that so long as the substituted beam met the requirements, it would be approved. If there was a problem, an engineer would be consulted to determine if the substitution met the Ontario Building Code requirements. He testified that when drawings were submitted and stamped by an architect or engineer, the Building Department relies on the architect or engineer to design in compliance with the Ontario Building Code. Even when the drawings are submitted by a professional, the Building Department examines them and if they are found to be insufficient, an explanation is required, and in some cases a new set of drawings must be filed for approval before a building permit is issued. Alternatives to the Building Code can be used by an architect or engineer; however, the Building Department will often require information on specifications if the Building Department is not familiar with the materials or assemblies proposed.

In cross-examination, Mr. Tremblay, confirmed that he was familiar with the examination of plans and drawings as this was part of his duties when he was a building inspector. He does not generally become involved with individual building projects once the plans have been approved and the building permits issued unless the inspectors find particular problems with the project and bring it to his attention. Either he or the building inspector may sign an Occupancy Permit when the building is safe to occupy, even though it may not be fully completed. In this case, the Occupancy Permit was signed August 27, 1997 by John Steven the building inspector. According to Mr. Tremblay's

notes, the inspections were carried out appropriately by the building inspector, and there were no notations of serious problems. The inspections for fire separation and fire stopping were carried out by a Fire Prevention Officer from the fire department at the time of the framing. On this project there were no Orders to Comply issued and when the builder was found to be building without a permit, they ceased work when asked to do so. Mr. Tremblay did remember a meeting with Mr. Steven the building inspector, a representative from the fire department, and a representative from the Program concerning fire safety and noise transmission. At this meeting, the Program's representative was advised that in the opinion of the Building Department, the Ontario Building Code standards had been met. The witness was familiar with the claim by the Applicants that there were many unhappy purchasers in this development, however he said that the Applicants were the only ones that he had dealt with.

Mr. John Steven testified that he is the Deputy Chief Building Official for the Town of Newmarket. He has been employed by the Town of Newmarket for approximately 23 years and prior to that had 20 years of experience as a carpenter and site supervisor. Although he is entitled to make decisions on his own if the Chief Building Official is unavailable, he does not make decisions on equivalencies. Together with his building inspections, he examines plans to ensure the joist spans are proper, and other building issues are met. Whether a beam is wooden or made of steel, he checks the Ontario Building Code to ensure that they meet the requirements. Mr. Steven testified that he does look at the "loading points", where one beam rests on another, to determine if there is sufficient strength, and if it becomes a technical issue, he will ask for a structural engineer's drawing with the engineer's stamp to ensure that it is sufficient. Similarly, if the plan is drawn by an architect, he examines it, but he would depend on the expertise of the architect for some technical details. He had no notes of deficiencies. He stated that when deficiencies were found, he would advise the builder, and later check to ensure that the problems were rectified. He confirmed that he did the inspection for the excavation, footings, framing, insulation, and the final inspection on the Applicants' home. Mr. Steven did not remember having seen a revised drawing, although one had been issued and dated September 19, 1997. He thought it was possible that he used the original architectural drawing of March 24, 1997 for his inspections although he did not take it with him. He said he was familiar with the drawing but only up to a point, and did not notice any changes from the original plan. Mr. Steven did not remember a wooden beam, being substituted for a steel beam, and did not remember whether he was told of the substitution by the builder. His evidence was that he would have inspected the beam and based on his experience determine if it were sufficient, just as he examined the roof trusses and determined their suitability.

Mr. Steven stated that he does get down and look at the seal used under the door to inspect the gas proofing in the garage. He also testified that he would determine whether there was proper support for the stairs, and if a support was needed he would ask for a post to be installed. In this case, he did not ask for a post although it was agreed that based on an engineer's report provided by the Applicant, a post was necessary and was later provided by the builder. His evidence was that he does not become involved in fire safety issues and that he did not take part in the question of whether there were back to back outlets as that is a matter for the Fire Prevention Officer, Mr. Jim Bond, who has since died. Mr. Steven testified that he did not observe the installation of the floor tiles, and he did not inspect the finished product. Mr. Steven did not check the calculations for the heating system, but simply inspected it to ensure that the system was installed according to the plans. He did not observe any "form ties" being left exposed by the builder.

The Mr. Yancy Ambling testified that he is a building inspector but was appearing in a private capacity. In the early autumn of 1998 he went to the Applicants' home, made observations, and took notes. His last visit to the Applicants' home was April 1, 2000. He had some concerns over structural issues and recommended that the Applicants hire an engineer. As he went through the home, he noted issues which he considered to be Ontario Building Code violations as well as workmanship issues. He testified that the ceramic floor tile was not even and level, as some tiles were higher than others. There were cracks in the grout and grout coming out.

In his opinion, this was a violation of article 9.30.1.4 of the Ontario Building Code which required that the tile be level and smooth. There was one chip in a tile in the front hall at the base of the stairs. He stated that he could hear a hollow sound with some tile which he said could be caused by an inadequate adhesive. In his opinion this could lead to tile cracking. When he looked at the underside of the floor under the tiled area he found that there was no "blocking" installed as required by article 930. 6 of the Ontario Building Code (Exhibit 7). At the request of the Applicants, strapping had been applied, but the blocking was not in place as required. In his opinion, the system of laying the tile used was common practice in the industry, but did not comply with the requirements of the Ontario Building Code. Mr. Ambling testified that according to the photographs produced to him it appeared to be only half an inch from the top of the tile to the sub floor and this was below the standards in the Ontario Building Code. In the laundry room he observed a "form tie" protruding from the wall under the laundry tub and according to article 9.15.6.3 of the Ontario Building Code it was to be removed. In his opinion, this constituted a safety hazard as it was accessible to small children. He observed that there was no fire separation at the party wall at the stairs. He testified that the fire rating for party walls was from both sides, and the gaps in the drywall meant that there was insufficient fire separation. He testified that according to the chart for article 9.10.3.1 of the Ontario Building Code, the type of wall assembly used in the Applicants' home was described as number 28. He referred to the sound transmission rating, and stated that it was rated at 57. The minimum requirement was 50. Mr. Ambling testified that he did not find acoustical sealant, although it was required where there was a rating over 50 according to the chart.

Mr. Ambling testified that on the left of the landing, the stairs rest on a 2 X 6 beam. There was a joist hanger which had been bent around and nailed. He was unsure if this was correct, and he felt that it had to be examined.

He further testified that he considered the electrical outlets as shown in photograph 42 (Exhibit 4) to be "back to back" and, therefore, not in compliance with article 9.10.9.6 of the Ontario Building Code.

On April 1, 2000 Mr. Ambling noticed a deficiency in the gas proofing under the sill of the garage door to the residence, as it did not appear to be sealed adequately where the drywall met the sill. In his opinion, this did not meet requirements of article 9.10.13.15 of the Ontario Building Code.

Mr. Ambling testified that the master bedroom window appeared to have a problem with vertical displacement of the jam, a bowing of the sill, the caulking and paint pulling apart, and the growth of mildew. In his opinion, the thermal pane had failed as there was more moisture than he had seen on a window before. When he examined the window, he found that the area that opened was less than the 3 square feet needed

under the Ontario Building Code section 9.32.2.1 to meet the natural ventilation requirements. If the natural ventilation requirements are not met, it is necessary for there to be sufficient mechanical ventilation as provided for in article 9.32.3 of the Ontario Building Code.

In cross-examination, Mr. Ambing testified that he met the Applicants in 1996 through his employment although he did not socialized with them. He has been to their home approximately seven times. His first attendance there concerning this matter was in the autumn of 1998 when he was asked to look at some items, although he did not remember the exact date. He was unsure of the dates of his other visits to home. During these visits to the home, he inspected every aspect of construction based on his extensive experience as a building inspector, his training and his work in private industry. He did not prepare a report, and the notes were taken by Mrs. Reid. He was present twice when Mr. Rocky Chew a professional engineer examined the home. Drywall had been removed to expose the framing at the master bedroom window and the living room window.

Mr. Ambing testified that he did not remove drywall to examine the issue of fire separation, and his opinions were based on the photographs produced as drywall would have to be removed to look into the wall.

The witness agreed that an architect or engineer can stamp a plan to certify that Ontario Building Code requirements have been met. Where there is a question of Code compliance, questions may be asked by the Building Department as the professional must still meet the minimum requirements. Often a prior approved assembly is used which the plans examiner knows meets the necessary standards.

The next witness was Ann Reid who testified that she took possession of the house September 10, 1997. She stated that the Pre-Delivery Inspection was done with David Vigeon who went through the house quickly and did not examine things in depth. On the issue of the gas proofing in the garage, she stated that she raised the issue in the Pre-Delivery Inspection Report and although Mr. Vigeon did put caulking on it, he missed a spot. According to article 9.4.3 of the Ontario Building Code, if an attached garage is used by one unit, there does not have to be fire separation, but there must be a gas barrier. Her observation was that the barrier was not complete.

Mr. Reid testified that there was one form tie sticking out of the wall under the laundry tub, which she considered to be a safety hazard and wanted it removed. Mr. Vigeon attempted to snap it off but was unable to do so. According to article 9.15.6.3 of the Ontario Building Code the "form tie" must be removed cleanly so that it does not protrude from the surface of the foundation.

Mr. Reid described the separation of drywall in the ceiling and said that in her opinion it was a workmanship issue, and not an issue of shrinkage as drywall tape does not shrink. She did not wish to attempt to repair this matter herself as she could cause damage to the ceiling. There was also one nail pop in the drywall.

Mrs. Reid testified as to the floor tiles and said that there was insufficient support. The joists were sufficient, and the 2 X 6 beams were adequate but there was not enough support under the floor to prevent the cracking of grout. Also, one of the joists hangers with was installed was not properly finished and was simply twisted around the beam.

The Applicant also testified that there was a crack in the caulking between the tile in one area, a hole in the tile at the base of the stairs, and a tile in the kitchen that makes a popping noise when it is stepped on. Repairs were carried out by installing joist hanger's under the floor, but no other repairs had been made. She raised the issue of whether the tile was installed according to the Ontario Building Code article 9.30.1.4 that requires the floor to be smooth and even. The Applicant testified that the installation of the floor was not done properly as they used a "thin set" method with an inadequate base that did not meet the requirements of the Ontario Building Code and also failed to install the blocking necessary at half the distance of the floor joists. She testified that the hole in the tile, and cracking of the grout was attributable to this defective installation and she produced materials showing preferred methods of installation. Her concern was that there was damage, and if it was not fixed it would continue to get worse and the tile in the foyer would develop the same problems.

Mrs. Reid testified that there were unsealed area at the sides of the dust pan portion of the central vacuum system as shown in photographs 1, 2, 6, and 8 of Exhibit 4. She stated that grout or something else should have been used to fill the gap. In her opinion, this is a defect in workmanship as it forms part of the floor, and is an "open defect" as set out in the Ontario Building Code article 9.30.1.4 which requires the floor to be smooth, even, and free of open defects. She testified that she did not repair it herself as she knew that this could void the warranty on it.

Mrs. Reid next gave evidence concerning the window in the master bedroom. She explained that photographs (Exhibit 4) 27 and 23 show that there has been water penetration, and that photograph 29 shows the present condition of the window. The builder has tried to repair it and there is still a gap in the caulking where the window has moved. Dampness is still a problem as shown by a buildup of mold at the corner of the window. She stated that photograph 29 in Exhibit 4 shows the black seal material between the glass and the wood had been "squashed" and was no longer functional. Despite her efforts in cleaning the mold away, it continues to reappear, but only on this one window. Another problem with the window was that there was supposed to be a larger window installed for light and ventilation. Her opinion was that the window failed to meet Ontario Building Code requirements as the area which opens is less than three square feet as required by article 9.32.1.2 to meet the natural ventilation requirements in the absence of sufficient mechanical ventilation. She stated that there was not mechanical ventilation which would be required if the natural ventilation was not sufficient. She concluded that it must have been the seal in the window causing the dampness problem. Her concern with the window was that it was very visible and would be a problem if the house was being sold.

Mrs. Reid testified that she was concerned with the issues of sound transmission and fire separation in different areas of the house. She said that there was a problem in that the fire separation at the stairs was not continuous, and she explained that the party walls are joint walls with the neighboring units and require a minimum one-hour fire resistance rating. Mrs. Reid expressed concerns that she would be left vulnerable if the rating was not met on the neighbor's side of the wall. She explained how she had taken the quarter round off at the stair stringer, moved the insulation out of the way and observed that the drywall was missing on the neighbor's side of the wall. She was also concerned about the fire separation in the basement at the header areas. Her evidence was that there are charts showing particular wall assemblies and the fire separation ratings achieved together with sound transmission ratings. Her opinion was that her party walls did not meet the requirements. There was a requirement for the sound

transmission rating of not less than 50, and that any rating of 50 or more had to be sealed with an acoustic sealant around electrical boxes, other openings, and the intersection of walls and floors. In her opinion, this was not present as she had probed one area in the bedroom and did not find acoustic sealant. She described sounds being transmitted from the neighbor's premises in a most disturbing manner. Although she was told that the walls had a sound transmission rating of 57, she disagreed that it met the requirement of 50, although she had not had tests done due to the cost. In cross-examination, she repeated that she wanted acoustic caulking put at the floors, ceilings, and electrical outlets.

Mrs. Reid gave evidence that the electrical outlets were not offset as required by article 9.10.5.1 in the fire safety portion of the Ontario Building Code. She produced photographs 41, 42, and 43 (Exhibit 4) showing that the electrical outlets in her unit and the neighbor's unit were mounted on the studs in each wall with apparently less than six inches between them. She testified that they should have been mounted with a stud between them to be properly offset, and produced written materials suggesting the best ways to meet the Ontario Building Code requirements.

Mrs. Reid testified that she was concerned that the fire separation at her stairs was inadequate. Drywall had been installed on her side of the party wall, but she testified that she had been able to observe that the drywall was not continuous on the neighbors side, and she was therefore left with insufficient fire protection. She stated that the Tribunal should order a repair.

Mrs. Reid testified that she considered the garage to be part of the dwelling unit under article 9.10.9.16 of the Ontario Building Code as it served only one unit and there was still a problem with sound proofing.

The witness then gave extensive background of the many items which were not properly completed at the time of the predelivery inspection, and of the difficulties that she had dealing with the builder. She summarized the repairs that she wished to have done to correct the deficiencies which she said presently exist.

Mrs. Reid testified that there were unfinished gaps to the sides the dust pan installation for her central vacuum system. Photographs were produced showing a gap of approximately half an inch on each side of the two units, and she stated that these gaps should have been filled with grout. In her opinion, this was a workmanship issue as it was left unfinished. She stated that these gaps should be considered part of the floor and were an open and obvious defect so that the floor was not smooth and level as required by the Ontario Building Code article 9.30.1.4. She stated that she did not want to do the work herself to try to finish it as it would void the warranty.

Mrs. Reid testified that there was damage to the window in the master bedroom and that there was obvious water penetration shown by the buildup of mold on the sill and rust forming on a nail. The builder tried to fix it and reattached the window to the studs as it was being twisted. She testified that the area around the window was caulked and had still separated, so there is a gap. She stated that the black material which seals the window had been squashed and there was a problem with water penetration. When the issue was brought to the attention of Mr. Fortune, he suggested that it was normal shrinkage but she stated that it was obviously too close to the brick. She also stated that the ventilation capacity of the window did not comply with the Ontario Building Code article 9.32.1.2 which required a three foot square area that could be opened in each room for natural ventilation. The opening on this window was less than three square

feet. She stated that mechanical ventilation was required if the natural ventilation was not sufficient, and the furnace did not meet the requirements as it was a system which re-circulated air within the house. Mrs. Reid stated that she uses her fans within the house in a normal manner and objected to suggestions that the buildup of moisture on the window was caused by a number of plants in the home. She explained that the plants received very little water, and are not the source of the problem. Her concern is that the window sill is very visible and looks worse than it should for its age. In cross-examination, the issue was raised that the question of the mold buildup and a problem with ventilation was in the second Conciliation Request Form signed on August 17, 1999 (Exhibit 6, Tab 21) although it had been mentioned in a letter to the Program dated August 6, 1998. Mrs. Reid confirmed that the builder had done a repair which she described as loosening the window installation.

Mrs. Reid testified that the fire resistance rating is a problem as the fire separation is not continuous and that when there is a party wall there should be a rating from both sides. The wall separating her unit from that of her neighbor must act as a firewall and meet a rating requirement of one hour fire resistance. According to the Ontario Building Code article 9.10.11.2 (2) the fire protection must be continuous from each side of the property. An area was found where the stair stringer in her home had been fixed; however, she had concerns about whether the repairs had been made on the neighbor's side. Mrs. Reid testified that the header areas throughout the basement were missing the drywall necessary to provide fire separation. She produced pictures to show how the problem had been fixed in the laundry room with drywall being installed on the common wall between the ceiling joists. She explained her concerns about the fire separation for the party walls. She testified that designers usually use a tested wall assembly to be sure that fire and sound ratings are met. Mrs. Reid referred to table 9.10.3.A in the Ontario Building Code (Exhibit 13) which described the walls in her unit and set ratings of one hour fire resistance and a total of 57 for sound transmission. In the addendum to that chart, item (2) stated:

"constructions with sound transmission class ratings of 50 or more require acoustical sealant applied around electrical boxes and other openings, and at the junction of intersected walls and floors except intersection of walls constructed of concrete or solid brick".

Mrs. Reid described in detail the level of sound transmission through the walls and stated that the builder said that if he removed the baseboards to apply the sealant it would damage the drywall. She explained that any holes in the assembly would reduce the rating, and that a sound rating of at least 50 is required.

Evidence was given on behalf of the Applicant by Mr. Rocky Chew who is a professional engineer who studied mechanical engineering and has worked in the field of structural engineering, although he does not hold a designation as a consulting engineer or a structural engineer. He was not accepted by the Tribunal as an expert in the field of structural engineering, but gave extensive evidence based on his observations.

Mr. Chew made observations of the living room and bedroom windows and initially concluded that there was a deflection of the beam; however, when he made an examination with some drywall removed, he saw that there was no failure of the beam at that time, and concluded that the apparent movement of the window was caused by the exertion of an external force. Based on this, he concluded that the brick veneer was too close to the window frame thereby putting pressure on the window frame when the

brick expanded during warm conditions, and this combined with the natural shrinkage of the wooden framing of the wall caused the bowing of the window. He suggested that there should be a gap left so that these forces would not put pressure on the window. In his opinion, this could cause a break in the seal of the window leading to moisture, and the growth of mould. He suggested that the brick be cut to provide more room or smaller windows be installed in the living room and bedroom.

Mr. Chew testified that cracks in the floor tile are usually the result of movement in the structure below, and that the Ontario Building Code suggests different methods of installation. He suggested that a thicker mortar bed would have to be used or the sub floor could be reinforced with blocking to prevent the floor from moving. He also noted that the hollow sound under some tile suggested that there was an incomplete adhesive which compounded the problem of the insufficient sub floor. Mr. Chew suggested that the blocking would have to be put in every eight inches at center and the adhesive for that tile would have to be re-applied.

In cross-examination, he explained that drywall was removed to permit him to observe the underlying beam, and based on his inspection he changed his conclusion to find that the pressure causing the movement of the windows was not exerted by a failing beam, but was caused by exterior pressure. He agreed that once the wood in a home has stabilized there is very little further movement. The witness was unsure if the window was a double or single pane but agreed that most windows are double. He described the windows as a wood frame containing glass with a rubber seal, and explained that the failure could be caused by external forces. When it was suggested to him that the problem had been fixed, he asked when the repair was done and stated that he was last in the house on November 11, 1999 but did not inspect the windows. He was unsure of the date of his last inspection of the windows, but he thought that it may have been the date that he examined the structure with the drywall removed. On the issue of the floor tile, he indicated that he did see cracks in the grout in the foyer and had concerns about the load bearing capacity of the floor. He found that the floor joists were adequate, but found that the blocking was not installed as required. When he returned to the house at a later time he saw that the cracks were still there in the same area but did not see if they were any worse.

In re-examination, he stated that on subsequent visits to the house he was more concerned with the beam in the basement and did not focus on the floor. He also explained that when he examined the windows he was concerned about possible structural failures and did not take note of the type of window.

WITNESSES FOR THE PROGRAM

Evidence was given on behalf of the Program by Mr. Tibor Pal, Mr. Jim Fortune, and Mr. Mike Larkin.

Mr. Tibor Pal testified that he is a graduate of civil engineering and has specialized in structural engineering. Since 1962 he has worked in different companies in the structural engineering field in various countries, and has been involved in the design and construction of bridges, subway projects, residential construction. In 1967 he established a firm specializing in the design of industrial, commercial, and residential projects. He is an Associate Professor of Engineering, and was also designated as a consulting engineer in 1974. Mr. Pal testified that he does consulting work for the Program, and tries to help resolve claims involving structural problems with single-family

detached homes or condominium projects. The Tribunal ruled that he would be accepted as an expert based on his particular experience with structural engineering. He testified that he had extensive experience with wooden structures, and between 1974 and 1986 made inspections and assessments of wooden arenas throughout Ontario and made recommendations for necessary repairs to be carried out.

He attended at the Applicants' home, and made visual inspections on December 10, 1999, inspected the architectural drawings, and assessed the reports of Mr. Rocky Chew dated May 12, 1999 and July 1, 1999. He did not carry out any destructive tests, and no drywall was removed. Mr. Pal did not notice any structural deficiencies with the master bedroom window, and when he made his observations he was advised that the window had been repaired by an adjustment of the attachment of the window to the structural frame. He did not see any evidence of the beam over the living room window showing signs of failure and stated that the tim above the window showed a minor deflection of between 1/8 and 1/16 of an inch over the distance of five feet. He did not see the framing around the windows or the studs, and relied upon the architectural drawings for his information. In his opinion, the framing was adequate to carry the necessary loads to the basement. He also found the 2 X 8 porch lintel to be structurally adequate. When he was shown the photograph of the exposed lintel (Exhibit 4, photograph 36) he found it to be adequate. Mr. Pal stated that he did the engineering calculations for the lintel over the front entrance, and found it to be adequate although he did not bring his calculations. He was questioned about whether allowances had to be made for the beam being 2 X 4 and not 2 X 6, and stated that no allowance had to be made. In doing his calculations, he stated that he had often relied on the sketches and measurements made by Mr. Chew in his report. When he was shown the photograph (Exhibit 4, photograph 34) of the lintel above the porch, he stated that wood did not appear to be two pieces of wood spliced together, and pointed out that the mark in the middle of the wood was thicker than the very thin line that would indicate a splice, and the grain of the wood showed that it was all one piece. Mr. Pal was not able to determine from the photograph whether the wood was 2 X 8 or 2 X 10, and relied on Mr. Chew's calculation that if a 2 X 8 beam was installed rather than the 2 X 10 as set out in the architectural drawings, it would be adequate. In his opinion, the problem with the bedroom window would be repaired by the reattachment of the window to the wood.

Mr. Jim Fortune testified on behalf of the Program. He has been employed by the Program since January, 1989 and for all but two years of the time has been a Warranty Representative. In the course of his duties he draws upon his experience and technical expertise, refers to technical literature and takes training to keep his skills and knowledge up-to-date. He estimated that over the course of his career, he has carried out approximately 1000 Conciliation inspections.

When Mr. Fortune received the Reid file, he did a Conciliation Inspection, and had other visits to the home for reinspection. Many of the complaints were resolved, and he wrote the Decision Letter and the supplemental Decision Letter on the issues which remain outstanding. He explained that when he writes the Decision Letters, he set out each claim by paraphrasing the words of the Applicant, and is not using his own assessment of the situation. When he received the complaint that there were back-to-back outlets in contravention of the Ontario Building Code he was not able to confirm what was on the other side of the party wall as there was drywall in place, and he could not enter the neighbor's home without a proper invitation. He did know of complaints from the

neighbors on both sides, but did not carry out inspections as the matters were resolved or withdrawn.

When he was shown the photographs of the wall studs with the electrical outlet boxes attached, he said that they looked as if they were offset. In his opinion, outlet boxes which are within the same stud space, and approximately six inches apart would be considered offset for Ontario Building Code purposes. His understanding was that the Ontario Building Code requires the outlets to be tightly fitted and offset, and he found them to be so. There was no requirement in the Ontario Building Code that boxes must not be placed within the same stud space. Mr. Fortune also testified that in his opinion Mrs. Reid was confusing issues of fire separation and sound transmission. He stated that the explanatory materials presented by the Applicant were not part of the Ontario Building Code. The wall studs in the Applicants' home were staggered in any event, so the electrical outlet boxes mounted on the studs would be offset. Mr. Fortune testified that there had been no complaints from the neighbors regarding sound transmission, and he had been provided with no test results showing that the level of sound transmission exceeded the permissible level.

The continuity of the fire separation at the stair stringer appeared to have been fixed, and now complied with Ontario Building Code requirements on the Applicants' side of the party wall. The neighbors on the other side of that party wall had filed for a Conciliation, and had listed this as a problem, but the request was withdrawn and he was advised by the builder that the problem had been repaired.

Mr. Fortune testified that the neighboring garages have a common wall but each garage serves only one dwelling unit. He explained that article 9.10.9.16 (2) of the Ontario Building Code states:

"storage garages containing five cars or fewer shall be separated from other occupancies by a fire separation of not less than one hour."

Under article 9.10.9.16 (3) there is an exception for storage garages which serve only one unit which states:

"where a storage garage serves only the dwelling unit to which it is attached or built in, it shall be considered as part of that dwelling unit, and the fire separation required in sentence (2) need not be provided between garage and the dwelling unit where (a) the construction between garage and the dwelling unit provides an effective barrier to gas and exhaust fumes, and (b) every door between the garage and the dwelling units conforms to article 9.10.13.15".

Mr. Fortune found that there was no requirement of fire resistance as the garage was for less than five cars, and was attached to the Applicants' unit so only gas proofing was required. There were no work orders from the building department for the construction of the garage. He also found that there was no requirement in the Ontario Building Code setting out sound transmission requirements for the garage.

Mr. Fortune testified that there was an unfinished basement, and there was a complaint of insufficient fire separation at the points of connection with the party wall. He assumed Mrs. Reid was referring to the floor joists. Mrs. Reid had said that she would accept a repair by wrapping the floor joists with drywall, and have it installed between the joists

on the ceiling and the wall to become continuous. In his opinion the cost of materials would be \$15 for the drywall, and one hour of labor at \$35. He did not make personal observations of the area, and did not remember being told about it.

Mr. Fortune testified that Mrs. Reid complained of abnormally loud sounds from the neighbor's residences and believed that the builder failed to apply acoustic caulking and the outlets were too close to each other. Mr. Fortune explained that an architect can design a home to meet the Ontario Building Code requirements, and certifies that he has done so. He referred to the table set out in article 9.10.3.A of the Ontario Building Code (Exhibit 13) which stated that where there is a sound transmission rating of over 50, acoustic sealant will be required. In his opinion there was a design by an architect showing a certain type of construction to achieve the necessary rating, the design was approved by the Building Department, and a building permit was issued. During construction, inspections are carried out by municipal officials and if there had been a breach of the Ontario Building Code, an order would have been issued requiring compliance. No such order was made. Mr. Fortune was aware that the builder had agreed to apply sealant in some areas, but he did not consider that there was a breach of the warranty and the Program was not bound by a promise by the builder which did not involve a repair for a breach of warranty. He testified that acoustic caulking could not be put around electrical outlet boxes as they are screwed onto the studs, and there is nothing to apply it to.

Mr. Fortune testified that originally there were no joist hangers in place, however they were subsequently installed, and in his opinion the floor did not show signs of movement. There had been a breach of the Ontario Building Code, but it was rectified and there was no damage caused. He found that the cracking of the grout was the result of normal shrinkage, and therefore was not covered by a warranty. Since he had first been to the house, there appeared to be no change in the crack in the grout, so he concluded that the floor was stable. He also observed that the hole in the tile is at the foot of the staircase, and could be caused by normal wear and tear. In his opinion, the issue of the depth of the base under the tile was raised after the one year period, and it was the issue of the floor joists that was raised within the proper time.

Mr. Fortune testified that the dust pans are part of the central vacuum system, and he concluded that the small gaps were not warrantied and were not readily visible.

The witness testified that there was some drywall separation and a nail pop which he attributed to normal shrinkage caused by the wood framing drying out. Normal shrinkage of materials is not covered by warranty, and the claim was denied.

One ceramic floor tile in the kitchen made a sound when it was stepped on, but Mr. Fortune stated that he observed no damage. The sound only occurred when the tile was stepped on a certain way once it could be found. He saw no indication that the tile was loose, and denied the claim as there was no damage, and no apparent defect of workmanship or materials.

Mr. Fortune testified that a complaint had been made about damage to the master bedroom window which was similar to the complaints about the living room and kitchen windows. In his opinion, it was an issue of structural adequacy and he agreed with the findings of Mr. Pal that the window jam had appeared to have warped. His opinion was that it did not need to be replaced as the bowing was minor and acceptable. The witness stated that he thought the moisture on the window was due to plants in the room, and he said that the homeowner should use the ventilation fans more often. He

observed that the seal in the window did not appear to be broken as there was no moisture between the panes of glass in the window, and there was nothing wrong with the weather stripping.

Mr. Fortune testified that the beam over the front porch was still in issue but he agreed with Mr. Pal that it is adequate, and believes that the mark in the middle of the beam was caused by a metal strap used to bundle the lumber when it was being moved. In his opinion there is not a splice in the beam, and there is no evidence of damage or structural failure. If such a failure had occurred, there would be signs of cracking in the home.

Mr. Fortune stated that he had observed the joist hanger which had been turned to join the end of the joist, and in his opinion it was not a very clean way to finish the job, but it was adequate.

The witness testified that the form tie did stick out of the wall in the laundry room, but it was in an area under and behind the laundry tub. Although it did stick out about three inches from the wall, he did not consider it a health or safety concern covered by the Act. He described how Mr. Vigeon had difficulty getting under the laundry tub and reaching up to try to break it off.

Mr. Fortune testified that he believed that the fire separation at the floor level was now covered and could only be observed in photographs. As he could not see the area, he relied upon the fact that there were no work orders and upon the inspections made by Mr. Pal. Typically a 2 X 4 was put between the stud beams to stop the fire from passing up through the wall. As he could not see between the studs, he could not say whether or not this had been done.

Mr. Fortune stated that he did not observe any penetration of the gas proofing under the door between the garage and the residence. The door is set in a frame and there is drywall with caulking or tape under the aluminum threshold. He did not get down for a close look, but the drywall compound normally used does show cracks, and he did not see anything that appeared to penetrate into the residence.

In cross-examination, Mr. Fortune repeated his background qualifications in more detail and explained the duties that he had performed in assessing builders. He explained that the bulk of his work involves people who have an idea what they would like, but the work does not meet their expectations. He testified that he does read and interpret the Ontario Building Code, and consults with the Ministry of Housing when he has questions, however he did not make inquiries at the Applicant's office in this case as there was a probability of a conflict of interest. He explained that on matters of workmanship, he tries to look for acceptable industry standards and agreed that there could be some difference in interpretation between Warranty Representatives. He tries to ensure that products meet the requirements set by the manufacturer but does not apply a standard of perfection to workmanship or materials. He gave examples of how certain levels of defects are tolerated by manufacturers of various products. Mr. Fortune stated that he would order the repair of any apparent Ontario Building Code deficiency, and he explained that there are no set criterion for the acceptable level of shrinkage for materials. When he was asked if he sought any outside advice on the issue of fire and sound ratings, he explained that he did seek advice and got different opinions from different sources. He said that he was aware of equivalencies being approved by Chief Building Officers but was not sure how often it was done and did not know whether it was done in this case.

The witness was presented with materials from a book produced by the Program (Exhibit 4, p. 104) which showed suggested methods of installing outlet boxes. He testified that the book was a code and construction guide showing better ways to do things, but does not part of the Ontario Building Code and did not show methods of basic Code compliance. Mr. Fortune confirmed that a complaint had been received from the Applicants' neighbor concerning fire separation, however he did not have conversation with them as the problem had been resolved by a repair before the file reached him. When he was asked if he was aware that some people simply gave up in frustration when dealing with these problems he agreed that it can happen but he did not have dealings with the neighbor and does not know the circumstances surrounding their claim. He confirmed that he did not go to their home and did not measure the location of outlets, but still considered the outlets as shown in the photographs to be offset as required by the Ontario Building Code.

Mr. Fortune was cross examined on the issue of fire and sound ratings between the dwelling unit and garage. He repeated that the requirement for a sound transmission rating applies to the dwelling unit and not to the building as a whole, so it did not apply to the garage for the reasons stated in his evidence in chief.

Mr. Fortune was cross examined on the issue of the basement header, and stated that he failed to make observations and there was confusion about whether the area had been repaired. He did not remember how the area was constructed, and could not see into the wall to know if there was fire separation. The witness was shown architectural diagram D-4C of a party wall in the basement (Exhibit 4, p. 73) showing the header area, and he stated that if the construction had not met the requirements of the Code he would have questioned it and would not expect that it would be approved by the building inspector.

He disagreed with the Applicant when she suggested to him that the caulking in the diagram was acoustic caulking, and stated that he believed it would be for fire separation. Mr. Fortune was aware of the repair at the stair stringer to make the fire separation continuous. Mr. Fortune explained that an architect or an engineer has the right to design a system sufficient to meet Code requirements and will often use alternative materials or methods. The plans will be examined by the municipal building department to determine if they are adequate before a building permit is issued. He also did not know if the Chief Building Officer approved any equivalencies. In his opinion, the system as constructed does meet the Ontario Building Code requirements, and he explained that the Ontario Building Code does not contain diagrams of approved systems. When he was questioned about the use of acoustical sealant in the Applicants' unit, he stated that the Applicants' party wall would have a 57 rating due to the insulation, and he had no reason to believe that the wall as built did not meet the Ontario Building Code requirement of a 50 rating. Mr. Fortune explained that he did not remember Mrs. Reid removing the baseboards and looking to see if there was acoustic sealant present, as he was focusing on other issues. He testified that it was not the responsibility of the Program to have acoustic testing done in the unit and said that it was available to the Applicant if she chose to do it.

Mr. Fortune testified that when he inspected the home, he observed that hangers were not installed on the floor joists, and there was no evidence of movement of the joists, as set out in his Conciliation Inspection Report. (Exhibit 6, Tab 10) In his opinion, the cracking in the grout was not related to the issue of the floor joists, and there was no

cracking of the tile. Since he has been back to the home, there has been no change in the condition, and he attributed the cracking to normal shrinkage of materials. When he was questioned about the installation of the tiles, he stated that he did not see the installation. He was shown photographs 5, 6 and 8 of Exhibit 4 and observed that the base looks like 3/8 inch, but he was not able to see where the measuring tape started.

Mr. Fortune testified that it was not unusual to see gaps with some flooring, and he observed that the tile was not cracked, and the grout in the kitchen was not cracked. He did not consider the small gaps beside the dust pans to be a defect. In his opinion they were not very noticeable and the dust pans were provided by the homeowner for the builder to install, in any event.

He did hear a sound when one tile was stepped on, however it only occurred when it was stepped on in a certain way, and there were no signs of cracking. Questions were asked about his eyesight. He explained that he does use glasses for reading, and demonstrated that he could read a document several feet away without difficulty.

Mr. Fortune testified that the separation of the drywall tape and the nail pop were normal and consistent with the usual shrinkage of materials and therefore not covered by warranty.

Mr. Fortune was questioned about the issue of ventilation and testified that if he finds a health and safety issue, he will treat it as subject to a two-year time limit. In this case, he determined that the mechanical ventilation was sufficient and admitted that it was confusing as the Ontario Building Code requirements have changed several times. He explained that typically mechanical ventilation is provided by fans and often by a main exhaust fan in the washroom. He did not agree that natural ventilation requirements had to be met if mechanical ventilation was provided, and for that reason he did not consider the window in the bedroom to be under-sized. The ventilation and heating system was inspected, and approved by the building department. He stated that they would not have been passed if they did not meet the Code requirements. Mr. Fortune maintained his opinion that the moisture on the window was caused by condensation which typically occurs at the corner of windows. He did not contact the window manufacturer and could not examine the method of installation as it was not exposed to view. There were plants in the room, and he explained that when there are plants or an aquarium, it was necessary to use the exhaust fan periodically or open the window. He agreed that a system designed and installed in accordance with the Ontario Building Code could still have problems, but in his opinion there should not be problems if it operates properly.

Mr. Fortune testified that it is a Code requirement that form ties be removed; however, the one behind the laundry tub was not a health or safety concern due to its location. He saw Mr. Vigeon get down on the floor and try to reach up behind the laundry tub to try to break it off, but he was unable to do so as it was hard to reach. In his opinion it was possible for a child to scratch themselves, but he did not consider it a hazard.

Mr. Fortune testified that the gas proofing in the garage appeared to have some normal cracks but nothing that appeared to penetrate beyond the surface. He saw drywall compound but was unsure if there was drywall under it. He did bend down to look, but did not manually examine it. This was a minor item, and he agreed that there could be some movement from people stepping on the aluminum still above it.

Mr. Mike Larkin testified that he has been employed as a building inspector for the town of Newmarket for between 3 and 4 years. Prior to that he was a building inspector in Mississauga for approximately 10 or 11 years. His duties involved inspection of heating, plumbing, electrical installations, and Ontario Building Code issues. In Mississauga he was involved with mechanical installations and fire separation. Prior to being a building inspector, he was employed in the construction field. He testified that he has taken all of the Ministry courses to be certified as a building official, and is also certified as an engineering technician as well as being licensed for plumbing and heating. With this designation, he is allowed to design heating and ventilation systems for residential and small commercial construction. On a daily basis he consults and interprets the Ontario Building Code. He explained that when an engineer or architect designs a building, they are allowed to go outside of the Code for some purposes. The drawings are reviewed for Code violations and strict compliance is required on some items while others are allowed

latitude so long as they meet performance requirements. An equivalency can be accepted by the Chief Building Officer, the approved drawings are stamped and a building permit issued. No note is made if an equivalency is agreed to, however a record is kept if something is found to be insufficient in which case a permit will not be issued. During construction, if Code violations are seen, the superintendent of the building project is notified and the repair is carried out. If not, an Order to Comply is issued, and if necessary a Stop Work Order can be made. In the case of a very serious defect, an Unsafe Order is made so no one will be allowed to enter the building.

Mr. Larkin testified that he was involved with the Applicant's home from the time of framing until the final inspection, and discussed remedial work as a result of the complaints. He stated that he inspected and dealt with fire separation and sound transmission issues although the fire separation inspection was carried out by Mr. Bond of the fire department. Mr. Larkin stated that deficiencies were repaired, and he did not make notes because they were of a minor nature. The witness stated that the electrical outlet boxes were offset as required by the Code as there is no requirement that there be a stud between them. In his opinion there was no section in the Code relating to sound transmission which required the electrical outlet boxes to be offset. In his opinion, the double insulation used in the party walls produced a higher rating than on the chart in the Code, and would have been specified by the architect and approved by the building department. He stated that drywall is not the only method of meeting the fire separation requirement as the stair stringer is a thick timber and also has a fire resistance rating. During construction, drywall is not installed until there has been an inspection of the framing and the insulation. He confirmed that the town did not receive complaints from the neighbors and there were no Orders to Comply. Mr. Larkin stated that a garage which serves only one residence is considered part of the residence for fire separation purposes, and only a 45 minutes rating is required for the walls or ceiling. In this case, the town approved the design, and it appears to have been built as designed. There is no requirement to meet the sound transmission rating for the garage. With regard to the rest of the home, he found that the sound transmission rating for the party walls based on the chart in the Ontario Building Code would be 57, even though the minimum standard is 50. In his opinion even if there is no acoustical sealant he did not think that it would affect the sound transmission rating enough to bring it below the required standard. In his review of the architect's plants, he did not see that acoustic sealant was required. In his opinion there was no failure to comply with the Ontario Building Code.

Mr. Larkin did not inspect the basement headers, but he stated that if they were wrapped with drywall they would comply with the Ontario Building Code requirements although compliance could be achieved in other ways. Mr. Larkin explained that he did not think a "fire stop" was required in the basement, as the room was not drywalled and there would be no cavity for a fire to travel. The floor joists would also be adequate fire stops for the next floor of the home.

Mr. Larkin testified that the Ontario Building Code allows the home to be ventilated by mechanical means. He explained that the heating system was designed by a well-known heating contractor who would have submitted the plans for approval.

In cross-examination, Mr. Larkin outlined his qualifications again in more detail, and explained that an Occupancy Certificate is issued once the house is safe even though many items may not be completed. He confirmed that he did see the revised drawings for her home and although he was not sure when he saw them, he knew that they had been approved by John Steven the building inspector. Mr. Larkin explained that when plans are submitted they are examined for Ontario Building Code violations and if they are approved, a building permit is issued. In this case the plans were not stamped, but he expected that they were part of the larger group of documents. When revised plans are received from an architect, they are sometimes not stamped, as the building department knows that the architect is on record and treats anything from their office as certified. Mr. Larkin explained that he attended at the Applicants' home with regard to the question of Ontario Building Code deficiencies and discussed the issue of fire separation with the Mrs. Reid. He testified that if he thought that the home did not meet the necessary requirements, he would have made an order declaring it to be unsafe.

Mr. Larkin testified that he did not inspect the tile or the installation, but does inspect the tile bed, and looks for the minimum thickness. He does not carry out destructive testing, and sees that the floor is flat and even with the edges properly trimmed once it is completed.

Mr. Larkin testified that he is certified as an engineering technician for heating and ventilation, and is qualified to design systems. He does calculations of heat loss and examines the duct locations. If a system was not installed in compliance with its plans, the deficiencies would be noted during the inspection, and there is no indication of that in this case. Mr. Larkin testified that mechanical ventilation can be used in place of natural ventilation, and windows are not required. He stated that the principal exhaust fan is often in the washroom and air is circulated through the furnace system as well as the normal infiltration of air through the opening and closing of doors and windows. In his opinion, the Applicant's home is not a "tight" home and is properly serviced by her furnace system.

Mr. Larkin testified that he does not look for form ties inside building and simply breaks them off if he sees them.

In re-examination, Mr. Larkin explained that the party walls in the home consist of drywall attached to 2 X 4 studs with insulation in the air space. The drywall on each side is rated at 40 minutes, the stud is rated at 20 minutes and the insulation is rated at between 5 and 15 minutes so that the rating from the middle of the party wall is between 60 and 70 minutes and the walls exceed the minimum requirements.

WITNESS FOR THE ADDED PARTY

Mr. David Vigeon testified on behalf of the Added Party. He was hired by the builder for approximately five years as a construction manager to assemble drawings, schedule the trades, arrange inspections by the building department and the fire department and to deal with customer complaints. Mr. Vigeon was involved in the construction of approximately 220 homes over that period of time. He worked with his father in construction from the age of 12 years, attended a management course at Sheridan College, operated his own business, and is licensed as a journeyman carpenter. The Applicant's home is part of a 20 block project with approximately 106 units. The architectural plans were prepared by the builder's architects and were submitted to the town for approval. The revised plan was submitted with additional living space included. The building permit was issued, and Mr. Vigeon became involved after the foundations, roads, and sewage were completed. The witness testified that he did remember two fire inspections being done as some drywall was installed before the second inspection and had to be removed so that the inspection could take place. Mr. Vigeon stated that Mr. Steven had been very critical of the fire stopping, and Mr. Bond requested drywall be installed in the air space in the party walls. He also remembered that the Applicant was charged an additional \$500 for Roxul insulation which was not installed in the correct house.

Mr. Vigeon remembered that a repair was done to rectify the problem with fire separation at the stair stringers. Drywall was installed as required, and "fire stop caulking" was to be used. His recollection was that deficiencies were dealt with in the homes of both neighbors and included a repair of the fire separation at the stairs. He examined pictures of the basement headers area. He confirmed that the drywall was attached to provide fire separation and that caulking was applied in the basement area although he was unsure if acoustic caulking had been applied. He did not have specific recollections of the Applicants' unit; however, he did know that acoustical sealant had been supplied to the framers and he had seen it being used during construction.

Mr. Vigeon testified that the proper finish for the dust pans would be a cover plate which covers the gaps as well as the screws. He stated that he had the same unit in his house, and the cover plates cost \$6.00.

The witness testified that he did not consider the crack in the grout to be a workmanship issue. In his opinion it was a common problem consistent with shrinkage, traffic or the type of grout used. In this case the materials used were the standard for the industry and adequate for the job.

Mr. Vigeon testified that there had the problem with the windows in the project, but it had been remedied. The tabs at the top and sides of the window caused it to move when force was applied by the shrinkage of the wood frame of the house. After experimenting with a sample of this type of window, he devised a repair by removing the tabs at the top and bottom of the window and having it reinstalled. He stated that he saw no evidence of a broken seal in the window, as moisture between the panes of glass would be present if the seal was compromised and there was no moisture between the panes of glass. In his opinion, this was proof that it was a condensation problem.

Mr. Vigeon examined the photograph of the beam over the porch, and stated that the mark in the middle of the beam was the type of mark normally left by the steel band to hold bundles of lumber together. The beam was approved and was adequate for the purpose.

The witness stated that the form tie was under the laundry tub and difficult to get at. In his opinion it could be removed with a cutting tool, but did not present a hazard.

In cross-examination, Mr. Vigeon confirmed that he was a journeyman and had not taken specific courses on the Ontario Building Code but did complete a test by the Program to prove his knowledge of it. He confirmed that there had been a Stop Work Order, however it did not involve work on the Applicants' block. Revised drawings were also issued for the Applicants' model of home as significant changes were made, walls were changed and a different beam was used. He was unsure if the revised drawings were onsite and was unclear about which plans were on site during construction of the Applicants' unit. The witness confirmed that Mr. Steven identified problems during inspections by using a red crayon, and a number code to identify deficiencies by making marks on the wooden studs involved.

Mr. Vigeon testified that he had discussed the issue of back-to-back outlets with the building department, and they accepted the solution. The requirement in the Ontario Building Code is that the outlets be offset, however there is no distance specified.

Mr. Vigeon stated that drywall had to be removed to examine the continuity of the drywall behind the stair stringer. The Applicant was correct in her claim, and the problem was repaired. He knew that the trades had signed off on the repair, but did not have a copy of the note from the repair crew. He was not aware if the neighbour's home required the same repair to the stair stringer as in the Applicants' home. The neighbor did file a deficiency notice, but he recalled having the work done to repair the problem and the claim had been withdrawn. He was also aware that the Program follows up on claims, and he knew that this one had not preceded any further.

Mr. Vigeon stated that garages were built with 2 X 4 wooden studs, insulation and 5/8 drywall. He knew that the garages were insulated and inspected, however he did not have a specific recollection of being present to watch the installation of the insulation into the Applicant's unit.

Mr. Vigeon testified that Mr. Bond of the fire department had required drywall be installed behind the party wall as well as a wooden cross block for fire separation and fire stopping in the area of the headers in the basement. In the opinion of the witness, this exceeded the requirements of the Ontario Building Code but was necessary for Mr. Bond to approve it. He also remembered repairs being done to the header area in the basement but he did not know why, as he did not think it was necessary. The witness explained that Mr. Bond and Mr. Steven met with him on issues of fire separation. Mr. Bond was very particular and gave courses on fire separation issues within the industry. In re-examination, Mr. Vigeon stated that the drywall had been placed between the headers and black acoustical sealant had been installed. After that was done, no complaint was received that the work was not done properly.

Mr. Vigeon testified that he had no notes or records that acoustic sealant was used in the Applicants' home, however he was aware that a large amount was used in the

project and has no reason to believe it was not used in construction of the Applicants' home. He could not testify as to the level of workmanship as he did not see it installed.

Mr. Vigeon explained that the ceramic tile was installed on a 5/8 inch thick board rated for interior or exterior use, without underlay, nailed into the floor joists six inches apart, a plastic mesh was then applied with a scratch coat of mortar and stapled down with plastic under the mesh, and thin set used to set the tiles. He stated that this was the industry standard for setting tile and was more stable than a mortar bed. The thickness varies but the mesh is 3/16 inch thick and the scratch coat is therefore thicker. Thin set mortar is then applied with a 1/4 inch trowel and the tiles are set in. Grout is added afterwards. He is familiar with this method of installation as he has used it in his own home and most other construction. The witness did not know if cross bridging was used under the floor and did not see it in the photos shown to him, but he confirmed that strapping was applied at the Applicant's request. In re-examination, Mr. Vigeon testified that if there were problems with the installation, there would be cracked tiles, cracks in the grout and loose tiles as these defects occur when there is an improper installation. After this period of time, there would not simply be the minor cracking in the grout which has occurred.

Mr. Vigeon testified that the framing of the house shrinks naturally and causes nail pops and drywall separation and some movement in the windows. At the time of installation, the instructions for installing the windows required a 3/16 inch clearance from the brick but this had been changed to 3/8 inch. The repair was done, and he had inspected the window subsequently. In his opinion, the caulking was purely cosmetic and was used to repair a small gap.

The witness testified that the form tie behind the laundry tub was difficult to get at, and he did not consider it dangerous because it was bent upwards.

FACTS FOUND PROVEN:

Bedroom window

The evidence given by Mr. Tibor Pal was based on an examination of the plans for the home, the report by Mr. Rocky Chew, and observations of the home made without the removal of any drywall. Mr. Pal was unable to directly observe the wooden structure and framing of the building. He has expertise in this field and testified that in the past he had examined many arenas, had climbed up into the wooden framework to make his observations and recommendations for safety measures that were required. In this case, unfortunately, his conclusions were not based on a direct examination of the wooden structure, and his calculations assume that the plans were followed, and that the beams were a proper size. By the time he examined the windows, some form of repairs had already been made. In cross-examination, he also agreed that if the joists were parallel his calculations would have to be different. The Tribunal does not accept his explanation that the trim around the bedroom window was simply improperly installed, as this does not explain the apparent bowing of the window.

Mr. Rocky Chew, although not found to be an expert witness by the Tribunal, is a qualified mechanical engineer with practical experience in the field of structural engineering. He did have the benefit of making some first-hand observations of the structural elements of the building when drywall was removed. He changed his initial

conclusions about the problem of the upstairs window and the structural integrity of the building once he had the opportunity to examine the wooden framing of the area with some of the drywall removed. He observed that there was no obvious deflection of the window assembly or the surrounding structure which led him to the conclusion that there was an improper installation of the window. When the physical evidence disproved his original theory, Mr. Chew used his observations and knowledge of materials to conclude that a proper allowance was not made for the expansion and contraction of the brick around the window resulting in forces being exerted on the window causing movement. Mr. Vigeon testified that the problem was due to external force being exerted on the window but that it was corrected by removing the top and bottom attachments between the window and the surrounding frame. The Tribunal finds that the situation has stabilized since this repair was done, and the external force exerted on the top and bottom of the window has been removed.

There was a further issue that the window did not provide sufficient natural ventilation and was an Ontario Building Code Violation. The Tribunal finds that the Code permits ventilation to be provided by natural or mechanical means. Although the window did not provide the required amount of natural ventilation, there was evidence that the home had mechanical ventilation through exhaust fans and the furnace system combined with the normal infiltration of air. Mr. Larkin testified that this system was designed by a well known company, and installed according to the plans. There was no evidence that the mechanical ventilation system was inadequate. The Tribunal finds that the window does not need to meet the Code requirements for natural ventilation.

Cracked grout, tile chip and sound from kitchen tile

Mr. Pal did not make any observations of what was in place under the tile floor, however it is clear from the evidence of the Applicant, and the photographs that there was no blocking used as required by the Building Code. Mr. Ambling had testified that although this did not meet the Code requirements it was the standard in the industry. He did not testify that it was a problem that in his capacity as a Building Inspector he commonly required to be rectified although it was below Code. Strapping had been applied at the request of the Applicant. The Tribunal finds that there is no cracking of the tile. There is one hole in the tile at the bottom of the stairs, but that tile has not otherwise cracked. There is no evidence if the hole was caused by an impact, or a defect in the tile. One other tile produces a sound when stepped on a certain way, but the tile has not cracked, and there is no visible damage. The problem of cracking is specifically with a small area of grout and does not appear to have become worse. This is not consistent with a tile floor which is insufficiently stable, and there is evidence that it is consistent with normal shrinkage of materials. The claim was made concerning joist hangers in the Conciliation Request on March 30, 1998 and the warranty began to run September 10, 1997.

Outlets

The Tribunal finds that the electrical outlets were installed on the wooden studs in the party walls, and that the studs were staggered. Although the outlets were within the same stud space, they were not directly behind each other. No definition of "offset" is provided in the Ontario Building Code, and the ordinary meaning of the word must apply. The outlets are attached to studs which are not directly behind each other, and the outlet boxes are therefore to the side of each other. This is not the optimum

installation as suggested in the published materials, but the Tribunal finds that there has been compliance with the Ontario Building Code.

Fire separation

The fire separation at the stair stringer in the Applicants' unit has been repaired, and Mrs. Reid's concern is that if it is not repaired at the adjoining neighbour's residence, she could be put at risk. The Tribunal accepts the evidence of Mrs. Reid that she observed the apparent lack of drywall on the neighbour's side, however there was credible evidence that it had been repaired as the neighbours withdrew their complaint and provided a letter confirming they were satisfied. Mr. Larkin testified that the fire rating from the middle of the party wall met or exceeded the Code requirements. The Tribunal finds that the Code requirement was met if the repair was made and is also met if the repair was made on the neighbour's side of the wall as there is a sufficient fire rating for the wall assembly even if the drywall is still not continuous.

Garage fire separation and sound transmission rating

The Tribunal finds that the Applicant's garage serves only one dwelling unit and is attached or built into the Applicant's unit. By article 9.10.9,16 (3) of the Ontario Building Code, it need not meet the fire separation rating of one hour from the Applicant's residence and must only meet the gas proofing requirement. The party wall with the neighbour's garage also consists of drywall and studs. There is evidence that insulation was installed as part of the construction process and no evidence that it was not installed. The wall as constructed would meet or exceed the one hour fire separation rating. The Applicant has not satisfied the onus to prove that there was a violation of the Ontario Building Code. There is found to be no requirement of sound proofing.

Sound transmission, party walls and electrical outlet boxes

There is no evidence of independent testing to prove whether the sound transmission rating required in the Ontario Building Code has been met. The only evidence is the evidence of the Applicant that there is too much noise coming through the wall, and she did not find acoustic caulking when she probed an area under a wall. The evidence is that the type of wall assembly used would have a rating of 57 with insulation being installed according to item 28 of the chart at 9.10.3.A of the Ontario Building Code. Item 2 of the Addendum states that acoustical sealant must be applied around electrical boxes and wall intersections if the rating of the assembly is over 50. There was no evidence of the reduction in the rating if acoustic caulking was not used, and the only evidence was the speculation of Mr. Larkin who said he did not think it would reduce it below the required 50 if the intersections were not sealed, but he was not sure. There was no proof that the rating would be under 50 as built, and the Applicant has not met the onus of proof.

Dustpans

There is evidence that there are small gaps at the sides of the dustpans. The dustpans were supplied by the Applicants, and installed by the builder. There are also visible screws on each side of the units. Evidence was given that a face plate is available to cover them, close the gaps, and cover the screws. The Tribunal finds that the units as supplied and installed were incomplete and finds that there is no defect in workmanship.

Separation of drywall tape and one nail pop

There is evidence of an area in a ceiling where there was separation of drywall tape, and a nail pop. The Applicant provided no evidence of what caused this aside from her opinion that there was a defect in workmanship. Evidence was by given by Mr. Chew and other witnesses that the wood in a home dries out for a period of time after construction, and this causes some movement in the structure. The Tribunal accepts the evidence that this takes place, and causes drywall separation and nail pops, and finds that this is not an issue of poor workmanship.

Headers in basement

There is evidence from Mr. Vigeon that during the fire separation inspection, Mr Bond required drywall to be placed in the wall behind the headers before he would pass the job. This area is now covered, and is not visible. The Applicant's best recollection is that it was not in place when she looked, but if it is in place it has been repaired. The evidence of whether the proper fire separation has been made is ambiguous, and the Tribunal can not find that it has not been installed or that it has been installed improperly, which is the onus resting on the Applicants.

Structural sufficiency of the beam over the porch

The Tribunal finds there is no evidence of a splice in the beam. There is evidence that the mark in the middle of the beam is consistent with a metal strap having been applied during transport, and the word grain, as shown in the photograph, appears to be continuous. There is conflicting evidence from Mr. Chew and Mr. Pal who did the calculations and came to different conclusions, and there is no evidence of any visible signs of failure. The Applicants have not satisfied the onus of proof regarding this aspect of their claim.

Joist hanger

There was evidence that one joist hanger was not cleanly finished. The evidence from Mr. Ambling is that it should be looked at. The Applicant said that it was improperly twisted around he beam. Mr. Fortune said that the finishing was not completed neatly, but that it was adequate. Applicants have not established that the workmanship was inadequate.

Fire stop at floor level

The issue of the fire stop at floor level is the same as the header area in the basement as any fire separation installed in the wall at the basement headers would act as a fire stop. There is evidence from Mr. Larkin that the floor joists act as a fire stop, and since the basement is not finished there is no cavity in which a fire could travel below the floor joists. The Applicants have not established this aspect of their claim.

Form tie

The Tribunal finds that the form tie was not removed as required by the Ontario Building Code, however it is located in an area behind the laundry tub, and was difficult to reach when an attempt was made to remove it. This is not one of the form ties on the front porch mentioned in the Request for Conciliation or the attached letter. The claim for this

form tie was made within the 2 year limit for health and safety issues, but this form tie is not in a traveled portion of the basement, and does not constitute a hazard unless the laundry tubs are removed.

Gas proofing under garage door

The Tribunal finds that the area under the garage door is gas proofed with drywall compound, caulking or tape. There was evidence of some cracks in the drywall compound. Mr. Ambling stated that he thought it did seal adequately where the caulking met the sill, but there was no evidence whether this was a surface defect or whether there was penetration such that the seal had been compromised.

ISSUES:

The legal issues in these claims are;

1. Is there a breach of warranty resulting in damages due to a defect in workmanship, materials or a breach of the Ontario Building Code.
2. Has the Applicant filed the claim within the required time limits.
3. Has the Applicant met the onus of proof to show that the findings in the Decision Letters were in error.

APPLICABLE LAW:

Section 1 of the *Ontario New Home Warranties Plan Act* states:

"home means",

(a) a self-contained one-family dwelling, detached or attached to one or more others by a common wall,

(b) a building composed of more than one and not more than two self-contained, one- family dwellings under one ownership,

(c) a condominium dwelling unit, including the common elements,
or

.....

and includes any structure or appurtenance used in conjunction therewith, but does not include a dwelling built and sold for occupancy for temporary periods or for seasonal purposes;

Section 13 of the *Ontario New Home Warranties Plan Act* states:

(1) Every vendor of a home warrants to the owner,

(a) that the home,

- (i) is constructed in a workmanlike manner, and is free from defects in material,
 - (ii) is fit for human habitation, and
 - (iii) is constructed in accordance with the Ontario Building Code;
- (b) that the home is free from major structural defects as defined by the regulations; and
- (c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

- (a) defects in materials, design, and work supplied by the owner;
- (b) secondary damage caused by defects, such as property damage and personal injury;
- (c) normal wear and tear;
- (d) normal shrinkage of materials caused by drying after construction;
- (e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;
- (f) damage resulting from improper maintenance;
- (g) alterations, deletions or additions made by the owner;
- (h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;
- (i) damage resulting from an act of God;
- (j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;
- (k) damage caused by municipal services or other utilities;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner's possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

(5) A warranty is enforceable even though there is no privity of contract between the owner and the vendor.

(6) The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.

Section 14 of the *Ontario New Home Warranties Plan Act* states:

(1) Where,

(a) a person who has entered into a contract with the vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

(c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

(3) The Corporation may perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under subsection (1).

Regulation 892, Section 1, of the *Ontario New Home Warranties Plan Act* states:

"major structural defect" means, for the purposes of clause 13(1)(b) of the Act, any defect in work or materials,

(a) that results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or

(b) that materially and adversely affects the use of such building for the purpose for which it was intended.

including significant damage due to soil movement, major cracks in basement walls collapse or serious distortion of joints or roof structure, and chemical failure of chemicals, but excluding flood damage, dampness not arising from failure of a load-bearing portion of the building, damage to drains or services, damage to finishes and damage arising from acts of God, acts of the owners, and their tenants, licensees and invitees, acts of civil and military authorities, acts of war, riot, insurrection or civil commotion and malicious damage.

Regulation 892, Section 4 of the *Ontario New Home Warranties Plan Act* states:

4. (1) Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

.....

Regulation 892, Section 6 of the *Ontario New Home Warranties Plan Act* states:

.....

6. (3) In the case of a home of a type referred to in clause (a) or (b) of the definition of "home" in section 1 of the Act, the maximum amount payable to the owner out of the guarantee fund in respect of a claim made after August 1, 1989 under clause 14(1)(b) or (c) of the Act is \$100,000.00.

.....

APPLICATION OF LAW TO FACTS:

Bedroom window

The Tribunal has found that the problem of movement of the master bedroom window has been repaired, and the Applicant has failed to meet the onus of proof. On the issue of the insufficiency of the opening for natural ventilation, the Tribunal has found that sufficient mechanical ventilation is provided, and the Applicant's claim that the window is undersized is dismissed

Electrical outlets

The Tribunal has found that the installation of the electrical outlets is in compliance with the Ontario Building Code and there is, therefore, no breach of warranty.

Continuity of fire separation

The continuity of fire separation at the stair stringer has been repaired, and the Tribunal has found that the fire separation rating has been met. The Tribunal does not have jurisdiction to order repairs on the neighbour's side of the wall, however there is evidence that a repair has been done. The Applicant has not met the onus of proof and the claim is dismissed

Garage fire separation and sound rating

The Tribunal has found that the Applicant has failed to meet the onus of proof that there is a breach of the Ontario Building Code in relation to the garage fire separation and sound transmission. The claim is therefore dismissed.

Basement header

The Tribunal has found that it has not been proven that the required fire separation at the basement headers has not been installed. The Applicant has therefore failed to meet the onus and the claim is dismissed.

Party wall sound rating and electrical outlets

The Tribunal has found that the Applicant has not met the onus to prove that the sound transmission rating in the party walls including the electrical outlet boxes has not been met, and the claim is dismissed.

Cracked grout, hole in tile, and sound from tile

The Tribunal has found that the crack in the grout is consistent with shrinkage, and is not covered by warranty. There is no evidence that there is any visible damage at the tile which can produce a sound, and there is no evidence whether the small hole in the tile at the foot of the stairs was caused by a defect in materials or an impact. Therefore, there is no proof of damages as a result of a defect in workmanship or materials or a Building Code violation. The onus of proof has not been met, and the claim is dismissed.

Dustpans

The dust pans are part of the central vacuum system, and were installed as provided by the Applicant. A central vacuum system part does not form part of the floor and is not covered by the Ontario Building Code requirements for floors. The dustpans as installed are incomplete, and there is evidence that they are to be finished by a face plate rather than the application of caulking. The Applicant has not met the onus to prove that there is a breach of warranty.

Drywall tape separation and one nail pop

There is evidence that the ceiling drywall tape separation and one nail pop are consistent with shrinkage caused by the drying of materials. There was no evidence of a defect in workmanship or materials. Therefore, the Applicant has failed to meet the onus of proof, and the claim is dismissed.

Structural sufficiency of front porch beam

There is expert evidence that the beam is sufficient, and the Tribunal can not accept the opinion evidence of Mr. Chew as he was not qualified as an expert. If Mr. Chew had been found to be an expert and his opinion evidence was admissible, the Tribunal would then have conflicting credible evidence from two experts, but it would still find that

the Applicant had not met the onus of proof. The onus not having been met, the claim is dismissed

Joist hanger

The Tribunal finds that there is no proof that the one joist hanger was not properly installed. Without proof of a defect in workmanship or materials or a Building Code violation, the onus of proof is not met, and the claim is dismissed.

Form tie

The form tie has been found by the Tribunal not to be a health or safety issue, and as the claim was not made within the required time, the claim is dismissed.

Fire stop at floor level

There is no evidence that a fire stop has not been provided at floor level. The onus of proof is not met and the claim is dismissed.

Gas proofing in garage

The Tribunal has found that there was no proof that the gasproofing in the garage had been compromised so that fumes could penetrate into the residence. The Applicant has therefore failed to satisfy the onus of proof, and the claim is dismissed.

DECISION:

Therefore, by virtue of the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Registrar of the Ontario New Home Warranty Program to disallow the claim.

LICENCE APPEAL TRIBUNAL

David J. Hunt
Vice-Chair

Released: October 18, 2000

ORAV TRAVEL INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
ORAV TRAVEL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: June 15, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

ORAV TRAVEL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Orav Travel Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 10, 2000

B E T W E E N:

ORAV TRAVEL INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Orav Travel Inc. (hereinafter referred to as “the Registrant”) is a corporation incorporated pursuant to the laws of Ontario and registered as a travel agent (Registration No. 03228277/R) and as a travel wholesaler (Registration No. 04338695 /W) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as “the Act”). The Registrant was originally approved for registration as a travel agent on April 2, 1990. The Registrant was originally approved for registration as a travel wholesaler on May 1, 1995.
2. The Registrant signed an acknowledgement of terms and conditions of registration on April 18, 1995.
3. On October 28, 1993, the Registrant filed the financial statements for the fiscal year ended December 31, 1992.
4. By letter dated December 20, 1993, the Registrant was requested to file the financial statements for the fiscal year ended December 31, 1993, on or before March 31, 1994.
5. On April 26, 1994, the Registrant was again requested to file the requisite financial statements.
6. By letter dated May 9, 1994, the Registrant requested an extension to file its financial statements to July 15, 1994.
7. By letter dated May 10, 1994, the Registrant was reminded that there is “no provision for any grant or authorization of an extension” to file financial statements as required by the Regulation.
8. By letter dated July 18, 1994, the Registrant was again requested to file financial statements for the fiscal year ended December 31, 1993, as required.

9. On September 9, 1994, the Registrant advised by telephone that it would submit the financial statements by October 7, 1994.
10. By letter dated August 22, 1994, the Registrar requested to the Registrant to file its financial statements on or before September 7, 1994.
11. On October 11, 1994, the Registrant filed the financial statements for the fiscal year ended December 31, 1993. The statements had been due by March 31, 1994.
12. By letter dated November 11, 1994, the Registrant was advised that the financial statements as filed for the fiscal year ended December 31, 1993, revealed a working capital shortfall in the amount of \$14,853.00. The Registrant was requested to address this deficiency on or before December 5, 1994.
13. By letter dated November 30, 1994, the Registrant was requested to file the financial statements for the fiscal year ended December 31, 1994, on or before March 31, 1995.
14. On December 6, 1994, the Registrant was again requested to address the working capital shortfall as revealed by the financial statements filed as at December 31, 1993.
15. By letter dated January 12, 1995, the Registrant was requested to address the working capital shortfall in the amount of \$14,853.00, as revealed by the financial statements filed for the fiscal year ended December 31, 1993, on or before January 27, 1995.
16. On February 6, 1995, Mr. Ed Holba, an Inspector designated by the Registrar, *Travel Industry Act*, made a site inspection at the business premises of the Registrant. The inspection was made due to the fact that the financial statements for the fiscal year ended December 31, 1993, which were filed seven months late, revealed a working capital deficiency of \$14,853.00.
17. On March 12, 1995, the Registrant was again requested to file the financial statements for the fiscal year ended December 31, 1994, as required.
18. By letter dated May 29, 1995, the Registrar requested the Registrant to file the financial statements for the fiscal year ended December 31, 1994, on or before June 15, 1995.
19. On June 16, 1995, the Registrant filed the financial statements for the fiscal year ended December 31, 1994. The statements had been due by March 31, 1995.
20. By letter dated June 10, 1996, the Registrar requested the Registrant to file the financial statements for the fiscal year ended December 31, 1995, on or before June 27, 1996.
21. On August 9, 1996, the Registrar issued a Notice of Proposal to revoke the Registrant's registration for its failure to file the financial statements for the fiscal year ended December 31, 1995, as required, on or before March 31, 1996.
22. On August 29, 1996, the Registrant filed the financial statements for the fiscal year ended December 31, 1995. The statements had been due by March 31, 1996.
23. By letter dated October 18, 1996, the Registrant was advised that the Proposal to revoke its registration issued on August 9, 1996, had been withdrawn.

24. On May 15, 1997, the Registrant filed the financial statements for the fiscal year ended December 31, 1996. The statements had been due by March 31, 1997. The statements revealed a working capital shortfall in the amount of \$17,384.00.
25. By letter dated May 21, 1997, the Registrant was advised of the working capital shortfall and requested to address the shortfall on or before June 4, 1997.
26. On June 4, 1997, the Registrant advised that it would provide documentation showing that the working capital shortfall had been addressed.
27. On July 21, 1997, the Registrant was again requested to address the working capital shortfall in the amount of \$17,384.00, as revealed by the financial statements filed as at December 31, 1996.
28. By letter dated August 9, 1997, the Registrar advised the Registrant that the documentation that was promised had not, to date, been provided. The Registrant was requested to provide the documentary evidence that the working capital shortfall had been addressed on or before August 27, 1997.
29. By letter dated August 18, 1997, the Registrant provided documentation that the working capital shortfall had been addressed.
30. On May 21, 1998, the Registrant filed the financial statements for the fiscal year ended December 31, 1997. The statements had been due by March 31, 1998.
31. On July 20, 1999, the Registrant filed the financial statements for the fiscal year ended December 31, 1998. The statements had been due by March 31, 1998.
32. By letter dated August 10, 1999, the Registrant was advised that the financial statements for the fiscal year ended December 31, 1998, revealed a working capital shortfall in the amount of \$20,246.00. The Registrant was requested to address the shortfall on or before August 27, 1999.
33. By letter dated August 11, 1999, the Registrant provided documentation that the working capital deficiency had been addressed.
34. On November 3, 1999, Mr. Jack Foster, an Inspector designated by the Registrar, *Travel Industry Act*, made a site inspection at the premises of the Registrant. The Inspection revealed that the Registrant may potentially be a threat to the Fund.
35. On November 19, 1999, the Registrant was requested to file the financial statements as required for the fiscal year ended December 31, 1999, on or before March 31, 2000.
36. On April 20, 2000, the Registrant was again requested to file the financial statements for the fiscal year ended December 31, 1999, as required.
37. By letter dated May 5, 2000, the Registrar requested the Registrant to file the financial statements for the fiscal year ended December 31, 1999, as required, no later than May 19, 2000.

38. On June 15, 2000, the Registrar issued a Notice of Proposal to revoke the Registrant's registration due to its failure to file the financial statements for the fiscal year ended December 31, 1999, as required.
39. On July 20, 2000, the Registrant filed its financial statements for the fiscal year ended December 31, 1999. The statements had been due by March 31, 2000.
40. By letter dated July 21, 2000, the Registrant was advised that the financial statements as filed as at December 31, 1999, revealed a working capital shortfall in the amount of \$29,781. The Registrant was requested to address this deficiency no later than August 7, 2000.
41. By letter dated August 3, 2000, the Registrant requested an extension of time to address the working capital deficiency to October 15, 2000.
42. By letter dated August 29, 2000, the Registrant was advised that the Registrar would not withdraw his Proposal dated June 15, 2000, until and unless the Registrant was in compliance with the Act and Regulation 806/93, made under the Act, as amended ("the Regulation").
43. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under s. 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated June 15, 2000, with respect to Orav Travel Inc.;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation");
 - b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - c) The Registrant shall maintain the previously submitted renewable and irrevocable Letter of Credit in the amount of \$10,000.00 (Canadian) with the beneficial interest in favour of the Travel Industry Council of Ontario for so long as the Registrar shall so require;
 - d) The Registrant shall maintain a proper trust account pursuant to and in accordance with section 36 of the Regulations, and such account shall be properly designated as a *Travel Industry Act* trust account on or before October 15, 2000;
 - e) The Registrant shall address the working capital shortfall as revealed by the financial statements filed as at December 31, 1999, and shall provide documentation evidencing the correction of the deficiency acceptable to the Registrar in his sole discretion on or before October 15, 2000;
 - f) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 15th day of December, 2000, for the month of October, 2000;
 - g) If the above-noted trust account reconciliation as filed according to (ii)(f) is incomplete and/or reveals a customer deposit deficiency, the Registrant will have **five (5) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - h) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31, 2000, on or before **February 14, 2001**;
 - i) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending December 31, 2000, on or before **March 31, 2001**;
 - j) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- k) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended June 30, 2001, on or before **August 14, 2001**;
 - l) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended December 31, 2001, on or before **February 14th, 2002**;
 - m) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending December 31, 2001, on or before **March 31, 2002**;
 - n) If the above-noted financial statements as filed are incomplete and/or reveal an unacceptable deficiency, the Registrant shall have **thirty days (30)** from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - o) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - p) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - q) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions **(ii) (d) to (n)** inclusive, the Registrar **shall revoke** the Registrant's registration on five (5) days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by the signature below that it has obtained or has had full opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of October, 2000.

Orav Travel Inc.

Registrar, *Travel Industry Act*

Mr. Tonu Orav, President
I have authority to bind the corporation

Michael Pepper, Registrar
Travel Industry Act

REID

LORI ANNE REID

MOTION BY THE REGISTRAR UNDER THE
REAL ESTATE AND BUSINESS BROKERS ACT TO SEEK
AN ORDER BY THE TRIBUNAL DECLARING THAT THE
TRIBUNAL LACKS JURISDICTION TO HOLD A HEARING
IN THIS PROCEEDING

TO REVOKE REGISTRATION

TRIBUNAL: SHEENA MACASKILL, VICE-CHAIR,

APPEARANCES: LORI ANNE REID, representing herself, did not appear
GEORGE DRAMETU, Counsel, representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
MOTION: October 10, 2000 Toronto

REASONS FOR RULING

BACKGROUND:

This is a motion by the Registrar of Real Estate and Business Brokers (the "Registrar") for an Order by the Licence Appeal Tribunal (the "Tribunal") for a declaration that the Tribunal lacks jurisdiction to hear an appeal requested by Lori Anne Reid. Ms. Reid was served with the Motion Record and Affidavits but did not appear at the motion.

On June 15, 2000 the Registrar issued a Notice of Proposal to revoke the registration of the Ms. Reid as a salesperson under the *Real Estate and Business Brokers Act* (the "Act"). On July 6, 2000 Ms. Reid mailed a notice in writing under the Act to the Registrar and to the Tribunal, requesting a hearing before the Tribunal.

The Tribunal set the dates of October 13, 2000 for a pre-hearing and November 8 and 9, 2000 for a hearing under the Act.

The Registrar takes the position that Ms. Reid's registration under the Act expired on September 1, 2000 when she ceased to be a member of the Real Estate Council of Ontario ("RECO"). Ms. Reid ceased to be a member of RECO on September 1, 2000 when her membership terminated under RECO's By-Laws due to her failure to submit an insurance application and payment of an insurance premium on or before August 31, 2000. It is the Registrar's position that as a result of the expiration of Ms. Reid's registration, she has no status as a registrant under the Act and there is no valid registration under the Act before the Tribunal. The Registrar submits that as there is no valid registration, the Tribunal lacks jurisdiction to hold a hearing in this matter.

ISSUE:

The issue to be determined on this motion is whether this Tribunal has jurisdiction to hold the hearing requested by Ms. Reid under section 9 of the Act.

THE LAW:

The Act provides for the regulation of real estate brokers and salespersons, including: the registration of brokers and salespersons, the Registrar's authority to propose to revoke or to order suspension of such registration, and a right of appeal by way of a hearing before this Tribunal.

Section 6 of the *Real Estate and Business Brokers Act* provides:

6(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

- (a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
- (c) the applicant is a corporation and,
 - (i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of its business, or
 - (ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or
- (d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

It is important to note that Applicants are entitled to registration subject only to the factors enumerated above.

Section 8 of the *Real Estate and Business Brokers Act* provides:

8(1) Subject to section 9, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 6 or 7.

(2) Subject to section 9, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 6 or 7 if the registrant were an applicant or where the registrant is in breach of a term or condition of the registration.

Section 9 of the *Real Estate and Business Brokers Act* provides:

9(1) Where the Registrar proposes to refuse to grant or renew a registration or proposes to suspend or revoke a registration, the registrar shall serve notice of the proposal, together with written reasons thereof, on the applicant or registrant.

(2) A notice under subsection (1) shall state that the applicant or registrant is entitled to a hearing by the Tribunal if the applicant or registrant mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Registrar and the Tribunal.

(3) Where an applicant or registrant does not require a hearing by the Tribunal in accordance with subsection (2), the Registrar may carry out the proposal stated in the notice under subsection(1).

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

.....

Section 52 of the Act authorizes the making of regulations:

52. The Lieutenant Governor in Council may make regulations ,

(a).....

(b).....

(c).....

(d) governing applications for the registration or renewal of registration and prescribing terms and conditions of registration;

On January 1, 2000 Regulation 986 under the Act was amended by adding section 17.1. Relevant to this motion, section 17.1 provides that the registration of a registered broker or salesperson expires if the broker or salesperson ceases to be a member of Real Estate Council of Ontario.

17.1 (1) A person registered as a broker or salesperson shall become a member of the Real Estate Council of Ontario immediately after being registered if the person is not a member of the Council.

(2) The registration of a registered broker or salesperson described in subsection (1) expires if the person ceases to be a member of the Real Estate Council of Ontario.

In addition, section 46.1 of the Act provides that RECO may, with the prior approval of the Minister, pass by-laws to establish consumer protection programs.

46.1

(a) pass by-laws to establish consumer protection programs; and

(b) require that a person registered under this Act participate in any consumer protection program established under clause (a). 1988, c. 18, Schedule E, section 205.

Pursuant to section 46.1, RECO passed By-Law No. 12, section 5 which requires all members to participate in the Consumer Protection Program. In essence, this provision requires each member to purchase insurance.

By-Law No. 12 states:

Being the Consumer Protection Program By-law to Establish
Compulsory Consumer Deposit Insurance
And Compulsory Errors and Omissions Insurance and
Compulsory Commission Protection Insurance

Of the Real Estate Council of Ontario
(hereinafter referred to as the "Corporation")

5. Pursuant to Section 46.1 of REBBA, it is a requirement of the CPP for CDI, EOI and CPI that all persons registered under REBBA (which includes all Members, both voting and non voting, of the Corporation) must participate in the CPP for CDI, EOI and CPI such that the participation of all Members in the CPP for CDI, EOI and CPI is compulsory and obligatory. Participation in the CPP for CDI, EOI and CPI shall include, without limitation, the payment of any annual premium on or before its respective due date together with any applicable taxes, the completion and provision of any relevant forms, information or documentation as requested on or before their respective due dates, as the case may be, or compliance with the CPP. A Member who fails to participate in the CPP is subject to the provisions of the By-laws including the provisions of Section 16 of By-law No. 10.

Members who do not pay their insurance premiums on or before the specified due date are subject to section 16, By-law No. 10.

By-Law No. 10 states:

Membership by-law
Terms of Membership

16. Breaches of the following terms of membership in the Council shall result in the immediate termination of membership:

- (a) revocation of registration under REBBA;
- (b) the Member's registration under REBBA lapses or otherwise terminates;
- (c) failing to complete successfully the articling or other courses specified by the Registrar within the time specified by the Registrar;
- (d) failing to pay fees, dues or other amounts attributable to their being Members as required under the by-laws;
- (e) failing to comply with a direction or order of the Discipline Committee made under this by-law other than a probation order within the time provided by the direction or order or, if there is no such time provided, within three (3) months of the direction or order: or
- (f) failing to comply with any consumer protection programs established by the Council provided such consumer protection programs were or are in effect and they have been approved by the Members at a meeting of Members duly called for such purposes and approved by the Minister of Consumer and Commercial Relations, and any successor thereto or Minister responsible for the administration of REEBA or the SCSAA, as the case may be.

Sections 16(d) and (f) are relevant to this motion.

REGISTRAR'S SUBMISSIONS:

The Registrar's position, simply put, is that Ms. Reid failed to pay her insurance premiums by August 31, 2000 and therefore failed to comply with sections 16(d) and (f) of By-Law 10. As a result of Ms. Reid's non-compliance, her membership in RECO was terminated on September 1, 2000.

The Registrar states that pursuant to section 17.1(2) of Reg. 986, Ms. Reid's registration under the Act expired when her membership in RECO terminated.

It is submitted by the Registrar that Ms. Reid is neither a registrant nor an applicant under the Act and, consequently, she has no right of appeal nor does this Tribunal have jurisdiction to hear this matter.

The Tribunal was referred to two cases dealing with the issue of jurisdiction in similar licensing statutes. In *Chadderton*, 1997 O.C.R.A.T. No. 155, released November 18, 1997, the issue was whether the Tribunal had jurisdiction to hear an appeal of the applicant who had lost his registration under the *Gaming Control Act*. The legislation provided that when the employment of a gaming assistant terminates, the gaming assistant's registration terminates. This is subject to the proviso that registration is revived if the applicant finds a new casino employer within thirty days of termination. In *Chadderton*, the applicant's employment was terminated, and his registration was, consequently, terminated. He did not obtain employment with another casino within the

time stipulated. The Tribunal concluded that it did not have jurisdiction to hear the appeal, stating at paragraph 35:

“..section 7 of the Act terms of registration are “ to give effect to the purposes of the Act”, and the Act provides that a gaming assistant is only to work through a registered casino. It is therefore consistent with the public protection purpose of the Act, that termination of a gaming assistant’s employment, voluntary or involuntary, results in termination of the gaming assistant’s registration.”

Chadderton, where loss of employment led to loss of registration, is clearly distinguishable from the facts in this case. In this case, the cause and effect sequence is reversed. There is no evidence that Ms. Reid lost her employment connection to a registered broker which led to loss of registration as a salesperson. On the contrary, the affidavit of Margaret James, filed by the Applicant shows that Ms. Reid was gainfully employed by a registered broker, McMath Realty Ltd., until her loss of membership in RECO on September 1, 2000 and, in the opinion of the Registrar, termination of her registration.

In *Blencowe* (1980), 8 C.R.A.T. 1, the Tribunal found that a registration had expired under the *Motor Vehicle Dealers Act* because the Applicant had not transferred his registration within a curative period of 60 days. Consequently, the Tribunal found the Notice of Proposal to revoke the applicant’s registration was no longer valid and that the Tribunal had no authority under the Act to direct the Registrar to take any action with regard to that invalid registration. Ms. Reid finds herself in a very different situation to that faced by the applicant in *Blencowe*. In the *Blencowe* case, there was a curative provision to maintain registration under Regulation 98/71 pursuant to the *Motor Vehicle Dealers Act*, which Mr. *Blencowe* did not utilize. Section 13(9) of Regulation 98/71 provided:

“Where a salesman has not applied for a transfer of registration within sixty days of termination of his employment, and where he intends to continue as a salesperson, he shall apply for registration by filing an application in Form 2 together with the prescribed fee.”

A similar curative provision was also available in *Chadderton* where the applicant had thirty days in which to find employment with a new casino employer. In contrast, section 17.1(2) of Reg. 986 provides no “grace” period in which Ms. Reid might, if she so chooses, remedy or correct her non-compliance. As well, section 16 of By-Law 10 states that a breach shall result in the “immediate termination of membership.” Counsel for the Registrar argues that Ms. Reid is not prejudiced because she may make a fresh application for registration to the Registrar. According to the Registrar, such application would be subject to a two year waiting period from the date of termination pursuant to section 14(4) of Reg. 986, which states:

Section 14(4) Where a person who applies for registration has previously been registered and has surrendered his or her registration or has had it terminated, if more than two years have elapsed since such surrender or termination, the person shall not be registered before completing the course or courses of study approved by the Registrar and passing the written examination or examinations approved by the Registrar.

It is the Tribunal's view that this is an incorrect interpretation and application of section 14(4). Clearly, this provision applies only to individuals who have not been registered under the Act for more than two years and it has no relevance to Ms. Reid's situation. In any event, the presence of a curative provision in *Blencowe* and its absence in this case distinguishes the *Blencowe* decision from the matter at hand.

ANALYSIS:

The import of the Applicant's position is that section 17.1(2) of Reg. 986 and By-Laws 10 and 12 give RECO a broad discretion to deal with membership and registration of brokers and salespersons under the Act. It is the view of this Tribunal that this subordinate legislation is beyond the scope of the empowering sections of the Act.

The authority to make subordinate legislation must be exercised within the scope of the powers conferred by the empowering legislation; otherwise its validity may be questioned in proceedings directly challenging the legislation in issue or collaterally in proceedings which depend upon the validity of that legislation: *R. v. Beaver Creek Correctional Camp, Ex parte McCaud*, (1969) 1 O.R. 373 (C.A.); *Martineau v Matsqui Institution* (1977) 33 CCC (2d) 366 (SCC).

Section 52(d) of the Act states that regulations may be made prescribing "terms and conditions of registration." Section 46.1 of the Act provides that RECO may establish consumer protection programs and require that a "person registered under this Act participate in any consumer protection program." There is no authority given to make regulations which would have the effect of terminating a registration. This power is strictly reserved to the Registrar under sections 6 and 8 of the Act and to the Tribunal in the case where a hearing is held under section 9 of the Act. Sections 52(d) and 46.1 must be read subject to the duties and powers of the Registrar to grant, renew, suspend or revoke registration under sections 6 and 8 of the Act.

Section 2(2) of the Act states:

2(2) The Registrar may exercise the powers and *shall discharge the duties conferred and imposed upon him or her by this Act* and the regulations under the supervision of the Director.(emphasis added)

The principles of procedural fairness are codified in section 9 of the Act. The duties that shall be discharged by the Registrar include the requirement to give notice of a Proposal to refuse or revoke registration and the requirement to provide written reasons in support of the Proposal (section 9(1)). The powers and duties of the Registrar cannot be delegated. There is nothing in the Act, either express or implied, authorizing the Registrar to delegate his duties.

Further, the only grounds that the Registrar may consider in refusing or terminating a registration are clearly delineated in section 6 of the Act.

Section 9(4) of the Act imposes a duty on the Tribunal to hold a hearing at the request of an applicant or registrant. The Tribunal may direct the Registrar to carry out the Registrar's Proposal or refrain from carrying it out. The Tribunal may also substitute its opinion for that of the Registrar.

In this case, the Registrar relies on section 17.1(2) and the By-Laws to terminate the membership and registration of Ms. Reid without any regard to the procedural safeguards mandated by the empowering statute. Subordinate legislation which narrows the scope, or in this case ignores statutory substantive and procedural rights has been found by the courts to be invalid, see *Langlois v Quebec (Minister of Justice)* (1984), 7 Admin. L.R. 279 (SCC). It is well settled law that very clear language is expected in the Act if a person's basic right to appeal is affected. In *Homex Realty & Development Co. Ltd. v Village of Wyoming* (1980) 116 DLR (3d) 1 SCC, Dickson J., as he then was, stated :

The "fundamental rule", formulated by Lord Denning M.R. in *Selvarajan v. Race Relations Board* (1976) 1 All E.R. 12 (C.A.), and quoted by the Chief Justice in *Nicholson* applies:

..that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it".

And also:

..the presence of a compelling public interest does not alone abrogate or diminish a citizen's right to procedural protection...The public interest, it seems to me, is best served by affording the private interest full disclosure and a fair opportunity to be heard".

Quite apart from the breach of procedural fairness in this case, section 17.1(2), Reg. 986 purports to create an additional ground for termination of registration; namely, non-membership in RECO. Secondly, section 17.1(2) purports to delegate to RECO the authority to terminate registration. As stated above, this delegation is not authorized by the statute.

This Tribunal is mindful of its own ability to determine questions of law and in particular, the validity of subordinate legislation. Section 3 of the *Licence Appeal Tribunal Act*, 1999 states:

3(1) the Tribunal shall hold the hearings and perform other duties that are assigned to it by or under any other Act or regulation.

(2) Except as limited by this Act, the Tribunal has all the powers that are necessary or expedient for carrying out its duties.

Section 9(4) of the *Real Estate and Business Brokers Act* provides that the Tribunal "may substitute its opinion for that of the Registrar."

The issue of whether an administrative tribunal has the power to interpret law was considered by the Supreme Court of Canada in *Tetreault-Gadoury v Canada (Employment and Immigration Commission)* (1991) 81 DLR (4th) 358. Speaking for the court, La Forest J. held at page 364:

..the power to interpret law is not one which the legislature has conferred lightly upon administrative tribunals, and with good reason. Although curial deference will not be extended to an administrative tribunal's holding on a Charter issue, such deference is generally applied to the interpretation of a statute within the tribunal's area of expertise, when the tribunal has been given the power to interpret law."

In the companion appeal, *Cuddy Chicks v Ontario (Labour Relations Board)* (1991) 81 DLR (4th) 121, La Forest J. held at page 130:

...a formal declaration of invalidity is not a remedy which is available to the board. Instead, the board simply treats any impugned provision as invalid for the purposes of the matter before it."

It is the view of this Tribunal that section 3(2) of the *Licence Appeal Tribunal Act* and section 9(4) of the *Real Estate and Business Brokers Act* authorize implicitly, if not expressly, the ability to treat section 17.1(2) of Reg. 986 as invalid for the purposes of this proceeding.

RULING:

For the above reasons, it is the opinion of this Tribunal that the termination of Ms. Reid's registration pursuant to section 17.1(2) of Regulation 986 and By-Law No. 10 is invalid. Accordingly, this Tribunal finds that it has jurisdiction to proceed with the hearing in this matter on November 8 and 9, 2000.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice-Chair

Released: October 19, 2000

BEHNAMY

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
SAM BEHNAMY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: June 7th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

SAM BEHNAMY

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on October 20, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 1:00 p.m., on Wednesday, November 1, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 20, 2000

ALPHA CLUB TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of
ALPHA CLUB TRAVEL

AND IN THE MATTER of a decision of the
Travel Industry Council of Ontario

TO DISALLOW A CLAIM
- Decision dated: September 1, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Decision

ALPHA CLUB TRAVEL

Applicant

- and -

TRAVEL INDUSTRY COUNCIL OF ONTARIO

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on November 2, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 10:00 a.m., on Thursday, November 23, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 20, 2000

DAVIDSON

JUDITH DAVIDSON

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: F. C. ROWETT
Representative for the Registrar of Motor Vehicles

JUDITH DAVIDSON, Applicant
unrepresented

DATE OF HEARING: October 19, 2000

DECISION RELEASED: October 27, 2000 Peterborough

REASONS FOR DECISION

A hearing was held on October 19, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Judith Davidson (the "Applicant")
Motor Vehicle:	1989 Plymouth Voyager, plate # 393 NHN (the "vehicle")
Date of Appeal:	September 22, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on October 19, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- * The vehicle was loaned to my son (Kevin Davidson) and Wendy Philp so Wendy could get to and from work primarily. I need the vehicle returned to me ASAP.
- * I have enclosed a copy of the vehicle ownership as evidence that I own the vehicle.

At the hearing the Applicant, opted to make a statement instead of proffering evidence under oath.

The Applicant stated that the vehicle in question belongs to her, but had been given to *"...Wendy Phillips ...son's fiancée, so she could get to work ...she needs the vehicle to get to work ...so far we all have been trying to help her get to work."*

The Applicant further states that at the time her son, Kevin, had his own car and was working. The Applicant was not aware until this hearing that her son did not have a valid driver's license.

According to the Applicant, on the day in question she did nothing to ensure that the driver of the vehicle had a valid driver's license.

The Applicant is able to driver her boyfriend's car and has incurred no economic losses from the impoundment of the vehicle in question. She is appealing on behalf of Wendy Phillips, who has a son, and is incurring a loss by the impoundment of the vehicle. The Applicant agreed that the loss incurred by Wendy is a result of her son's actions, and will not result in permanent loss.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kevin Davidson;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 7, 2000.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional: Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Appellant to establish due diligence and exceptional hardship ground of appeal as provided in subsection 50.2(3)(c) and 50.2(3)(b) and (d) of the Act, respectively.

The Tribunal will address the matter of due diligence first. Sect. 50.2 (3) (c) requires:

“that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's license of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension.”

The Respondent contends that the Applicant did not exercise due diligence as she did not ask to see her son's driver's license on the occasion in question. The Tribunal concurs. In order to exercise proper due diligence the owner of a motor vehicle must physically see the driver's license of the prospect driver immediately prior to allowing the car to be driven the individual. The Applicant, made no efforts to check that the driver of the vehicle had a valid driver's license. In fact the Applicant admitted, at the hearing, that she was not aware that the driver of the vehicle, at the time of impoundment, did not have a valid driver's license.

The Applicant stated that she had no expectation that her son would be driving the vehicle as the vehicle was given to the care of Wendy Phillips. Nonetheless, it is the Applicant's responsibility, under the law, to ensure that the vehicle is not driven by a person or persons other than the one the vehicle was given to.

The Tribunal is not satisfied that the criteria for due diligence as set out in Section 50.2(3)(c) was met.

With respect to undue hardship as per subsection 50.2(3)(d) of the Act, the Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Appellant stated that she has an alternate method of transportation, in that she is able to get about by using her boyfriend's car. As for the person directly affected by the loss, Wendy Phillips, the Applicant confirmed that “...so far we all have been trying to help her get to work.”

Is the loss immediate, significant and lasting?

The Appellant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Appellant shows proof that loss will be immediate, significant and lasting.

By her own admission the Applicant incurred no loss of income or extra expenses which could be considered hardship. Were the Tribunal to recognize the loss incurred by the individual affected by the loss of the vehicle, Wendy Phillips, said losses are not lasting, according to the Applicant.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the loss will be borne by a person regularly transported in the impounded vehicle. Nonetheless the loss is not significant or permanent. Therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are not met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

As previously stated the individual affected by the impoundment, has an alternative method of transportation, and has incurred no permanent loss.

After assessing the evidence presented, the Tribunal finds that the Appellant suffered no hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: October 27, 2000

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

STEPHEN BROWN, Agent, representing the Applicant
CAROL STREET, Counsel, representing the Ontario New Home
Warranty Program
ENZO BERTUCCI, Agent, representing Falstaff Heights
Development Corp., Added Party

DATE OF
HEARING: October 23, 2000 Toronto

ORDER

WHEREAS the Applicant appealed the Program's decision to this Tribunal which appeal was due to be heard in Toronto on October 23, 2000;

AND WHEREAS at the commencement of the hearing on October 23, 2000, Agent for the Applicant requested an adjournment of the hearing in order to reach a settlement of the matter as between the Applicant and the Added Party;

AND WHEREAS after hearing arguments from each of the parties;

NOW THEREFORE this Tribunal Orders:

- 1) The hearing is adjourned to commence at 9:30 a.m., on December 18, 2000, at the Tribunal's Chambers, 1 St.Clair Avenue West, 12th Floor, Toronto, Ontario and to continue if necessary at 9:30 a.m. on December 19, 2000.
- 2) Prior to December 18, 2000, if the parties settle they are to immediately inform the Tribunal and the hearing date will be cancelled.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATIONS of
1078370 ONTARIO INC. O/A CANATOURS and
1078371 ONTARIO INC. O/A DALE TOURS INTERNATIONAL
as a travel agent

AND IN THE MATTER of the PROPOSALS of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*

TO REVOKE REGISTRATIONS
- Proposal dated: February 25, 2000
- Proposal dated: February 28, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposals

1078370 ONTARIO INC. O/A CANATOURS and
1078371 ONTARIO INC. O/A DALE TOURS INTERNATIONAL

Applicants

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ADJOURNMENT

WHEREAS the Licence Appeal Tribunal appointed a time and place for a hearing in the
above matter on October 26, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing
peremptory against the Applicants to commence at the Travelodge Hotel, Renaissance
Room, 33 Riverside Drive East, Windsor, Ontario, at 9:30 a.m., on Wednesday,
December 6, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

PREHEARING

MICHAEL D. PERELGUT

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

MICHAEL D. PERELGUT, representing himself
NETANUS RUTHERFORD, Counsel, representing the Ontario
New Home Warranty Program
LAWRENCE F. WALLACH, Counsel, representing Hentob
Construction Ltd., Added Party

DATES OF

PREHEARING: July 13 and October 5, 2000

Toronto

ORDER

Following attendances on July 13, 2000 and October 5, 2000 at a pre-hearing before the Licence Appeal Tribunal of Michael D. Perelgut, representing himself (the "Applicant") and Netanus Rutherford, Counsel, for the Ontario New Home Warranty Program (the "Program") and Lawrence F. Wallach, Counsel, for Hentob Construction Ltd., (the "Added Party");

The Tribunal makes the following Order:

1. The status of the issues as enumerated in the Decision Letter of the Program dated March 21, 2000 is as follows:
 - a) Issue #1 (a), (b), (c) relating to the front door is withdrawn by the Applicant.
 - b) Issue #2 relating to the window over the garage will be an issue for the hearing.
 - c) Issue #3 relating to the front door lock is withdrawn by the Applicant. The Added Party will supply the lock to the Applicant and the Applicant will install it. As well the Added Party will give to the Applicant the name of the subcontractor who supplied the interior door handles for the house.
 - d) Issue #4 relating to the sod is withdrawn by the Applicant.
 - e) Issue #5 relating to the wrong grading is withdrawn by the Applicant.

- f) Issue #6 relating to the loose cord is withdrawn by the Applicant.
 - g) Issue #7 relating to the driveway paving being done on two separate occasions is withdrawn by the Applicant.
 - h) Issue #8 (a) cost of stain, (b) cost of tiles and (c) cost of duct cleaning are withdrawn by the Applicant; (d) cost of wildlife removal service in the amount of \$240.00 is to be paid by the Added Party to the Applicant; (e) cost of floor finishing will be an issue for the hearing.
 - i) Issue #9 relating to the horizontal crack on basement wall is withdrawn by the Applicant.
 - j) Issue #10 relating to pot lights in main hall will be an issue for the hearing.
 - k) Issue #11 relating to the lower cabinet for tub under sink for laundry room will be an issue for the hearing.
 - l) Issue #12 relating to grout in backsplash is withdrawn by the Applicant.
 - m) Issue #13 relating to the valence light in kitchen will be an issue for the hearing.
 - n) Issue #14 relating to plug in kitchen will be an issue for the hearing.
 - o) Issue # 15 relating to stains in grout by dishwasher is withdrawn by the Applicant.
 - p) Issue #16 relating to paint on carpet in family room is withdrawn by the Applicant.
 - q) Issue #17 relating to having a jacuzzi tub in the main bathroom is withdrawn by the Applicant.
 - r) Issue #18 relating to insulation around closet in third bedroom will be an issue for the hearing.
 - s) Issue #19 relating to squeaks in floor in master bedroom is withdrawn by the Applicant.
 - t) Issue #20 relating to the provision of spare tile for the master ensuite is withdrawn by the Applicant.
 - u) Issue #21 relating to single lever Moen in master ensuite will be an issue for the hearing.
 - v) Issue #22 relating to faucet upgrades for jacuzzi tub will be an issue for the hearing.
 - w) Issue #23 relating to water heater rattles is withdrawn by the Applicant.
 - x) Issue #24 relating to the wonder board for main bath tub and ensuite shower will be an issue for the hearing.
2. It is agreed that the Added Party will repair the exterior front stairs of the house. These repairs will take approximately two days. It is agreed that the repair will commence on October 24, 2000 and continue on October 25. If there is rain on

October 24 then the repairs will commence on October 25 and continue on October 26. It is agreed that the repairs to the front steps if commenced prior to October 31 must be completed prior to October 31 so the stairs can be used on Halloween night. The Applicant permits the workmen of the Added Party to come onto his property to work on this repair. The repair requires that the workmen drill down at the front corners of the stairs at least four feet; then sonatube will be installed and concrete poured. If the railing is removed it will be put back in the same state as when it was removed. If necessary at the conclusion of the repairs the stairs will be made level.

3. It is agreed by all of the parties that the disclosure provisions found in the Rules of Procedure of the Licence Appeal Tribunal are to be followed. If there is to be expert evidence there must be compliance with the twenty day time period for disclosure. There must be disclosure between the Applicant, the Program and the Added Party of all documents within the ten day time period for disclosure. Failure to comply with these disclosure requirements can result in the Tribunal not allowing such documents to be used at the hearing.
4. It is agreed by all of the parties that the hearing will commence on January 16, 2001 at 9:30 a.m. at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario and to continue on January 17 and January 18, 2001 if necessary.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: October 25, 2000

McCLELLAND

IAN AND KIMBERLEY McCLELLAND

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES:

IAN McCLELLAND, representing himself and his wife
ANDREA YORK, Counsel, representing the Ontario New Home
Warranty Program
JEFF WHITE, Agent, representing 1042147 Ontario Inc., Added
Party

DATE OF
HEARING: October 23, 2000 Toronto

CONSENT ORDER

Following attendances on October 23, 2000 at a hearing before the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) of Ian McClelland, representing himself and Kimberley McClelland (the "Applicants") and Andrea York, Counsel, representing the Ontario New Home Warranty Program (the "Program"), and Jeff White, Agent, representing 1042147 Ontario Inc., (the "Added Party");

AND PURSUANT to discussions prior to the commencement of the hearing on October 23, 2000, the parties have concluded a settlement in terms of which the Applicants have withdrawn their appeal.

AND WHEREAS, Kimberley McClelland, the Applicant, not present at the hearing, has sent by fax dated October 23, 2000 her consent to the withdrawal of her appeal before the Tribunal.

NOW THEREFORE this Tribunal orders, on the consent of the parties, that the proceedings in this matter are hereby withdrawn and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: October 25, 2000

BARRE

JENNY BARRE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: F. C. ROWETT
Representative for the Registrar of Motor Vehicles

JENNY BARRE, Applicant
unrepresented

DATE OF HEARING: October 20, 2000

DECISION RELEASED: October 27, 2000 Cobourg

REASONS FOR DECISION

A hearing was held on October 20, 2000, at Cobourg, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Jenny Barre (the “Applicant”)
Motor Vehicle: 1989 Honda DXC, plate #AANK 265 (the “vehicle”)
Date of Appeal: September 27, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 20, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Applicant submitted an itemized time line of events since the impoundment, as well as copies of bills, and statements of income and expenses.

The Respondent offered no objection to the Applicant’s package being entered as an exhibit.

There were no other preliminary matters and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

This is in regards to my vehicle being impounded on Sept. 13/00. I feel I need to appeal this decision for many reasons. Though it was not the wisest decision we have made for Derek to have driven my car, that is something he and I regret very much. We are dealing with the many consequences as we speak. A few days after the impoundment my other vehicle broke down on the 401. (I have documentation from a mechanic as well as a witness along with this letter). The outcome is a replacement of an engine. We do not have the funds and we also have a mortgage we have been struggling with to maintain to keep up to date. Derek, who is the provider in our family, to barely keep us a float had a job in Toronto. It was well paying (Electrical-Union) but since this incident he was told to quit due to an unreliable way up to work. His employer also agreed it was what he had to do at this time. There is no income coming in from him. Our only hope is unemployment insurance to assist us getting back on track. We all know how difficult it is to prove our situation when you quit a job. We have two small children, one starting school the other is 8 months old. It has been extremely difficult being the only one working at this time. I only have relief part time work and to get two kids off to daycare (other side of town) or enough to do my (more) hours is extremely difficult. It is also so much work to get to my job. I do not want to lose everything we are trying to work towards. We've made a big mistake and we just want to make it right. I really need my car back, and I can promise you there will not be a repeat of this situation. We want out of this mess and we understand how serious our stupid mistake was. We are adjusting our needs to finding solutions for Derek to get to jobs.

You can trust my word as I do not have a record and would just like to get pass this. Our money is extremely tight and getting my car out as soon as possible we would probably be able to make a payment. I would hate to think what happens if 45 days are up as I do not have this money to get my car back.

This is an embarrassing part of my life that I just want to get through, I am hoping you can hear my appeal and forgive our wrongful doing. I need my job, I need my car and will do anything to make it right and get it back as soon as possible.

If possible I would appreciate a telephone conference or a written hearing due to the difficulty of getting to a hearing. But if it all helps my situation to get my car back as soon as possible I will have to do what I need to do.

Thank-you for hearing my situation I will appreciate your reply.

Jenny Barre

A handwritten note signed by George Jacobson confirms Applicant's second vehicle *"...stalled on the 401 ...price of engine alone is \$850.00 ...does not include installation"* (Exhibit # 5)

A Record of Employment for Derek Matthews shows *'First Day Worked 09 02 2000 Last Day Worked 16 09 2000...'Comments': This person have no driver's license so he can't drive to work"* (Exhibit # 5)

At the hearing the Applicant opted to make a statement. The Applicant made it clear that she understands the law, nonetheless feels that her situation warrants special consideration.

The Applicant is a social worker with two part-time jobs, one in Port Hope where she can walk to, the other in Colburn. The Applicant has made an effort to get to the shifts scheduled ahead of time. Over and above the regular shifts, the Applicant is on call. The Applicant stated that she has had to give up several calls, as she had no way of getting the children to day care and get to work.

Taking a cab would be counter productive as the income would not warrant the expense.

The Applicant had an opportunity to obtain full time employment but the position required the use of a motor vehicle for the job, thus the Applicant was not hired.

Due to her husband's loss of his job, the family does not have extra health coverage. One of the children has been diagnosed with asthma and the Applicant is afraid of the extra prescription costs that will be coming up.

The Applicant described that meeting her mortgage payments has been a difficulty; one payment has already been missed. The Applicant further expressed a concern of not having the funds required to obtain the release of the vehicle after the impoundment period expires.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Derek Mathews;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 21, 2001.

The Respondent offered no viva voce evidence at the hearing choosing to stand on the information provided.

In closing the Respondent re-iterated sect 22 of the Act.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Appellant to establish the exceptional hardship ground of appeal as provided in subsection 50.2 of the Act.

Subsection 22 (2) Regulation 574 as amended by O. Reg. 632/98 provides that for the purposes of considering hardship, inconvenience, financial loss, loss of employment or opportunity for employment cannot be considered, unless there is no alternative vehicle and the economic loss is immediate, significant and long lasting, impact of loss is on person other than suspended driver.

The Tribunal will address each point separately.

Is there no alternative to the impounded vehicle?

A priori, given that public transportation as well as taxis are available, and that the Applicant owns a second vehicle, it would appear that the answer is yes. This Tribunal would remiss if other facts were ignored. While it is an accurate statement that the Applicant owns a second vehicle, there is evidence that this vehicle is currently in need of repair. A note from the Applicant's mechanic reveals that the cost of repairs would be over \$850.00 plus "*installation*". The Applicant has stated she is in financial straits and unable to afford this amount. Thus, at the time of hearing the Applicant's second vehicle could not be considered as alternative method of transportation.

The Applicant is on call and must respond within a certain time. Public transportation is not always practical, as the Applicant has two children, which in most instances are required to be taken to day care when the Applicant has to work. As for taxis, such an expense would aggravate the Applicant's present financial position, and should not be considered as an alternative.

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provides that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available. The Tribunal finds that there is no alternative vehicle to replace the impounded vehicle.

Is the loss immediate, significant and lasting?

This Tribunal further finds that the Appellant meets the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that economic loss may be regarded if the loss is immediate, significant and lasting.

The Applicant has lost an opportunity for a full time position, which required the use of a motor vehicle for work. Such a loss definitely appears to be significant and long lasting. The Tribunal considered the fact that the Applicant has had to refuse extra shifts, as she was not able to take her children to day care and get to work. The loss of income is immediate and its effects cumulative and long lasting.

With respect to retrieving the motor vehicle from the pound, the Applicant has stated that the longer the vehicle is impounded the higher the cost of release. Given the Applicant's current financial situation, it is likely, as she suggested, that the vehicle would have to stay at the pound for a period of time after the expiration of the impoundment period. The extra costs incurred by the extension of the impoundment as well as the continued loss of the use of the vehicle would certainly be punishment over and above that intended by law.

The Applicant satisfied the Tribunal that she has in fact incurred a loss of income and extra expenses which could be considered hardship.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the loss will be borne by the owner of the vehicle who is the person who may be transported in the impounded vehicle, not the driver. Therefore, the requirements under O. Reg. 632/98, Subsection 22(3)(c) are met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574, provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant meets the requirements of Subsection 22(3)(d)(i) as the loss of the impounded vehicle is upon a person other than the suspended driver. As the clause is cumulative that Applicant is also required to meet the requirements of 22(3)(d)(i)(ii). There is no doubt that the economic losses incurred by the Applicant are not "...a result of a loss by the suspended driver...". At this point in time the Applicant is the sole provider, the loss of the motor vehicle affects her earning capacity.

After assessing the evidence presented, the Tribunal finds the Applicant has met all the criteria of Subsection 22(3) and that the Appellant suffered extenuating hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal **sets aside** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: October 27, 2000

COLLAKU

VEBI COLLAKU

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DEREK ISRAEL, Vice-Chair, Presiding
SHEENA MACASKILL, Vice-Chair

APPEARANCES:
VEBI COLLAKU, representing herself
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
VITO FERA, Agent, representing the Added Party, Zancor Homes
Limited

DATE OF
HEARING: September 27, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal from a written decision of the Ontario New Home Warranty Program (the "Program") dated April 25, 2000 wherein the Applicant's claim was denied by the Program.

Pursuant to an Agreement of Purchase and Sale (the "Agreement"), Vebi Collaku (the "Applicant") bought a new home to be built on Lot 161, Plan 43 M1278, in Mississauga, Ontario from a vendor/builder Zancor Homes Ltd.- Westglen Village 2 (the "builder"). The purchase price of the home was \$255,690.00. The Applicant took possession on January 28, 1999.

The said Agreement (Exhibit 3, Tab 1) includes several Schedules. Schedule "A"-1 Standard Features provides that the builder agrees to include several Exterior Features including: "wood sectional roll-up garage doors" and "precast concrete steps as required." In addition, Interior Features include "oak railings, with white painted spindle and natural oak handrail" and "35 oz. Broadloom with underpad in all bedrooms, living, dining, hallway and stairs."

Schedule "A"-3 provides that oak stairs would be included at an extra cost of \$2200.00.

Schedule "Y" provides that:

Purchaser acknowledges that Lot 161 (Windsor Model) will be used by the builder as a temporary sales office. Additional upgraded items will be installed in this home at no extra charge to the Purchaser as compensation. The home will come with its full warranty as stated in the Agreement of Purchase and Sale. The Purchaser agrees with the above by signing this Schedule today.

Prior to the Applicant taking possession, the builder used the garage area of the house as a temporary sales office. The space was drywalled, insulated and painted. Electrical fixtures, heating ducts and carpeting were installed. A set of stairs with a railing was built from the garage to the main dwelling through a seven foot archway. The exterior wall facing the driveway was blocked off with wood on one side and double French doors on the other side.

After taking possession, the Applicant made numerous complaints to the builder. These complaints were not resolved and a conciliation inspection by the Program was requested, arranged and held at the Applicant's home on March 10, 2000. The Program issued its conciliation inspection report stating that it did not consider the complaints to be covered under warranty. On March 29, 2000, a re-inspection was arranged with another warranty representative from the Program. The re-inspection report confirmed the opinion set out in the conciliation report.

Following the conciliation report and re-inspection report, the Program issued its decision letter of April 25, 2000 denying all of the Applicant's complaints.

The Applicant restricts his appeal to the denial of four complaints which are set out in the decision letter as follows:

1.Claim: Stairs not oak as was paid for – all levels – Builder paid for oak stairs but not installed.

Reason: As there are no defects in materials or workmanship, and no violations of the Ontario Building Code, this item is not warranted as per section 13(1)(a)(i)(iii) of the Act.

5. Claim: Entrance stairs – front and rear entrance – stairs unstable and unsafe.

Reason: As there are no defects in materials or workmanship, and no violations of the Ontario Building Code, this item is not warranted. The builder agrees to check the steps in the spring once the frost is out of the ground and make any necessary adjustments at that time. This was confirmed by as completed at the re-inspection dated March 29,2000.

6.Claim: Garage Doors – Garage – Garage doors not installed.

Reason: As there are no defects in materials or workmanship, and no violations of the Ontario Building Code, this item is not warranted as per section 13 (1)(a)(i)(iii) of the Act.

9. Claim: New item at the time of inspection: Hardwood floor is lower than the ceramic tile floor in the front entrance, kitchen and bathroom.

Reason: As there are no defects in materials or workmanship, and no violations of the Ontario Building Code, this item is not warranted as per section 13(1)(a)(i)(iii) and 13(4) of the Act.

THE ISSUES:

The issues to be decided in this matter are:

- 1) Do the claims made by the Applicant qualify as a warranty within the meaning of section 13(1) of the Act?
- 2) Does the Applicant have a cause of action against the builder for damages resulting from a breach of warranty in terms of section 14(1)(b) of the Act?
- 3) If the Applicant is entitled to damages, what is the quantum of such damages?

THE LAW:

Section 13(1) of the *Ontario New Home Warranties Plan Act* states:

13(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(i) is fit for habitation, and

(ii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

Section 14(1) of the *Ontario New Home Warranties Plan Act* states:

14(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

the person of owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

THE EVIDENCE:

Testimony of the Applicant

The Applicant testified on his own behalf. He did not call any other witnesses. It should be noted that the Applicant gave his evidence through an Albanian interpreter. The Applicant is able to understand some English but cannot read English. The Tribunal is satisfied that the Applicant was able to understand these proceedings with the assistance of an interpreter.

Claim: Stairs not Oak

The Applicant stated that Schedule "A"-3 of the Agreement provides for oak stairs. In consideration for this upgrade, the Applicant paid an additional amount of \$2200.00. His complaint is that the builder did not install oak stairs as was bargained for; rather, oak veneer stairs were installed. The Applicant claims that the treads, risers and stringers are made from pieces of wood glued on top of the stairs. In cross-examination, the Applicant was asked whether he agreed that the industry standard regarding oak stairs was to use solid oak treads with oak veneer riser and stringers. The Applicant responded that he agreed with this standard but felt that as he had paid extra money, the standard should be changed.

Claim: Entrance Stairs

With respect to the issue of the front entrance steps, the Applicant stated that the builder should have constructed "permanent" steps at the front entrance of the house. He complains that the steps that were installed are unsafe and unstable. He also stated that the steps looked temporary and move when stepped on. The Applicant testified that he tried to fix the steps himself many times without success. He eventually removed the concrete steps in June, 2000.

In cross-examination, the Applicant agreed that Schedule "A"-1 to the Agreement provided for "precast concrete steps, as required." He also agreed that when the warranty representatives came to inspect the steps on March 10, 2000 and March 29, 2000, the steps did not move.

Claim: Garage Doors

With respect to the issue of the garage, the Applicant complains that the builder failed to install garage doors as per the Agreement. However, the Applicant did not complain about the missing garage doors at the time of the Pre-Delivery Inspection on January 26, 1999. The Pre-Delivery Inspection report dated January 26, 1999 (Exhibit 3, Tab 6) which is signed by the Applicant, states:

"Garage Overhead Doors – OK"

The Applicant states that while he did not complain about the missing garage doors on January 26, 1999, he did call his lawyer who, in turn, contacted the builder.

In cross-examination, the Applicant denied that he made a request in October, 1998 to the builder to leave the garage "as is" (this would be three months prior to taking possession). He also said that he had no knowledge of an application for a Building Permit to allow conversion of the garage (Exhibit 3, Tab 2). Finally, the Applicant denied the suggestion put to him that he told the salesperson that he intended to live in the converted garage space and that his son and his family would live in the main part of the house.

The Applicant admitted that the converted garage is furnished and is currently being used by all members of the family as a recreation or family room.

Claim: Hardwood floor lower than ceramic floor

The Applicant's fourth complaint is that the floors in the house are not level between the hardwood flooring and the ceramic tile. Specifically, he stated that the hardwood floor is $\frac{3}{4}$ inch lower than the ceramic tile floor at entrances to the kitchen, ground floor washroom and front hallway.

In cross-examination, the Applicant agreed that the actual difference between the floors is $\frac{1}{2}$ inch or less. The builder installed a quarter round between the wood floor and ceramic tile floor which the Applicant states makes it difficult to clean because it traps the dirt. The Applicant stated that the builder's offer to replace the quarter round with an oak transition strip is unacceptable to him. The Applicant insists that all of the floors in the house should be level.

Testimony on behalf of the Program

Roger Hicks testified on behalf of the Program and stated he has been a warranty representative for the Program since May 1999. Prior to that, he was employed as a building inspector and construction manager. He has inspected thousands of buildings during his over twenty year career in the construction industry.

Mr. Hicks attended the conciliation inspection on March 10, 1999 with the Applicant and a representative from the builder, Vito Fera. He authored the conciliation report and the decision letter dated April 25, 2000.

Claim: Stairs not Oak

As to the oak stairs, Mr. Hicks stated that the treads or steps are solid oak and the risers are oak veneer. He could not recall whether the stringers were solid oak or veneer. Mr. Hicks testified that a standard oak staircase could be all solid oak or a combination of oak and veneer; however, a solid oak staircase would usually only be constructed in a custom home with specifications in the agreement of purchase and sale. In a production home, such as that purchased by the Applicant, it is industry standard in Ontario to install oak treads with veneer risers and stringers.

Claim: Entrance Stairs

Mr. Hicks stated that the front entrance stairs were precast concrete steps. He testified that he stood on the steps and attempted to rock them, but they were stable and did not move. Mr. Hicks could not detect any defects in workmanship nor did he believe that the steps constituted a safety hazard. Nonetheless, he recalls that Mr. Fera stated at the conciliation meeting that he would return once the frost was out of the ground to ensure that the steps were level.

Claim: Garage Doors

Mr. Hicks described in detail the interior and exterior finishings to the garage. The space is totally finished with drywall, paint, baseboards and trim, electrical outlets, heating ducts, light fixtures and carpeting. He observed that the area was furnished with a couch, chairs, area rug and television. A set of stairs with a handrail and pickets lead from the garage to the main house through a finished archway.

Mr. Hicks stated that when he attended for the conciliation on March 10, 1999, he met with the Applicant and Mr. Fera in the garage/family room area. Also in attendance at that meeting was the Applicant's adult son. Mr. Hicks recalled that Mr. Fera had a discussion with the son to confirm that the Applicant had requested that the garage be left as it is. The son confirmed that this request had been made. Thereafter a disagreement occurred between the Applicant and the son, but Mr. Hicks has no knowledge of what was said by the Applicant.

On reviewing the file in preparation for the conciliation, Mr. Hicks stated that he noted the Building Permit dated January 28, 1999 (Exhibit 3, Tab 2) provides for a revised use of the garage space.

Claim: Hardwood floor lower than ceramic floor

With respect to complaints about the uneven floors, Mr. Hicks testified that it is not uncommon for there to be a discrepancy between different flooring materials. He stated that in his opinion, this was neither a defect in workmanship nor a violation of the Ontario Building Code.

Richard Johnston also gave evidence on behalf of the Program. Mr. Johnston conducted the re-inspection of the home on March 29, 2000.

Claim: Stairs not Oak

He confirmed Mr. Hick's evidence that the oak stairs that were installed represented an upgrade from the standard feature stairs which are typically made from pine, spruce or paper veneer. He stated that the standard in the industry is to use solid oak treads with oak veneer stringers and risers.

Claim: Entrance Stairs

Mr. Johnston stated that he did not address the issue of the front entrance steps in his report because the Applicant indicated to him at the time of the March 29 meeting that this issue had been resolved to his satisfaction.

Claim: Garage Doors

With respect to the garage, Mr. Johnston concluded that the garage doors were not warrantable for the following reasons: first, he stated that it was highly unlikely that a builder would, on his own initiative, go to the time and expense of applying for a permit without the authorization of the homeowner and second, the space could not be used as a garage without revisions to the entrance between the garage and the main house. Mr. Johnston explained that the existing archway would have to be replaced by a sealed door to comply with Ontario Building Code requirements for gas proofing.

Claim: Hardwood floor lower than ceramic floor

Mr. Johnston also confirmed the evidence of Mr. Hicks on the issue of the ½ inch height discrepancy between the floors. He stated that a ½ inch discrepancy is consistent with the requirement of the Ontario Building Code and does not present any safety issue.

Testimony by the Builder

Vito Fera, a manager employed by the builder, also testified at the hearing. Mr. Fera is trained as an architectural contractor and has worked in the construction industry for twenty six years. At present, he manages three companies, including Zancor Homes Ltd. – Westglen Village 2. He is responsible for product development, delivery and after sales service. Mr. Fera was also responsible for the after sales service to the Applicant's home.

Claim: Stairs not Oak

Mr. Fera's evidence with respect to the oak stairs and the prevailing industry standard echoed that of the Program's witnesses. Schedule "A"-1 to the Agreement provides for "oak railings, with white painted spindles and natural oak handrail" with broadloom on the stairs. The Applicant chose to upgrade the stairs to oak as per Schedule "A"-3. Oak stairs as defined by standards in the industry means solid oak treads, oak veneer risers and stringers.

Claim: Entrance Stairs

Mr. Fera stated that 24 by 30 inch precast concrete steps were used at the front and rear entrance of the Applicant's home abutting the foundation wall. He stated that the Applicant may have experienced settlement of the concrete steps near the foundation

wall which can create instability or rocking. However, Mr. Fera stated that at the time of the inspections, there was nothing wrong with the steps, and it was his observation that the steps were level and stable. Accordingly, no action was taken. Mr. Fera added that the Applicant has since replaced the steps with interlocking brick using no foundation material.

Claim: Garage Doors

With respect to the garage, Mr. Fera testified that in consideration for the Applicant allowing the builder to use Lot 161 and specifically, the garage area as a sales office, the Applicant received approximately \$8000 in upgrades which are detailed in a letter to the Applicant from Mr. Fera dated November 19, 1999 (Exhibit, Tab 5).

Mr. Fera gave direct evidence on the issue of the garage conversion. He testified that on October 19, 1998 he received a written memorandum from his head office asking if it was possible to leave the garage "as is" on Lot 161 (Exhibit 3, Tab 3). It was Mr. Fera's understanding that the request had been made on behalf of the Applicant. Mr. Fera relies on a letter written by Rick Zozourek, sales representative, Zancor Homes Westglen Village, undated (Exhibit 3, Tab 10). This letter states:

.....

"As far as I can remember, Mr. Collaku requested to have the garage left as it was used for the purpose of a Model Home, including Carpeting, Drywall, Electrical (including Baseboard Heaters), Telephone outlets, Stairs, Doors etc. Mr. Collaku purchased the Home with the intention of having his Son and Family living in the main part of the Home and re-open the area from the garage to the Main floor which was going to be the area where he was going to live.

Mr. Collaku was informed that we (Zancor Homes) could not leave the opening from the Garage to the Main floor area open, as this was not possible under the Building Code. He agreed with this and asked to leave the Stairs anyway as he was going to need them when he was going to re-open the area to the main floor."

.....

Following the request of October 19, 1998, Mr. Fera contacted the Zoning Department at the City of Mississauga. According to Mr. Fera, the Zoning Department granted approval of the request because the by-laws allowed the Applicant to park his vehicle in the driveway as opposed to the garage. Final approval was granted on January 28, 1999, the same date that the Applicant took possession of the home.

Mr. Fera stated that the Applicant first complained about the garage in November, 1999, some 10 months after he took possession. By facsimile letter dated November 15, 1999 (Exhibit 7), the Applicant wrote to Zancor Homes complaining of six items, one of which asserted that the garage doors were never put on.

By letter dated November 19, 1999 (Exhibit 3, Tab 5), Mr. Fera responded to the Applicant stating:

Item #5 "As per your request dated October 18,1998 the garage was left as is, attached is a copy of the request.

Mr. Fera admits that other than the memorandum from head office marked as Exhibit 3, Tab 3, there is nothing in writing evidencing the Applicant's request to leave the garage as is. He testified that it is his belief that the request came from the homeowner to the sales office and then to head office. He further testified that at the March 10, 1999 Conciliation Inspection meeting, he asked the Applicant's son if they had put in a request for the garage to be left "as is". According to Mr. Fera, the son responded that he and the Applicant did make this request. Following this exchange, a disagreement ensued between the Applicant and his son.

Mr. Fera explained that complying with the request entailed additional time and expense. He stated that it would be unreasonable for a builder to proceed in this manner without instructions from the homeowner.

With respect to the issue of the difference in level between the ceramic floor and the wood floor, Mr. Fera stated that a difference will usually result if different flooring materials are used. For example, if carpeting had been used instead of wood flooring the same result would occur. Mr. Fera stated that in certain situations, a purchaser may choose to have all of the floors leveled, however, this was not an option requested by the Applicant nor was it an option offered by the builder.

FACTS FOUND PROVEN:

The following are the facts found to have been proven.

- 1) The treads of the stairs in the home are of solid oak while the risers and stairs are of oak veneer which is standard procedure in a production home such as the Applicant's home. The stair as per schedule "A"- 3 to the Agreement conform to industry standards.
- 2) The entrance steps were not unstable and did not rock. The steps did not constitute a safety issue and were not constructed in a defective manner or of defective material. The steps, after installation by the builder, were removed and altered by the Applicant.
- 3) The interior space of the garage is finished with drywall, is painted and has baseboards and trim installed as well as electrical outlets, heating ducts, light fixtures and carpeting. The space is furnished and is used by the Applicant and/or his family as living space at the request of the Applicant and with the Applicant's full knowledge and consent.
- 4) There is a difference of approximately ½ inch in the height of the wood floor and ceramic tile floor in the home. This is common and accords with industry standards where different materials are used. The difference in height is minor, is not reflective of defective or poor workmanship or materials and is not a violation of the Ontario Building Code.

APPLICATION OF LAW TO FACTS:

The onus of proof in this matter rests upon the Applicant to satisfy the Tribunal on a balance of probabilities. The only evidence adduced by the Applicant was that of the Applicant himself. He brought no experts or other evidence to support his contentions.

Contrary to the evidence of the Applicant was that of the two warranty representatives, both of whom have had considerable experience in the home building industry and in the assessment of claims by homeowners. They found the workmanship of the builder and the materials used by it to be satisfactory and acceptable by industry standards.

The testimony of Vito Fera was most helpful to this Tribunal. Having regard to his lengthy experience in the home construction business and the candour of his evidence, the Tribunal was most impressed by his testimony.

Oak Stairs

The Applicant complains that the oak stairs were not installed as per Schedule "A"-3 to the Agreement. Schedule "A"- 3 simply states that the oak stairs would be installed at an extra cost to the Applicant of \$2200. There are no specifications regarding the stairs found in the Schedules or in the Agreement.

The Tribunal accepts the evidence of the warranty representatives and Mr. Fera that absent any written specifications, oak stairs installed in a production home such as that purchased by the Applicant, consist of solid oak treads, veneer risers and stringers. Further, Schedule "A"-1 clearly provides that the stair railings would consist of oak railings with white painted spindles and natural oak handrails. Accordingly, the Tribunal finds that there is no breach of warranty in terms of section 13(1) of the Act with respect to this claim.

Front Entrance Steps

Schedule "A"-1 sets out the requirement for precast concrete steps. It is common ground between the parties that precast concrete steps were installed. It is also agreed that when the warranty representatives attended in March, 2000 the steps were found to be stable and safe. The Tribunal finds that there is no breach of warranty with respect to this claim.

Even if this Tribunal had decided that there was a breach of warranty with respect to this claim, the warranty would be excluded by virtue of section 13(2)(g) which provides:

13(2) A warranty under subsection (1) does not apply in respect of,

(a).....

(g) alterations, deletions or additions made by the owner;

Garage

The Applicant denies any knowledge of a request to leave the garage "as is". The Tribunal finds this evidence to be completely incredible. While the Tribunal notes that it is unfortunate that the Applicant's instructions were not confirmed in writing, the Tribunal

accepts Mr. Fera's evidence that it is highly improbable that a builder would initiate such an application without the authority of the homeowner. Vito Fera, on behalf of the builder, took steps to obtain approval from the municipality for a building permit to allow conversion of the use of the garage. The Tribunal accepts the argument made by counsel for the Program that Mr. Fera would not have undertaken this task but for the homeowner's request. Mr. Fera also testified that he confirmed this request with the Applicant's son, in the presence of the Applicant, during a conversation on March 29, 2000. Mr. Fera's version of the events is supported by what the warranty representatives observed when they attended on March 10 and 29, 2000. The garage area is completely finished, with furnishings, and is used by the Applicant and other members of the family as a recreation/family room. The Tribunal finds it highly unlikely that the Applicant would wait almost one year before making a complaint about the garage doors. For all of the above reasons this Tribunal finds that there is no breach of warranty pursuant to section 13(1) of the Act.

Uneven Floors

It is agreed that there is approximately ½ inch difference in height between the wood parkay floor and the ceramic tile floor. Both witnesses called on behalf of the Program and the builder testified that it is common and standard in the industry to have a minor difference such as ½ inch between floors of different materials.

In Culjak (1998) O.C.R.A.T.D. No. 112, this Tribunal considered the same issue at page 5:

"The Tribunal accepts the Builder's testimony that homes built according to the industry practice can have floor surfaces of different heights. No evidence was adduced to indicate that, in this context, the floors were constructed in other than a workmanlike manner, or that there were defects in material which accounted for a difference in height between the hardwood and ceramic flooring. This claim is therefore not warrantable."

The Applicant has not lead any evidence to prove that the floors have been constructed in a less than workmanlike manner or that defective materials have been used. Accordingly, this claim is not warrantable.

It should be noted that the decision letter dated April 25, 2000 (Exhibit 1), indicates that this claim is statute barred by virtue of section 13(4). Interestingly, this defence was not raised by the Program at the hearing.

DECISION:

Pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs that the Program to disallow these claims.

LICENCE APPEAL TRIBUNAL

Derek Israel,
Vice-Chair

Sheena MacAskill,
Vice-Chair

Released: October 30, 2000

RAJENDRA

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PRATHEEPKUMAR RAJENDRA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 16th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PRATHEEPKUMAR RAJENDRA

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Pratheepkumar Rajendra, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 27, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Pratheepkumar Rajendra
1 - 2675 Eglinton Ave East
Scarborough ON M1K 2S2

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Pratheepkumar Rajendra, (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees to forthwith advise the Registrar in writing if any charges are laid against him and further agrees to advise his employer in writing and to provide proof of same to the Registrar MVDA. The Applicant further agrees to advise the Registrar, MVDA and his employer, in writing, of the disposition of the charges.
2. The Applicant agrees not to be a partner, shareholder, officer, and director or manager of a motor vehicle dealership.
3. The Applicant agrees that his registration will be revoked if he is convicted of an offence under any law.
4. The Applicant agrees not to be final signatory on any sales contracts on behalf of the Dealer.
5. The Applicant agrees to make full disclosure on all applications to be submitted to the Registrar, MVDA.
6. The Applicant agrees that he particulars of his conviction are substantially as disclosed to the Registrar, MVDA.
7. The Applicant agrees to provide a copy of this order to his employer.
8. The Applicant agrees to abide by the terms and conditions of his probation.
9. The Applicant agrees to pay the outstanding restitution order in full.
10. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar, MVDA.

11. The Applicant acknowledges that the Registrar, MVDA, may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
12. The Applicant acknowledges that the Registrar, MVDA, may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
13. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
14. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
15. In the event that the Applicant breaches any of the Terms and Conditions set out herein, in whole or in part, the Applicant agrees that the Registrar is authorized and directed to carry out the proposal and shall revoke his registration.
16. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

All other Terms and Conditions set out in the Order dated June 30, 1998, remain in full force and effect.

Signed in the City of _____, this _____ day of _____ 2000.

(Signature) Pratheepkumar Rajendra

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

0267/ADLS/00/021

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: October 19, 2000 Toronto

DECISION

A hearing was held on October 19, 2000 at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: *October 20, 2000*

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER-S
LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE, D.C.
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: October 19, 2000

DECISION
RELEASED: October 20, 2000 Toronto

REASONS FOR DECISION

A hearing was held on 19 October 2000 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on October 20, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated September 26, 2000, and was received by the Tribunal on September 29, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

AI was unable to provide the required breath sample because of a medical reason.®

Preliminary Matters

The Respondent presented to the Tribunal, the stamped certified copies of Notice to Registrar, Driving Record of the Applicant and the Vehicle Record as of Occurrence date.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal, dated September 26, 2000
- b) Exhibit #2 Applicant's Medical Information Page, dated September 22, 2000
- c) Exhibit #3 Applicant's submissions 6 pages, received September 29, 2000

By the Respondent:

- a) Exhibit # 4 MTO Submissions 14 pages, received October 16, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (HTA) states:

50.1 (1) A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) A report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of specialty.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 (amended) provides:

A person appealing a suspension has the onus of establishing the merit of the appeal.

FACTS:

The Applicant, was sworn and gave the following testimony. The Applicant had submitted to the Tribunal a typed statement which he proceeded to read to the Tribunal:

"To whom it may concern:

Listed below is the sequence of events, which took place on September 8, 2000 at approximately 12:00 a.m., when I was stopped by two police officers.

A few weeks prior to this, I had been informed that I was probably losing my job due to financial problems of the organization where I work. I have been extremely agitated and stressed and have not been feeling well. On this evening, while driving home from work, I did not feel right, my heart was beating quickly and my breathing was heavy.

The following is what took place when the police stopped me:

- One officer came to my car and advised me I was driving 130km to 140km.
- I advised him I was not: I was doing between 100 & 110km. I had just stopped at a stoplight, made a right turn and had checked my speed shortly before the cruiser approached me.
- The officer told me to get out of the car and asked for my licence. He then asked if I had been drinking.
- I told him no, I was on my way home (Pickering) from work in Port Perry.
- The officer told me to get in the cruiser and asked what type of work I did, did I own or manage the store (I am the Manager at (place of employment)) and had I ever had any trouble with the police.
- I advised I had some speeding tickets over the years (I am 55 years old)
- The officers checked the computer for five or ten minutes then told me to do a breathalyzer test.
- I told them I was not feeling well, was congested and was having trouble breathing.
- I was told to take the test or I would be arrested and my car impounded.
- I attempted to blow, the officer said "keep going, keep going, okay", When he said, okay, I stopped blowing (I took that to mean okay, stop) and he then said, "keep blowing".
- He told me I had to do it a second time.
- I repeated I did not feel right, I was congested, had to catch my breath and that my heart was pounding, my head was aching and I was not feeling well.
- The officer told me he would give me one more chance or he would arrest me and impound my car.
- I made another attempt and was unable to perform as my breathing was very raspy and I had to pant to catch my breath. My heart and head were pounding and I asked to step outside or to lower the window to get some air.
- The officer lowered the window and told me I was under arrest and took my wallet. He then called and arranged for my car to be towed.
- I was in the back seat breathing very heavy, and raspy trying to suck in air. My head was sweating heavily and my heart was beating faster. I had no feeling of strength in my arms or legs. I informed the officers of all this.
- On the way to the police station, one of the officers made a comment about what a "great acting job" I was doing. Then a couple of minutes later asked if I wanted the paramedics to meet us at the station.
- I advised that it would be a good idea.
- At the station I was in the back seat of the cruiser for a few minutes before the paramedics came. I had to request help to get from the cruiser to the stretcher, as I could not stand up.
- The paramedics checked my breathing & blood pressure, which was 160/90.

- In the ambulance oxygen was applied, an E.K.G. done and my blood pressure checked again-it was 170/100.
- At emergency, I required help again to transfer from the ambulance to the stretcher.
- In the hospital the nurse asked if I had been drinking. I told her no. She then said that a blood test could be done to check. I told her to go ahead. She did an E.K.G. and checked my pressure 170/100; no blood was taken.
- The doctor came in a while later, checked my blood pressure which was now 180/120. I was given medication at approximately 2:15-2:30a.m.
- At 3:20 a.m. the officer gave me a summons of impound and suspension and returned my wallet.
- At Approximately 4:30 - 4:40 a.m. the doctor returned, took my blood pressure (160/100) advised me I had a very close call, I was a walking time bomb and to see my family doctor immediately for medication and to change my eating and exercise habits.
- I visited my family doctor the next day at 11:00 a.m. my blood pressure was still 160/100, I was placed on medication and he repeated what the doctor in the hospital told me. He ran blood tests etc. and I received the result of September 22nd. My blood pressure is still high and I am to see a specialist Physician #1 in Ajax on October 26th.

I require my licence to get to work and I appreciate your consideration in waiving this suspension. I was at no time refusing to do the Breathalyzer, due to my breathing problem and heart pounding, etc I was unable to do it properly. Had I not been stopped, I would have had my wife call an ambulance or take me to emergency when I arrived home. "

Under cross-examination, the Applicant was asked if he had ever experienced a prior panic attack. The Applicant responded that he had one about three or four years ago and another about 20 years ago. The Respondent asked if he was familiar with the signs of the attack and the Applicant responded "yes". The Respondent then asked the Applicant if he relayed the signs to the officer's and if he did not, why not? The Applicant stated that he did not relay this to the officers and could not give an explanation as to why not. The Respondent asked the Applicant if he, "seen the emergency room report?" The Applicant stated that he had not seen it, yet it was submitted with his documents and he was in possession of a copy. On that report, the Respondent asked the Applicant if he could explain why the nurse had written, "smells of alcohol, denies drinking"? The Applicant responded that he did not know why. The Respondent also reminded the Applicant that in his statement he indicated that he was having chest pains, "sucking air" yet on the examination in the emergency room, the note states: "resps not labored, chest clear c/o nasally congested, faced flushed, no c/o chest pain," as well as the indication on the Triage code "less urgent" suggesting that he was not in serious degree of distress". The Applicant was then asked "when you left work, you stated that you did not feel right, your heart was beating quickly and your breathing was heavy" and then at the end of your statement said "Had I not been stopped, I would have had my wife call an ambulance or take me to the emergency when I arrived home," the question being, "If you were feeling this ill, why would you not have gone immediately to the hospital instead of going home first?" The Applicant had no response.

The Respondent had no further questions of the Applicant, and the Applicant was excused from the stand.

The Respondent called to the stand, P.C. Officer #1. Badge No. (no.). P.C. Officer #1 is employed by the Durham Regional Police.

P.C. Officer #1 stated that on September 8, 2000 he was on duty with fellow officer #2 patrolling in the Brooklyn area. At approximately 12:20 a.m., he received a call with regard to a possible drunk driver driving a Chrysler mini van in the area. While on patrol, P.C. Officer #1, (the passenger) noticed a Mercury Mystic turn westbound from Durham 23, not stopping at the red light. Officer #1 and Officer # 2 decided to pursue this vehicle. According to P.C. Officer #1, the vehicle, later identified as belonging to the Applicant, was traveling at a very high rate of speed. According to P.C. Officer #1, he noted that they were having a hard time catching up to this vehicle. He stated that their speed was somewhere between 150 km/hr and 160 km/hr and the subject vehicle around 140km/hr. According to P.C. Officer #1, it was approximately 6km before they were able to get close to the Applicant's vehicle. P.C. Officer #1 then stated that P.C. Officer #2 activated his roof lights and siren and the vehicle came to a rapid stop. P.C. Officer #1 exited his vehicle and approached from the passenger's side as he stated that the way the Applicant had stopped his vehicle, he would have been in traffic had he come to the driver's side to speak with the driver. P.C. Officer #1 testified that he "knocked" on the window and got no response from the driver. He stated that he knocked again and again the driver was staring straight ahead, with both hands on the wheel. P.C. Officer #1 stated that he decided to try the door, and it opened. He spoke to the driver, who seemed not to acknowledge his presence. When the Applicant finally responded, he was asked to exit the vehicle. According to P.C. Officer #1, he observed that the Applicant was unsteady on his feet. He also stated that the Applicant would not talk directly to him but turned his head away. P.C. Officer #1 asked the Applicant where he was coming from and the Applicant responded from (place of employment), where he worked. P.C. Officer #1 asked the Applicant if he would perform a few simple tests and if he knew the alphabet to which the Applicant replied, " I, do." However, the Applicant failed the alphabet test forgetting "W, X, Y, Z". P.C. Officer #1 asked the Applicant to walk heel to toe to which the Applicant refused. At this point, P.C. Officer #1 stated that he could detect the smell of an alcoholic beverage on the Applicant's breath.

P.C. Officer #1 asked the Applicant to sit in the back seat of the cruiser so that a roadside screening device could be used but the Applicant would have to supply a sample of his breath for testing. P.C. Officer #1 demonstrated the use of the device and read the Applicant the demand for breath as required. According to P.C. Officer #1, the Applicant provided two "puff" samples. According to the Applicant's own testimony, he was able to provide a sample on the first attempt but stopped blowing because he thought that when the officer said "Okay", it meant for him to stop, not that he was doing it correctly and to continue. However, by the third attempt, according to the Applicant, he was unable to provide the required sample. Officer #1 asked the Applicant, after the second attempt, if there was a medical reason for his inability to provide a sample, according to the officer, the Applicant was unresponsive to his question. Officer #1 also stated that the rear door of the cruiser was open during the entire time that the tests were performed and only closed once it was decided that the Applicant was to be transported home.

When the officers started to take the Applicant home, P.C. Officer #1 observed the Applicant's face to be flushed and the Applicant stated to Officer #1, "you guys have frightened me, I cannot breath". P.C. Officer #1 further testified that he is not a doctor, and he asked the Applicant if he would rather be taken to the hospital or have an ambulance take him, the Applicant was getting upset and replied "do what you want".

The cruiser met the ambulance at the police station where the Applicant was transferred to the ambulance and taken to Scarborough Centenary Hospital. At the Hospital, he was seen in emergency and released four hours later. The Applicant made his own arrangement to get home.

The Tribunal accepts the evidence of P.C. Officer #1.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is on the Applicant to substantiate his position. However, the evidence submitted by the Applicant does not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

The report from Physician #2, M.D. family physician, fails to meet the specific requirements of section 15(1) of Regulation 574 of the Highway Traffic Act in the following respects:

Physician #2 does not provide any subjective tests results to substantiate the Applicant's assertion that due to his medical condition he was unable to provide a proper breath sample. The "history" of the condition is a re-iteration of the symptoms told to Physician #2 by the Applicant. There is nothing in the report to indicate any history of the condition(s). Physician #2 recommends that the Applicant see a cardiologist; however, no report or findings have been included with this appeal. Physician #2 does not indicate that he has knowledge of what is actually required to perform the Breathalyzer tests but states in the report that it is suggestive of a panic attack as the applicant stated that he could not give a proper breath sample, since he could not give good respiratory effort. The only possible corroboration from a medical standpoint would have been the emergency room report. The report indicate that the Applicant claims that the police increased his level of anxiety for which he was given Ativan, an anti anxiety medication sublingual. Physical examination at that time indicated respiration not labored, chest clear and no chest pain.

The Tribunal after very careful review of the medical information presented by Physician #2, is of the opinion that this report is speculative in nature as to the condition of the applicant at the time that the demand for breath was made and does not provide sufficient medical evidence to support the position of the applicant. The Tribunal attaches very little weight to this report.

Reviewing the foregoing facts, the Tribunal finds that the Applicant has not related his medical condition to Regulation 574 and Section 50.(1)(2)(b) of the *Highway Traffic Act*.

The evidence shows that the Applicant refused to provide an adequate sample of breath for no stated medical reason. The evidence submitted suggests the actions of the Applicant were such as to lead this Tribunal to believe that he had no intention of providing a proper breath sample. The evidence presented by P.C. Officer #1 indicated that the Applicant provided only puff blows. The Tribunal can only conclude that the actions taken by the Applicant were not those of someone who was unable to provide a breath sample, but rather the actions of someone who was unwilling to provide the sample because of the negative consequences of providing that sample. By the

Applicant's own admission, he was able to provide a proper sample of air during the first attempt but misunderstood the officer's instructions and by the third attempt he was unable to provide a sample because he was have medical difficulties.

The Applicant has not discharged the onus of establishing a valid medical reason for his failure to provide a breath sample when demanded under section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 8, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* (HTA) and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee D.C.
Presiding Member

RELEASED: *October 26, 2000*

0264/ADLS/00/020

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant

DATE OF HEARING: October 13, 2000 Toronto

DECISION AND ORDER

A hearing was held on October 13, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL SETS ASIDE the suspension dated September 5, 2000 imposed by the Registrar pursuant to section 48.3 HTA.

THE TRIBUNAL ORDERS that the Applicant's driver's licence be reinstated subject to any other suspension under this Act pursuant to section 50.1(5).

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: October 16, 2000

0264/ADLS/00/020

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
Solicitor for Applicant

DATE OF
HEARING: October 13, 2000

DECISION
RELEASED: October 16, 2000 Toronto

REASONS FOR DECISION

A hearing was held on October 13, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on October 16, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO SET ASIDE the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated September 20, 2000, and was received by the Tribunal on September 28, 2000, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Respondent objected to the Pulmonary Function Test results, being entered in evidence, as said results were submitted, at the hearing, and therefore, outside the final date for disclosures. The Respondent contended that Dr. Mate, the Respondent's expert adviser, was not given the opportunity to access the results.

The Applicant's solicitor argued that although not previously submitted, the PFT is part of Physician # 1's original report and should be included as such.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated September 20, 2000
- b) Exhibit #2 Applicant's submissions – 3 pages – received September 28, 2000
- c) Exhibit #5 Pulmonary Function Test – dated September 18, 2000
- received October 13, 2000

By the Respondent:

- a) Exhibit #3 MTO submissions – 13 pages – received October 11, 2000
- b) Exhibit #4 Report from Dr. Eva Mate - received October 11, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is:

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1), (2) and (3) requires that a medical report must contain:

15. (1) a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

Applicant's driver's licence was suspended '05/09/00" as referred to in the Notice of Appeal (Exhibit # 1)

The Notice of Appeal was prepared, on "20/09/00", by Physician #1, who indicates that he has been the Applicant's physician since "18/9/00 ". In the "*Details and Diagnosis of patient's present condition*" section of the form, Physician #1 reports "...severe asthma and allergic rhinitis". Under "History of Condition", Physician #1 offers a more detailed description of the Applicant's affliction "...since childhood ...he is unable to take air into his lungs or exhale properly due to ASTHMA". Physician #1 refers to "...PFT on Sept 19/00...". (Exhibit # 1)

In a letter dated September 18, 2000, Physician # 2, confirms that he saw the Applicant on March 19 and then again on September 16, 2000. Physician # 2's perception is that the Applicant's "...clinical picture is compatible with that of allergic bronchitis or asthma." (Exhibit # 2)

Physician #1, under the letterhead of the Surrey Medical Health Centre, confirms on September 20, 2000, that the Applicant "...has asthma which makes it difficult for him to take deep breaths... severe allergies ... ragweed, grass and trees... Pulmonary function tests revealed severe asthma ...even with medication ...unable to give deep breaths ...due to asthma it is impossible for him to do an adequate test..." (Exhibit # 2)

The Respondent provided the following Documents:

1. Notice to Registrar.
2. Driver Record of the Applicant
3. Vehicle record
4. Medical Report of Dr. Eva Mate, Respiratologist. (Exhibit # 4)

The Applicant's driver's record since 1974, shows no infractions. (Exhibit # 3)

In a report to the Ministry, dated October 11, 2000, Dr Eva S. Mate, FRCP (C), a consultant in respiratory medicine with St. Michael's Hospital, qualifies that she has been in practice since 1982, and that she has "...extensive experience in the management of chronic respiratory illness such as obstructive lung disease and asthma." Dr. Mate goes on to describe her qualifications: "...lengthy experience with performance and interpretation of pulmonary function tests... Assistant Professor at the University of Toronto ...know the background evaluation of instrumentation such as Intoxilyzer 5000 cc and also Alcotest ...aware of breath sampling criteria required to provide acceptable information using the above instrumentation."

Dr Eva S. Mate, FRCP (C) concludes and notes after reviewing "...summary ...all the information in this case ...the two physicians involved ...i.e. Physician # 2 and Physician

#1 ...failed to provide objective evidence of severity of asthma and ...there is no mention as to previous needs for emergency room visit ...the inability to take deep breaths is not a characteristic of asthma ...inability to provide a breath sample is related to inadequate breath sampling techniques which is secondary to poor cooperation. It is a well known fact that breath sampling is an effort dependent test and is not only related to the presence of underlying lung disease..." (Exhibit # 4)

At the hearing, the Applicant was represented by his solicitor.

Through answers to questions posed by the Applicant's solicitor, the Applicant testified that he believes his asthma is due to allergies treated inappropriately since childhood. He had to be taken twice to the emergency room at Branson Hospital, and has suffered from "...severe bronchitis almost to the point of pneumonia..." since December.

The Applicant has been prescribed and currently uses two inhalers for his condition, Flovent, for long term effect, which he is required to take twice daily and the 'blue' puffer which he uses for emergencies.

According to the Applicant, on the night in question, he had been sitting in a smoke filled room and was feeling congested by the time he left. He was not able to use his inhaler as he had forgotten it at home.

The Applicant further attested that the placement of the breathalyzer machine forced him to lean forward, and that also impaired his ability to provide a breath sample.

After the test, as his car was being towed, the Applicant advised the officer that he has asthma.

The Applicant explained to the Tribunal that he did have a family physician who retired approximately ten years ago. He then consulted another physician for a number of years but found that sitting in the waiting room, for an hour and a half, prior to being seen by the physician, was a waste of time. For a few years now, the Applicant visits Walk-In Clinics and calls upon Med Doctors who make house calls when needed.

The Applicant's solicitor called T. Z. as a witness for the Applicant. T. Z. declared that she has known the Applicant since 1994 and that in 1996 or 1997 she had to take him to the emergency department of Branson Hospital due to an asthma attack.

The Respondent called PC Officer # 1 as a witness for the Ministry. Constable Officer #1 has been a member of the Toronto Police Force for twenty years and a technician with the breathalyzer "...since its acceptance as a screening device, about 10 years ago..."

During examination in chief, PC Officer # 1 attested that the Applicant "...blew softly and unsteadily on the first three attempts ...not reaching proper pressure for the machine to signal ...spit out ...gum ...at one point blew with sufficient breath ...but then reduced it ...one more attempt ...too softly and unsteadily to provide a proper breath sample..."

In cross-examination, PC Officer # 1 confirmed that had no recollection of the Applicant advising him that he suffered from asthma. At no time did PC Officer # 1 notice any signs of physical discomfort on the part of the Applicant.

In closing, the Applicant's solicitor argued that there is no doubt that the Applicant is asthmatic. There are two medical reports verifying this diagnosis. The Applicant's solicitor further contended that both the physicians who provided reports have examined the Applicant, whereas Dr. Mate has not.

In closing, the Respondent countered it may be "*undisputable*" that the Applicant suffers from asthma, nonetheless the issue is whether or not the Applicant was afflicted at the time he was asked to provide a breath sample. Further, according to the officer there were no visible signs of discomfort.

The Respondent remarked that there is no clear history of the Applicant's condition.

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for the decision the Tribunal must rule on the objection raised by the Respondent at the commencement of the Hearing, regarding the admissibility of the Pulmonary Function Test results. At the time, the Tribunal noted the objection and the rebuttal by the Applicant's solicitor, but reserved decision.

The Tribunal finds the PFT results to be inadmissible. The Notice of Appeal alludes to "...copy ...PFT on Sept 19/00..." Physician #1 in his letter dated September 19, 2000 discloses the results, "...*Pulmonary function tests revealed severe asthma...*", yet, the Tribunal was not offered a valid reason as to why the document was not filed within the time allocated for disclosure.

The issues are, how does the medical condition of the Applicant relate to section 50.1(2)(b), and did this medical condition cause him to fail or not comply with the breath demand? Pursuant to section 13 of Regulation 574 (amended), the onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Respondent requested that the Tribunal not consider Physician # 2's report as it does not conform to the criteria set out in Regulation 574. The Applicant's solicitor suggested that since Dr. Mate had not examined the Applicant, her report be awarded minimal significance. The Tribunal accepts both propositions. Physician # 2's report offers particulars of the Applicant's condition but offers no explanation as to how this condition may prevent the Applicant from providing a breath sample. As for Dr. Mate, with all due respect to her credentials as an expert in the field, she not only did not observe the Applicant directly, but also was provided with limited patient-specific information with which to form an opinion.

The Applicant asserts that he was not able to provide an adequate breath sample due his medical condition. This statement is corroborated by the medical evidence provided by Physician #1 in the Notice of Appeal and in his subsequent letter. Physician #1 diagnoses the Applicant with "...*severe asthma...*" and describes how this condition affects the Applicant by making it "...*difficult for him to take deep breaths ...even with medication...*" There seems to be no doubt in Physician #1's opinion that "...*due to ...asthma it is impossible for him to do an adequate test...*" (Exhibits # 1 & 2)

The Respondent expressed concerns about the fact that neither physician provided a sufficiently detailed diagnostic history, to substantiate the severity of the Applicant's condition. The Respondent submitted that the Applicant could not have been having difficulty breathing at the time, as none of the recognizable symptoms were noticeable to the officer, i.e. wheezing, coughing, etc.

The Tribunal concurs that the totality of the evidence introduced is conflicting and not comprehensive. Nonetheless, the Tribunal is aware of the various degrees of asthma manifestation and contributing factors, as well as of the fact that breathing impediments are not always perceptible. The Applicant's viva voce evidence cannot be disregarded. It is plausible to accept that, at the time the Applicant's lung congestion was precipitated by a smoke filled room and diminished by his momentary anxiety and position.

Based on the evidence before the Tribunal, and on a balance of probabilities, the Tribunal finds that the Applicant meets the criteria of section 50.1 (2) (b), in that he was able to demonstrate that he suffers from a medical condition which prevented him from providing a breath sample when requested.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 5, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal orders that the suspension be set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: *October 18, 2000*

0275/MED/00/033

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROBERT EHRLICH, M.D., Member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: October 17, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Notice of Appeal – dated October 3, 2000
- b) Exhibit #4 Medical report from North York General Hospital – signed by Physician # 1 – received October 17, 2000

By the Respondent:

- a) Exhibit #2 Ministry of Transportation submissions – tabs 1 – 7
- received October 12, 2000

b) Exhibit #3 Original sealed Driver Record Search – received October 17, 2000

PRELIMINARY MATTERS:

The Respondent submitted a file summary, containing an itemized list of the items submitted prior to the hearing, as well as a copy of the National Safety Code for Motor Carriers. Mentioning the fact that disclosures had been waived, the Respondent also introduced a certified copy of the Applicant's driver's licence.

The Applicant submitted a report prepared by Physician #1, dated October 16, 2000, under the letterhead of the North York General Hospital.

As there were no objections from either party to the documents being introduced in evidence, both were filed as exhibits 3 and 4 respectively.

FACTS:

The Applicant is appealing the suspension of driving privileges effective "00/05/22" as per Exhibit # 1

The Applicant came to the attention of the Ministry as a result of an unsolicited letter written April 20, 2000, by a family physician, Physician #2. Physician #2 informs the Ministry that the Applicant is "...very manic..." and suggests that he "...should not be driving until his illness is under control." (Exhibit # 2 Item 1)

An Emergency Record from the Markham Stouffville Hospital indicates the Applicant was admitted "08 02 96" with "...apparent manic behaviour..." (Exhibit # 2 Item 3 a).

An Emergency Psychiatric Nursing Assessment from the Markham Stouffville Hospital, dated "Feb 7" shows last visit to Psychiatrist "Nov. 2/96" (Exhibit # 2 Item 3 b).

A letter executed by D. G. under the letterhead of Family and Credit Counselling Service, refers the Applicant to Physician #3 for a psychiatric evaluation. (Exhibit # 2 Item 3 c)

On April 22, 1997, Physician #3 narrated the Applicant's history "... March 96: very upset with father's illness ...Physician #4 diagnoses him Manic Depressive ...lithium for 6 months ...felt worse ...stopped lithium in Dec." Physician #3 rules out any types of aberrant behaviour (Exhibit # 2 Item 3 d)

On May 26, 1997, Physician #3 states "...doing very well in the last month ...denied any manic episode, but admitted to three episodes of depression in 1994, Sept. 1995, and May 1996 ...history of manic behaviour from Physician #4 influenced by ...wife ...shocked at the diagnosis ...no pressure of speech, no flights of idea, not psychotic, not delusional, not grandiose, not depressed, not elated...". Aberrant behaviour is ruled out by Physician #3. (Exhibit # 2 Item 3 e)

An Administrative Review - Medical Suspension by Kim Grosskurth on June 28, 2000 states *"...does not feel that he currently has any medical condition that would affect his ability to drive ...1200 mg Lithium; 75 mg q.h.s. Desyrel; 150 mg b.i.d. Bupropion.ordered by the courts to regular see a psychiatrist..."* (Exhibit # 2 Item 4)

Physician #1, Co-Director (Medical) Mood Disorders Program North York General Hospital Assistant Professor of Psychiatry University of Toronto, in a letter dated September 6, 2000, relates the Applicant's history. (Exhibit # 2 Item 5)

MEDICAL ADVISORY COMMITTEE CASE STUDY dated October 3, 2000 upheld the suspension suggesting the need for *"...one year freedom of symptoms..."* (Exhibit # 2 Item 6)

In a letter dated October 16, 2000 Physician #1, Co-Director (Medical) Mood Disorders Program North York General Hospital Assistant Professor of Psychiatry University of Toronto, informs the Tribunal the Applicant *"did not consider ...to show evidence of psychotic functioning not hypomania, euphoria or grandiosity ...seen ...at least once a week ...has not displayed any symptoms ...rendering him unable to exercise ...good judgment...do not feel that he is clinically symptomatic for Bipolar Disorder...compliant with medication attending ...psychoeducational workshops ...responding appropriately ...for him to be denied his driver's license would put undue pressure ...stress ...make recovery more difficult..."*. (Exhibit # 2 Item 5)

At the hearing the Respondent reiterated the contents of the information contained in the written material provided for the hearing and filed as Exhibit # 2 Tabs 1 through 7, as well as on section 13.4 of the Guide for Motor Carriers.

On his own behalf, the Applicant testified that Physician #2 is not a specialist on mental health. The Applicant stated that on the date of his first appointment he telephoned at 2:45 p.m. to advise that he was across town and would not be able to make his 3 p.m. appointment. When the Applicant did see Physician #2, she told him he was manic depressive and would have to take Lithium.

According to the Applicant, he followed her advise but chose to see a psychologist, Physician #5. After that he saw Physician #1 whom he continues to see on a weekly basis, as well as attending his classes regularly.

The Applicant attested to the fact that he has not stopped taking the medication prescribed.

In closing, the Respondent admitted the Applicant has been cooperative at all times, and that indeed there had been a mistake made regarding his taking of the medication. Nonetheless, in accordance with the decision of the Ministry's Medical Advisory Committee, the Respondent asked that the decision of the Ministry be confirmed.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to “...suspend or cancel” a driver’s licence for “any ...sufficient reason...”. The Registrar originally suspended the Applicant’s driver’s licence after receiving an unsolicited letter from a family physician, Physician #2 informing the Ministry that the Applicant is “...very manic... should not be driving until his illness is under control.” (Exhibit # 2 Item 1)

Regulation 390/94, Section 14 (a) is clear in that:

“An applicant for a holder of a driver’s licence must not,

- a) suffer from a mental, emotional nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely...”*

The Tribunal finds that the Ministry acted properly and in accordance with the Regulation in suspending the Applicant’s driving privileges based on Physician #2’s report.

In 1997, when the Applicant was diagnosed with Bipolar Disorder, Physician #3 who examined the Applicant on at least two occasions did not find any evidence of deviant or erratic behaviour. (Exhibit # 2 Item 3 d & e)

The Applicant feels that he is stable and able to drive. His view is corroborated by his psychiatrist’s assessment.

The Tribunal is compelled to consider and accept the latest report written by Physician #1 who has been seeing the Applicant on a weekly basis, since August. Physician #1, Co-Director (Medical) Mood Disorders Program North York General Hospital Assistant Professor of Psychiatry University of Toronto, confirms that Applicant “*did not ...show evidence of psychotic functioning not hypomania, euphoria or grandiosity...has not displayed any symptoms ...rendering him unable to exercise ...good judgment...for him to be denied his driver’s license would put undue pressure...stress... make recovery more difficult ...*”. (Exhibit # 2 Item 5)

In weighing the evidence presented, the Tribunal is satisfied that the evidence does not show that the Applicant is subject to a disability likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely, as set out in the criteria described in Regulation 340/94 section 14(a) of the HTA. Thus the Tribunal orders that the Applicant’s driver’s licence be re-instated.

DECISION:

Upon the application by the Applicant to appeal the decision dated May 22, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Robert Ehrlich, M.D.,
Member

RELEASED: *October 24, 2000*

0254/MED/00/030

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: JOHN A. CARMICHAEL, Presiding Member

APPEARANCES: K.M. BIEL, Representative for the Minister

Applicant,
by written submissions only

DATE OF
HEARING: October 20, 2000 Kingston

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant is a 34 year old truck driver, whose job description identifies him as driving up to seven hours a day and over 100,000 kilometers a year. (exhibit #1)

On February 17th, 1999, the ministry received a report (exhibit #2) stating that on February 13th, 1999, the Applicant had suffered an epileptic seizure. Neurological examination two or three days post seizure states that his neurological exam and CAT scan were negative and an EEG inconclusive. The Applicant was started on anti epileptic medication, instructed to return for a repeat EEG exam, and asked not to drive his truck. The examining neurologist also reported that the Applicant had previously been involved in a single vehicle accident September 1998. The details of this episode are incomplete. The parents report that the Applicant was unresponsive for at least four hours, although the records do not report any loss of consciousness. As a result of this accident, the Applicant has been left with "at least 25 miles of retrograde amnesia", and

significant disabilities in his lower limbs. A CAT scan of the head, cervical spine and abdomen done at the time of the accident were all normal.

On November 2nd, 1999, the same neurologist reported (exhibit #3) that the Applicant had failed to return for a repeat EEG, was on 700 mgms of dilantin per day, had a dilantin level of 49 on one occasion, and has had no further seizures. The Neurological exam at that visit was negative.

On February 25th, 2000, the Applicant was reviewed at the Toronto Rehabilitation Institute (exhibit #4). At that time a neurological exam, EEG, and CAT scan were all normal. The discharge diagnosis was "Craniocerebral injury, moderate concussion. Post-traumatic epilepsy"

On July 24th, 2000, the Medical Advisory Committee of the Ministry of Transportation recommended the Applicant's licence be downgraded to class "G" (exhibit #5).

On August 11th, 2000, the Applicant was so informed (exhibit #6).

The Registrar of Motor Vehicles has raised the question of the Applicant's credibility based on the Applicant's apparent lack of awareness of his condition despite his repeated neurological examinations, EEGs, CAT scans, MRI, and large doses of anticonvulsants. As well, the Applicant's compliance has been questioned on the basis that he failed to return as requested for a repeat EEG (Feb17, 1999) and the single relatively low serum level of dilantin (49) despite an unusually high dosage level (700 mgms daily). Medical compliance cannot be fairly judged on a single serum level. The other subjective observations need not enter into the decision process here.

The Tribunal also notes the failure on repeat neurological examinations, including CAT Scans EEGs and MRI, to demonstrate an epileptic focus. This does not mitigate the diagnosis of post-traumatic epilepsy. Up to 40% of epileptics fail to show such a focus.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, section 17 and 18 states:

17.
 - (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
 - (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
 - (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
 - (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear,

with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.

18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
- (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
- (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 states:

- (1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

The regulations and guidelines particular to this hearing are H.T.A. Regulation 340/94 section 14(a) and Regulation 340/94 Section 17 (1) (g), the Ministry of Transportation National Safety Code (page 21 standard 6) and the Canadian Medical Association Physicians guide to Medical Examinations (page 28, (8.2)).

The Applicant experienced a well-documented spontaneous seizure (February 13th, 1999) as well as a previous possible loss of consciousness (September 98). The latter may have been spontaneous resulting in the single vehicle accident or secondary as a result of the accident. The Applicant has had no subsequent seizures. He is on a larger than usual amount of anticonvulsants.

The Applicant's history of seizure(s) identified by two neurological consultants plus his continuing large anticonvulsant medication place him clearly within the regulations and guidelines noted and fully support the decision of the Registrar of Motor Vehicles

DECISION:

Upon the application by the Applicant to appeal the decision August 10th, 2000 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

John A. Carmichael
Presiding Member

RELEASED: *October 31, 2000*

0226/MED/00/028

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF HEARING: October 2, 2000 London

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit # 1 – Notice of Appeal

Exhibit # 2 – Ministry of Transportation Submissions – Tabs 1-4f

Exhibit # 3 – Applicant's Submissions – Tabs A-G

PRELIMINARY MATTERS:

The Respondent provided the Tribunal with a file summary with respect to this matter.

FACTS:

The Applicant is appealing the downgrading of his driving privileges under subsection 32(12)(b)(i) of the *Highway Traffic Act*. The nature of the downgrading was for medical reasons. The licence was a class 'AM' and is now a class 'GM'.

The Applicant is the owner/driver of a tanker truck and transports gasoline between Windsor and London. He is 39 years old, 6 feet tall, weighs 250 pounds and apparently in good health. He works 10 hour shifts four days a week.

The Ministry of Transportation first became aware of Applicant when a letter was received from him stating he was to drive. A medical report from Physician #1, a neurologist, accompanied the Applicant's letter. Physician #1 had examined Applicant approximately 16 days after he had apparently suffered a single generalized seizure on May 27, 2000. He stated Applicant had experienced lightheadedness in the back of his truck, subsequently became unconscious and fell out of the truck. He had bitten his tongue, voided, was unconscious for about 30 seconds and confused for about 30 minutes. He was examined at the London Health Science Centre and a diagnosis of "first time seizure" was made.

CT scan was normal, EEG unremarkable and neurological examination was negative. Physician #1 prescribed Dilantin 300 mgm. daily and advised Applicant there was a 30% chance of recurrent seizures.

Another letter, dated June 12, 2000, from Physician #1's Resident to a Physician #2, Applicant's family doctor, provides additional information about the event. One week before, he was treated for an upper respiratory tract infection with a cough, congested nose and throat and a low grade fever. For four days prior to the event, he had been working continuously with little sleep. He mentioned that the Applicant had a history of feeling light-headed, when he did not eat regularly.

He stated that the witnesses did not observe any jerky movements after he fell. There was no history of any previous seizure disorder or febrile convulsions and no family history of seizures.

There was a "conflict of evidence" – Applicant stated he did not fall from his truck. He was on the loading dock when he felt light-headed. He sat down, put his head between his knees and it passed off. When he stood up he apparently fell over landing on his left shoulder. He stated that he drank a litre of water during his drive from Windsor and that was why he had urinated. He also thought he had bitten his tongue when he fell.

In a letter dated July 12, 2000 from Physician #1 to the Ministry of Transportation there is a note on the bottom stating "syncopal episode also a possibility", dated August 6, 2000, The letter states the Dilantin should be quite effective in preventing further seizures as long as he is compliant with the medication. A note from Physician #2, dated July 30, 2000 states - re: the Applicant, "Fit to drive a petroleum loaded tanker safely, if taking anti-seizure medication - Dilantin".

The Medical Advisory Committee reviewed Applicant's file and decided he had not been seizure free for one year and, as a result, did not meet the medical requirements to hold

a class 'AM' licence, Reconsideration would be given upon receipt of a neurologist's assessment confirming that he had established a one year seizure free period.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;
 - (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained

hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;

- (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) of the *Highway Traffic Act* states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which the person holds a driver's licence issued to him or her under this Act.
- (12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,
 - (b) in the case of a person who holds a driver's licence,
 - (i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

.....

Section 50 states:

- (1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (3) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

In the Physicians guide to Driver Examination, under seizure disorders it states -

A person who had a spontaneous seizure should not be allowed to drive until a complete neurological examination has been done to determine the cause. If the evaluation reveals no epileptiform activity, the patient may drive Class 5 or 6 vehicles, Professional drivers (Class 1,2,3 or 4 licence) should be seizure-free for 12 months before being allowed to drive again. An epileptic patient who takes medication to prevent seizures should not be allowed to hold a Class 1,2,3 or 4 licence. Professional drivers are often unable to avoid adverse conditions or high stress situations that may precipitate seizures.

APPLICATION OF THE LAW TO FACTS:

The Applicant's 'AM' licence was downgraded to a 'GM' under Subsection 32(12)(b)(i). Considering the evidence presented to it, the Tribunal is not totally convinced this was a true seizure suffered by the Applicant. He certainly lost consciousness, voided and bit his tongue, but witnesses did not observe any jerky movements. Nevertheless he was rendered unconscious and was observed to be in a confused state for about 30 minutes. The Registrar downgraded the Applicant's licence after receiving a letter from Physician #1 and investigating the circumstances.

The Tribunal finds that the ministry acted properly and in accordance with the Regulation, in downgrading the Applicant's licence, based on the information received.

The Applicant argues that he has been perfectly well since the May 27th episode and is quite capable of driving his tanker. His family physician agrees and his neurologist believes the Dilantin will prevent future seizures. This might be an acceptable answer for the ordinary driver operating under a 'G' licence, but the Applicant wishes an 'AM' licence to transport thousands of gallons of gasoline and any recurrence while the Applicant was driving could end up being a major disaster.

Based on the evidence before the Tribunal with respect to the circumstances, it appears premature to overrule the Ministry's decision at this time. Further medical tests are required to prove or disprove the diagnosis. The Tribunal is satisfied that the downgrade of licence under section 32(12)(b)(i) of the *Highway Traffic Act* is appropriate.

The Tribunal suggests the Applicant have another neurologist provide a second opinion and present it to the Ministry at his convenience.

DECISION:

Upon the application by the Applicant to appeal the decision dated August 1, 2000 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.
Presiding Member

RELEASED: October 17, 2000

TRAVEL WORLD INTERNATIONAL INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
TRAVEL WORLD INTERNATIONAL INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: May 31, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TRAVEL WORLD INTERNATIONAL INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Travel World International Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: October 25, 2000

B E T W E E N:

TRAVEL WORLD INTERNATIONAL INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. Travel World International Inc. (hereinafter referred to as "the Registrant") is a company incorporated pursuant to the laws of Ontario and registered as a travel agent (Registration No. 3004343/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration as a travel agent on February 3, 1989.
2. Financial statements for the year ended September 30, 1991 and due December 31, 1991 were received from the Registrant on July 7, 1992.
3. Form 1 sales for the six months ending June 30, 1992 and due August 15, 1991 were received from the Registrant on September 25, 1992.
4. Form 1 sales for the six months ending December 31, 1992 and due February 15, 1993 were received from the Registrant on February 24, 1993.
5. Financial statements for the year ended September 30, 1992 and due December 31, 1992 were received from the Registrant on July 13, 1993.
6. Form 1 sales for the six months ending June 30, 1993 and due August 15, 1993 were received from the Registrant on September 21, 1993.
7. Form 1 sales for the six months ending December 31, 1993 and due February 15, 1994 were received from the Registrant on March 25, 1994.
8. Financial statements for the year ended September 30, 1993 and due December 31, 1993 were received from the Registrant on March 25, 1994. The financial statements reveal a working capital deficiency of \$26,928, for a total shortfall of \$ 31,928.

9. Registrant notified by letter on April 4, 1994 that the working capital deficiency of \$26,928 must be addressed by April 29, 1994.
10. Fax received from Registrant's accountant on April 12, 1994 stating that in the notes to the September 30, 1993 financial statements are details regarding a subsequent shareholder advance of \$40,000 made by the Registrant on January 11, 1994.
11. Form 1 sales for the three months ending March 31, 1994 and due May 15, 1994 were received from the Registrant on May 26, 1994.
12. Registrant requested by letter dated September 22, 1994 to file financial statements for the fiscal year ended September 30, 1994 by December 31, 1994.
13. Form 1 sales for the six months ending September 30, 1994 and due November 15, 1994 were received from the Registrant on November 10, 1994.
14. A second request for the filing of financial statements for the fiscal year ended September 30, 1994 was sent to the Registrant on January 5, 1995.
15. Registrant notified by letter dated January 20, 1995, from the Registrar, under the *Travel Industry Act*, that financial statements for the year ended September 30, 1994 must be filed with TICO by February 6, 1995. Registrant warned that if request not met, administrative action may be taken including a proposal to revoke registration.
16. Financial statements for the year ended September 30, 1994 and due December 31, 1994 were received from the registrant on February 16, 1995. The financial statements revealed a working capital deficiency of \$41,897, or a total shortfall \$ 46,897.
17. Registrant was notified by letter dated February 27, 1995 that the working capital shortfall of \$46,897 must be addressed by March 21, 1995.
18. Letter received from the Registrant on March 23, 1995 along with evidence of a shareholder loan made on March 23, 1995 in the amount of \$5,000.
19. Form 1 sales for the six months ending March 31, 1995 and due May 15, 1995 were received from the Registrant on May 15, 1995. Interim Financial statements for the six months ended March 31, 1995 were also received from the Registrant on May 15, 1995. The financial statements reveal a working capital deficiency of \$ 8,081 for a total shortfall of \$ 13,081.
20. An Inspection was conducted on May 25, 1995 by Ed Holba, Inspector, Designated by the Registrar, under the *Travel Industry Act*. Several non-compliance issues with respect to Sections 15, 23 and 24 were reported. The Inspection concluded that the Registrant does not appear to pose a threat to the Fund.
21. Letter received from the Registrant June 1, 1995 along with evidence of a shareholder loan made on May 31, 1995 in the amount of \$15,000.
22. Letter dated August 2, 1995 sent to the Registrant by the Registrar, TIA, outlining the non-compliance issues reported in the Inspection of May 25, 1995. The Registrant was advised that failure to provide evidence of compliance may result in administrative action being taken by the Registrar, under the *Travel Industry Act*.

23. Form 1 sales for the six months ending September 30, 1995 and due November 15, 1995 were received from the Registrant on November 16, 1995.
24. Financial statements for the year ended September 30, 1995 and due December 31, 1995 were received from the Registrant on January 29, 1996. The financial statements reveal a working capital deficiency of \$ 28,240, for a total shortfall of \$ 33,240.
25. Registrant was notified by letter dated February 9, 1996 that the working capital shortfall of \$33,240 must be addressed by February 27, 1996.
26. A second request dated February 29, 1996 was sent to the Registrant regarding the working capital shortfall of \$33,240.
27. A third request dated March 20, 1996 was sent to the Registrant stating that the working capital shortfall of \$33,240 must be addressed by April 2, 1996. The Registrant was advised that failure to respond to this request will result in the matter being referred to the Registrar, under the *Travel Industry Act*.
28. Form 1 sales for the six months ending March 31, 1996 and due May 15, 1996 were received from the Registrant on May 17, 1996.
29. Registrant was notified by letter dated September 20, 1996, from TICO, that the working capital shortfall of \$33,240 must be addressed by October 4, 1996. The Registrant was warned that if the request was not met, administrative action may be taken, including Revocation of Registration under the "Act".
30. Registrant was requested by letter dated September 23, 1996 to file financial statements for the fiscal year ended September 30, 1996 by December 31, 1996.
31. A letter dated October 23, 1996 was received from the Registrant along with evidence of a shareholder loan made on July 9, 1996 in the amount of \$39,125.51.
32. Form 1 sales for the six months ending September 30, 1996 and due November 15, 1996 were received from the Registrant on November 19, 1996.
33. Received fax communication December 6, 1996 from The Registrant's Accountants, Rieger McDonald & Associates, Certified General Accountants requesting an extension to January 20, 1997 to file the Financial statements for the year ended September 30, 1996.
34. Registrant was notified by letter dated January 20, 1997, from TICO, that financial statements for the year ended September 30, 1996 must be filed with TICO by February 6, 1997. Registrant warned that if request not met, administrative action may be taken including a proposal to revoke registration.
35. Notice of Proposal to revoke registration dated March 12, 1997 issued to Registrant by the Registrar, under the *Travel Industry Act*, for failure to file financial statements for the fiscal year ended September 30, 1996.
36. Appeal received April 3, 1997 from the Rieger McDonald & Associates on behalf of the Registrant with respect to the Proposal to Revoke Registration for failure to submit Financial statements for the year ended September 30, 1996.
37. Form 1 sales for the six months ending March 31, 1997 and due May 15, 1997 were received from the Registrant on May 15, 1997. Received written confirmation from CRAT

that the hearing regarding the Proposal to revoke registration for failure to file financial statements for the year ended September 30, 1996 will take place on September 16, 1997.

38. Received a copy of written communication on May 21, 1997 between Rieger McDonald & Associates and the Commercial Registration Appeal Tribunal advising CRAT that the above Accounting firm has resigned as accountants for Travel World International Inc.
39. Financial statements for the year ended September 30, 1996 and due December 31, 1996 were received from the Registrant on August 6, 1997. The financial statements revealed a working capital deficiency of \$ 32,982, making the total shortfall \$ 37,982.
40. Registrant was notified by letter from TICO, dated August 12, 1997 that the working capital shortfall of \$37,982 must be addressed by August 29, 1997.
41. A second request was sent to the Registrant on September 10, 1997 regarding the working capital shortfall of \$37,982.
42. Consent Order dated September 15, 1997 binding the Registrant to adhere to Regulation 806/93 acknowledged in writing by the Registrant.
43. Commercial Registration Appeal Tribunal hearing conducted on September 16, 1997 between the Registrar, *Travel Industry Act* and the Registrant, Travel World International Inc. The decision of CRAT is as follows,
 - On consent of the Applicant, within 30 days of the date of this hearing, the Applicant shall,
 1. file the financial statements required to be filed under the *Travel Industry Act*, and
 2. comply with the financial requirements set out under the Act.
44. Letter received from Registrant September 17, 1997 along with Confirmation of a Guaranteed Investment Certificate in the name of the Registrant for \$25,000. The maturity date for this investment listed as September 16, 2000.
45. Letter received September 30, 1997 from Registrant along with Confirmation of a Guaranteed Investment Certificate in the name of the Registrant for \$13,000. The maturity date for this investment listed as October 2, 2000.
46. Registrant notified October 24, 1997, by the Registrar, under the *Travel Industry Act*, that a rehearing with the Commercial Registration Appeal Tribunal with respect to the Proposal to Revoke the Registration of Travel World International will not be pursued by the Registrar, under the *Travel Industry Act*. The Registrant was advised that a copy of the Proposal to Revoke Registration will be maintained in the Registrant's permanent registration file.
47. Form 1 sales for the six months ending September 30, 1997 and due November 15, 1997 were received from the Registrant on November 21, 1997.
48. Financial statements for the year ended September 30, 1997 and due December 31, 1997 were received from the Registrant on December 29, 1997. The financial statements reveal a working capital of \$758, for a total shortfall of \$4,242.
49. Registrant notified by letter dated January 27, 1998 that the working capital shortfall of \$4,242 must be addressed by February 12, 1998. Registrant also informed that the following items were to be forwarded to the Ontario Travel Industry Inspections Office by February 12, 1998.

- Letter from the Registrant's bank confirming the designation of a *Travel Industry Act* Trust Account
 - Acknowledgement and consent to the Terms and Conditions of Registration
50. Letter received from the Registrant February 16, 1998 along with evidence of a shareholder loan made on February 10, 1998 in the amount of \$4,300. Registrant also requested that they be exempt from Trust Accounting and allowed to operate under the regulations in effect prior to December 31, 1993.
 51. A second request for the items specified on January 27, 1998 sent to the Registrant on February 19, 1998.
 52. Form 1 sales for the six months ending March 31, 1998 and due May 15, 1998 were received from the Registrant May 20, 1998.
 53. Financial statements for the year ended September 30, 1998 and due December 31, 1998 were received from the Registrant on January 11, 1999. The financial statements reveal a working capital deficiency of \$5,261, for a total shortfall of \$10,261.
 54. Form 1 sales for the six months ending September 30, 1998 and due November 15, 1998 were received from the Registrant on January 12, 1999.
 55. Registrant notified by letter dated January 19, 1999 that the working capital shortfall of \$11,261 must be addressed by February 2, 1999.
 56. Letter received from the Registrant February 3, 1999 along with evidence of a shareholder loans made on the following dates,
 - December 23, 1998, \$1,500
 - December 24, 1998, \$4,000
 - January 14, 1999, \$6,700
 57. An Inspection is conducted on February 19, 1999 by Jack Foster, Inspector, designated by the Registrar, under the *Travel Industry Act*. The Inspection concludes that the Registrant does not appear to pose a threat to the Fund.
 58. Form 1 sales for the six months ending March 31, 1999 and due May 15, 1999 were received from the Registrant on May 18, 1999.
 59. Registrant requested by letter dated August 25, 1999 to file financial statements for the fiscal year ended September 30, 1999 by December 31, 1999.
 60. An Inspection is conducted on September 15, 1999 by Jack Foster, Inspector designated by the Registrar, *Travel Industry Act*. The Inspection concludes that Trust Accounting is not yet implemented by the Registrant. As a result, the Registrant consents to implement and maintain a Trust Account by October 1, 1999 and to forward a copy of the October 31, 1999 Trust bank statement along with a customer deposit position report to TICO by November 25, 1999.
 61. Registrant notified by letter dated December 1, 1999 that the information requested by Jack Foster, Inspector, during his September 15, 1999 visit has yet to be received. Registrant advised that the required information must be forwarded by December 15, 1999.
 62. Second request for the above information originally requested during Jack Foster's Inspection sent to the Registrant on December 16, 1999.

63. Form 1 sales for the six months ending September 30, 1999 and due November 15, 1999 were received from the Registrant on January 6, 2000.
64. Information originally requested during Jack Foster's September 15, 1999 Inspection and again requested on both December 1 and 16 received from the Registrant on January 7, 2000.
65. A second request for the filing of financial statements for the fiscal year ended September 30, 1999 sent to the Registrant on January 10, 2000.
66. Registrant notified by letter dated March 6, 2000, from TICO, that financial statements for the year ended September 30, 1999 must be filed with TICO by March 20, 2000. Registrant warned that if request not met, administrative action may be taken including a proposal to revoke registration.
67. Financial statements for the year ended September 30, 1999 and due December 31, 1999 were received from the Registrant on April 3, 2000. The financial statements were not prepared by a Licensed Public Accountant and are therefore not acceptable under the requirements of the *Travel Industry Act*.
68. Letter sent to Registrant on April 4, 2000 informing the Registrant that the financial statements must be prepared by a Licenced Public Accountant and that acceptable financial Statements for the year ended September 30, 1999 must be submitted to TICO by April 20, 2000.
69. Notice of Proposal to revoke registration dated May 31, 2000 issued to Registrant by the Registrar, under the *Travel Industry Act*, for failure to file acceptable financial statements for the fiscal year ended September 30, 1999.
70. Notice of Appeal received June 15, 2000 from the Registrant with respect to the Registrar's Proposal to revoke registration for non-filing of Financial Statements.
71. Form 1 sales for the six months ending March 31, 2000 and due May 15, 2000 were received from the Registrant on July 10, 2000.
72. Letter received on October 2, 2000 from Giles Accounting stating that C. Giles has recently attained his CPA designation and therefore the Review Engagement for the September 1999 year-end financial statements for Travel World International Inc. should now be acceptable to TICO.
73. Registrant notified by letter from TICO dated October 4, 2000 that according to the Public Accountants Council of Ontario, Mr. C. Giles is not registered with the Public Accountants Council and is therefore not a Licenced Public Accountant. Registrant advised that the Review Engagement submitted for the September 1999 year-end Financial Statements remained unacceptable.
74. The Registrant filed financial information for the fiscal year ended September 30, 1999; however, the information was not acceptable as a financial statement as it did not contain a review engagement report by a public accountant licensed under the *Public Accountancy Act*.
75. To date, the Registrant has not filed acceptable financial statements as required for the fiscal year ended September 30, 1999.
76. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Commercial Registration Appeal Tribunal under s. 6 (4) and (5) of the Travel Industry Act directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated May 31, 2000; with respect to Travel World International Inc
- (ii) the Registrant's registration is to be subject to the following conditions:
 - a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation") and which it has acknowledged in its Terms and Conditions of Registration;
 - b) The Registrant shall file complete financial statements as required, by the Regulation, including a trust account reconciliation, for the fiscal year ended September 30, 1999, no later than November 10, 2000;
 - c) If the above-noted financial statements as filed, according to (ii) (b), are incomplete and/or reveal an insufficient working capital amount, the Registrant will have thirty (30) days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - d) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 25th day of each month for the preceding month, beginning on December 25th, 2000, for the month of November 2000, for so long as the Registrar shall so require;
 - e) The Registrant shall file financial statements as required by the Regulation for the fiscal year ended September 30, 2000th, no later than December 31st, 2000;
 - f) If the above-noted financial statements as filed, according to (ii) (e) are incomplete and/or reveal an insufficient working capital amount, the Registrant will have thirty (30) days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - g) The Registrant shall file the Form 1 filings, and make the corresponding payment to the Fund, as required by the Regulation, for the period ending September 30th, 2000, no later than November 14th, 2000;
 - h) The Registrant shall file the Form 1 filings, and make the corresponding payment to the Fund, as required by the Regulation, for the period ending March 31st, 2001, no later than May 15th, 2001;
 - i) The Registrant shall file the financial statements, as required by the Regulation, for the fiscal year ending September 30th, 2001, no later than December 31st, 2001;

- j) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - k) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - l) If any of the Registrant's future financial statements reveal a working capital deficiency, the Registrant will have thirty (30) days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions (ii) (b) to (i) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day, that is not a holiday after the day of mailing.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of October, 2000.

**Travel World International Inc.
Act**

Registrar, *Travel Industry*

Ms Christina J Bishop, President
Travel World International Inc
I have authority to bind the Corporation.

Michael Pepper, Registrar
Travel Industry Act

224-DUDI

224/MVIA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JOE HEWITT
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Representative for Applicant

Applicant

DATE OF HEARING: September 27, 2000

DECISION RELEASED: October 4, 2000 Sault Ste. Marie

REASONS FOR DECISION

A hearing was held on September 27, 2000, at Sault Ste. Marie, Ontario, to consider the Applicant’s appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Applicant (the "Applicant")
Motor Vehicle:	Vehicle (the "vehicle")
Date of Appeal:	September 12, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3)(c) of the Act.

This matter came before this Tribunal on September 27, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

A preliminary motion was heard on September 22, 2000 by Vice-Chair, Derek Israel with respect to the hearing, made closed to the public and certain documents made non-accessible to the public.

It was ruled on the consent of both parties, that the husband of the Applicant and father of child, would be allowed to remain in the hearing.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"To my knowledge, based on the documents enclosed, my child's licence was suspended for 30 days, from June 14, 2000. My child returned the licence to Office # 964 on June 13, 2000, as per the instructions in Suspension # 00xxxx. My child had the licence returned in the mail in July. I took my child to pay the reinstatement fee. My understanding was that the licence was reinstated. My child would not have had my permission to drive my vehicle if this was not the case.

To the best of my knowledge the information from the M.T.O. indicated that the licence was reinstated. On September 5, 2000, a representative of the M.T.O. in Sault Ste Marie indicated that a mistake must have been made and that the licence should not have been returned.

The basis of my appeal is that my vehicle should not have been impounded because of miscommunication from M.T.O.

Applicant
September 8, 2000"

The Applicant testified that she was aware of the impaired charge against her child and the conviction in May of 2000. She stated that she read the Notice of Suspension issued by the Ministry of Transportation, dated June 6, 2000. The "Notice" stated that her child's driver's licence would be suspended for 30 days from June 14, 2000. She drove her child to the Ministry office to pay a reinstatement fee. She did not go into the office, but she did see a receipt of payment. She believed that the licence was reinstated after that payment. The Applicant stated that she would have never let her child drive if she knew that the licence was still under suspension. Ms. Applicant's child had limited use of her vehicle, and would only get it on special occasions.

The Applicant stated in hindsight she should have read the Notice of Suspension no. 0077947 more closely as it did not relate to an impaired charge but a Notice of Novice Driver Violation. She never saw Notice of Suspension no. 00xxxx or no. 0xxxxx with respect to impaired violations. At the time of the impoundment, she was aware that her child's driver's licence was under suspension until May 29, 2003.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the

time it was detained was being driven by the Applicant's child;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until May 29, 2003.

The Respondent's representative called two witnesses, Officer # 1 and Officer # 2 of the Sault Ste. Police, to give evidence. The officers gave evidence that on the night of the impoundment, the Applicant's child was pulled over for erratic driving. They followed the driver to a gas station where they witnessed the driver jump out of the vehicle and run around and get into the rear seat. The Applicant's child was checked through the computer system and it was found that the driver's licence was under suspension for an impaired conviction. The owner of the vehicle was the Applicant, and as a result the vehicle was impounded.

The Ministry through its representative introduced three documents entered into as exhibits #6, #7, #8, being two NOTICE OF SUSPENSION documents and a registered postage mail receipt signed by the Applicant's husband.

Exhibit #5, the Affidavit of Witness #1, sets out the Ministry's driving record of the driver of the impounded vehicle which clears up any confusion with respect to the two driver's licence numbers issued to the suspended driver.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2 Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

Facts Found Proven

- 1) The Applicant is the owner of the motor vehicle that was the subject of the impoundment order.
- 2) At the time of the impoundment order, the Applicant's vehicle was driven by the Applicant's child.
- 3) At the time of the impoundment of the Applicant's motor vehicle, the Applicant's child's driver's licence was under suspension due to a conviction under the Criminal Code of Canada for driving with more than 80 mg of Alcohol in the blood.

ONUS OF PROOF

The onus of proof based on the balance of probabilities rests upon the Applicant.

Did the owner exercise due diligence respecting the driver's licence of the driver of the impounded vehicle?

The Applicant did not ask or inspect the driver's licence of her child after the conviction of May 29, 2000 for impaired driving. The Applicant made no attempt to contact any office of the Ministry of Transportation with respect to the status of the licence of her child. The Applicant showed no measure of prudence that would be expected in these circumstances. The level of care that is required would be greater as a result of the history of the driver of the impounded vehicle.

The Tribunal therefore cannot conclude that the Applicant exercised due diligence within the meaning of section 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Joseph Hewitt, Presiding Member

RELEASED: *October 4, 2000*

0268/ADLS

**HIGHWAY TRAFFIC ACT
R.S.O. 1990 CHAP. H.8 AS AMENDED, SECTION 50.1**

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to Section
48.3(2) of that Act;

AND IN THE MATTER OF

APPLICANT

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a hearing was scheduled to be held on October 25, 2000 in Toronto in the above matter;

AND WHEREAS a letter was filed dated October 24, 2000 by the Respondent, requesting an adjournment.

TAKE NOTICE, upon consent of all parties, the Tribunal Orders;

- (1) this matter is adjourned
- (2) a written hearing will be held on November 3, 2000 at **1 St. Clair Avenue West, 12th Floor, Toronto, Ontario**,

AND TAKE FURTHER NOTICE that upon failure to participate in accordance with the notice, the Tribunal may proceed without the party's participation and without further notice to you.

THE LICENCE APPEAL TRIBUNAL

Kent McClure, Q.C.
Chair

RELEASED: *October 27, 2000*

MARIA MADRUGA

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

MARIA MADRUGA, Applicant
Unrepresented

DATE OF HEARING: October 27, 2000

DECISION RELEASED: October 31, 2000 Toronto

REASONS FOR DECISION

A hearing was held on October 27, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Maria Madruga (the "Applicant")
Motor Vehicle: 1993 Buick CCH (the "vehicle")
Date of Appeal: October 12, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on October 27, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"AUTOMOBILE REQUIRED FOR:

1. TRANSPORTATION TO EMPLOYMENT LOCATION IN MARKHAM. BUS SERVICE IS NOT CONVENIENTLY AVAILABLE FOR WORK HOURS BEGINNING AT 7 O'CLOCK A.M.
2. DRIVING TO DOCTORS APPOINTMENTS. LETTER FROM DR. PETER D'ANGELO.

3. DRIVING TO WEEKLY THERAPY TREATMENTS. LETTER FROM NORTH EAST THERAPY SERVICES. NEXT APPOINTMENT OCT. 18TH.
4. REGULAR VISITS TO OWNER'S ELDERLY PARENTS WHO RESIDE IN STREETSVILLE, ONT. WILL NOT BE ABLE TO DRIVE OUT TO PROVIDE ANY ASSISTANCE IF NECESSARY.
5. TRANSPORTATION TO DENTAL APPOINTMENT IN STREETSVILLE ON THUR. NOV 2 AT 8:00 A.M.

MARIA MADRUGA, (OWNER OF VEHICLE), WAS NOT DRIVING THE VEHICLE AND WAS NOT IN THE VEHICLE WHEN IT WAS STOPPED AND, CONSEQUENTLY IMPOUNDED."

The following testimony by the Applicant was given first, separate and apart from Mr. Whitcher, the father of the driver of the impounded vehicle.

The Applicant is employed in the Accounts Payable Department of Acklands Grainer in Richmond Hill. She has maintained this position for approximately 20 years.

The Applicant has known David Whitcher, the driver of the impounded vehicle and his family for 5-6 years. David has been staying with the Applicant since May, 2000 as the court ordered David to stay with someone who would be able to provide a "watchful eye" over him which the Applicant consented to. Her main responsibility was to ensure David did not drive.

The evening the vehicle was impounded, the Applicant retired early for she was not feeling well. David told the Applicant that he would be going out that evening, but failed to elaborate on when or how he was going to be transported. The Applicant kept her keys with her in a pouch, but David unfortunately found the spare set of keys that were hidden. The Applicant was advised later that evening by police that David had been arrested and her vehicle was impounded.

In support of the Applicant's appeal, Mr. Whitcher provided the following testimony. He is 76 years old and does not condone any past or recent activities of his son, David. He sympathizes with the Applicant since she currently resides on her own, is trying to make ends met and is trying to carry on her way of life without a vehicle. He testified that if and when the Applicant needs assistance in getting around, for example, in attending today's hearing, he has and is willing to lend her or take her anywhere she likes.

Mr. Whitcher indicated that he and his wife spend the majority of their time at their home in Muskoka, but has currently closed it for the season. The Whitcher's also have a home in Willowdale.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 6 and 7):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by David M. Whitcher;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified or prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 12, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owners right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(l) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(1) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be given or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Board in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,

- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

(3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d)- if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
- (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Appeal - Due Diligence

The first issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that David's driver's licence at the time in respect of which the order was made was not then under suspension as required by section 50.2(3)(c) of the Act.

The Applicant has conceded that when she assumed the court-appointed role of being a "watchful eye" over David, her main responsibility was to ensure that David did not drive. She was well aware that he had a suspended licence and he was not permitted to have care and control of a motor vehicle.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

Appeal - Exceptional Hardship

The Applicant has also requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardships as described by section 22(2). In order for her claims to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Tribunal would like to refer to the Applicant's Owner's Position in Appeal (*Exhibit 2*):

AUTOMOBILE REQUIRED FOR:

1. *TRANSPORTATION TO EMPLOYMENT LOCATION IN MARKHAM. BUS SERVICE IS NOT CONVEIENTLY AVAILABLE FOR WORK HOURS BEGINNING AT 7 O'CLOCK A.M.*

The Applicant testified her hours of employment are from 8 a.m. to 4 p.m. Her usual commute to work by car, before the impoundment, would have taken 15 to 20 minutes. Since the impoundment, her current commute including transfers takes approximately 1 ½ hours to 2 hours due to public transit.

The Applicant also testified that she has not taken taxis and cannot afford to rent a vehicle. She is not aware of any co-workers that reside in her area. Mr. Whitcher, in his testimony, as well as that of the Applicant indicated that in the event the Applicant required transportation assistance, he would be able to lend a hand. (For example, Acklands Grainger is performing an inventory commencing October 27 through to October 29, 2000. Since the Applicant is required to work difficult hours, Mr. Whitcher has honourably offered to take her to and from work this weekend.)

The Applicant indicated that in the event she required to work flex hours she was of the opinion that her employers would be sympathetic to her situation and would be able to accommodate her work schedule.

The Applicant has taken four sick days due to stress since the impoundment. Her employer has deducted 30 hours from her pay due to these sick days. She is entitled to four weeks vacation per year, but all has been consumed. When asked if she could make arrangements to work longer hours or weekends to make up the four days, she conceded that her employer would allow her to do so.

2. DRIVING TO DOCTORS APPONTMENTS. LETTER FROM DR PETER D'ANGELO.

3 DRIVING TO WEEKLY THERAPY TREATAIENTS. LETTER FROM NORTH EAST THERAPY SERVICES. NEXT APPOINTMENT OCTOBER 18TH.

Since March, 2000, the Applicant's neck and shoulder pain has been acting up due to an accident a few years ago. Her regiment from March until August, 2000 was physiotherapy twice a week. From August to date, her physiotherapy visits have been reduced to once a week.

Since the impoundment, she has kept three appointments and has had to cancel two. Of the three appointments that she was able to attend, a friend was able to drive her to them.

Her physiotherapist's office is located at Bayview and Sheppard. She has had to reschedule her appointments after work from 5 p.m. to 6 p.m. so that she could give herself enough time to make these appointments. The Applicant confirmed that she could manage to take a taxi if it was necessary and also confirmed that she has not called to inquire into the public transit from her place of employment to her physiotherapist's office.

4 REGULAR VISITS TO OWNER'S ELDERLY PARENTS WHO RESIDE IN STREETSVILLE,ONT. WILL NOT BE ABLE TO DRIVE OUT TO PROVIDE ANY ASSISTANCE IF NECESSARY

The Applicant's parents reside in Mississauga as well as her brother and his family. Her father and brother own separate vehicles. In the Applicant's testimony, her

"brother is close in the event of an emergency". The Applicant would attend her parents' home on weekends to assist her mother who suffers from severe arthritis in her neck and lower spine. She also stated that her father and brother are "managing" in the care of her mother since she has been unable to attend every weekend.

Once again, in Mr. Whitcher's testimony, he indicated that in the event the Applicant needed to visit her parents in Mississauga, he would lend her his vehicle.

**5. TRANSPORTATION TO DENTAL APPOINTMENT IN STREETSVILLE ON THUR.
NOV 2 AT 8:00 A.M.**

The Applicant has resided in Thornhill for approximately three to four years. She has been unable to find a dentist suitable to her needs in her immediate area. She has been a patient of the dentist in Streetsville since she was quite young.

Needless to say, there are numerous vehicles available to her as well as public transit for her to attend this appointment.

With regard to section 22(2), the impoundment has been quite "inconvenient" for the Applicant in (1) her ability to get to and from work although she is managing in getting to and from work by way of public transit; (2) attending to her physiotherapy appointments; and (3) visit her parents each weekend in Mississauga.

Technically, there is no financial or economic loss to the Applicant since she could make up the four sick days if she so desired and there is no loss or threat of employment loss.

But as aforementioned in section 22(2) above, these are not criteria which the Tribunal may consider.

In considering the above requirement, the Tribunal is of the opinion that the Applicant has not investigated all reasonable alternatives to the impounded vehicle as required by section 22(4) of Regulation 574 as amended by Regulation 632/98.

As the Applicant has stated that she is under some financial restraints, she may pursue compensation from the suspended driver, David Whitcher, once he is released from prison and able to find employment, as is stated in Section 55.1(21) of the *Highway Traffic Act*:

"The owner of a motor vehicle that is subject to an order to impound under this section may bring an action against the driver of the motor vehicle at the time the order was made to recover any costs or other losses incurred by the owner in connection with the order."

None of the claims presented by the Applicant have been substantiated by the evidence as being exceptional hardship. None of the losses presented in the Applicant's submissions have been proven to be immediate, significant and lasting.

Also, the Tribunal is of the opinion that the Applicant does have alternatives to the impounded vehicle, and under section 22 of Regulation 632/98 can not establish exceptional hardship under section 50.2(3)(d) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano
Presiding Member

RELEASED: October 31, 2000

0256/ADLS/00/019

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: GILLES A. LAMARCHE, D.C.
Presiding Member

APPEARANCES: K.M. BIEL, Representative for the Registrar of Motor Vehicles
(by written submissions)

Applicant
(by written submission only)

DATE OF HEARING: October 12, 2000 Timmins

DECISION

A hearing was held on October 12, 2000, at Timmins, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Gilles A. Lamarche, D.C.
Presiding Member

RELEASED: *October 13, 2000*

0256/ADLS/00/019

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: GILLES A. LAMARCHE, D.C.
Presiding Member

APPEARANCES: K.M. BIEL
Representative for the Registrar of Motor Vehicles
(by written submissions)

Applicant
(by written submissions)

DATE OF
HEARING: October 12, 2000

DECISION
RELEASED: October 13, 2000 Timmins

REASONS FOR DECISION

A hearing was held on October 12, 2000, at Timmins, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on October 13, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended,

chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated September 19, 2000, and was received by the Tribunal on September 20, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

The Applicant's information was received by the Tribunal on September 20, 2000. The respondent's submission was received October 2, 2000 by fax. Rebuttal information from the Applicant was received by fax October 11, 2000.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal - dated September 20, 2000
- b) Exhibit # 2 Applicant's Medical Information
- c) Exhibit # 10 Applicant's Written Submissions
- d) Exhibit # 11 Applicant's Rebuttal - received October 11, 2000

By the Respondent:

- a) Exhibit # 3 Written Argument of the Respondent – parts I-IV
- b) Exhibit # 4 Notice to Registrar – sealed September 26, 2000
- c) Exhibit # 5 Driving Record – Vehicle Information of Applicant – sealed September 26, 2000
- d) Exhibit # 6 Affidavit of Officer #1
- e) Exhibit # 7 Affidavit of Officer #2
- f) Exhibit # 8 Medical Report from Dr. Roger S. Goldstein, MB, FRCP(C)(UK)
- g) Exhibit # 9 LSAB Decision – (precedent)

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is:

Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

On September 7, 2000, S. C. Officer #2 of the Metro Toronto Police Service, observed a black Toyota, licence plate # (no.) traveling at a high rate of speed. S.C. Officer #2 activated his MDR-2 mobile radar set which registered 98 km/h in a posted 60km/h zone. S.C. Officer #2 pulled the vehicle over at Eglinton, east of Royal York Road. The driver identified himself with a valid Ontario photo licence as the Applicant. The officer noted a smell of alcohol on the driver's breath. A roadside demand was made, the driver complied, completing the demand on a DRAGAR 7410 GLC instrument. The instrument registered FAIL.

After reading the driver his rights to legal counsel and breath demand, S.C. Officer #2 states that the driver acknowledged he understood both. The Applicant was transported to 22 Division. He was allowed to call his mother and Duty Counsel.

The Applicant was turned over to P.C. Officer #1, a breath technician for the purpose of breath testing. The driver completed his first test approximately one hour and 50 minutes after he was stopped and registered 103 mgs of alcohol in 100 mls of blood. According to P.C. Officer #1, in his affidavit point #12, "The male now outright refused to provide a second sample."

Both P.C. Officer #1 and S.C. Officer #2 state that they never observed any breathing problems or anything to suggest a medical condition. P.C. Officer #1 states "The male easily provided the first breath sample and I could see no reason why he would not attempt the second test."

APPLICATION OF THE LAW TO FACTS:

Subsections 48.3(1), (2) and (3) of the *Highway Traffic Act*, R. S. O. 1990, Chapter H-8 as amended [hereinafter referred to as "the HTA"], provide:

48.3 - (1) Where a police officer is satisfied that a person driving or having the care, charge or control of a motor vehicle meets one of the criteria set out in subsection (3), the officer shall notify the Registrar of the fact, or cause the Registrar to be notified, in the form and manner and within the time prescribed by the regulations.

(2) Upon being notified under subsection (1), the Registrar shall suspend a person's driver's licence for a period of ninety days.

(3) The criteria for the purpose of subsection (1) are:

1. The person had a concentration of alcohol in his or her blood in excess of 80 milligrams in 100 milliliters of blood, as shown by an analysis of the person's breath or blood taken pursuant to a demand made under section 254 of the *Criminal Code (Canada)* or pursuant to section 256 of the *Criminal Code (Canada)*.

2. The person failed or refused to provide a breath or blood sample in response to a demand made under section 254 of the *Criminal Code (Canada)*.

It is quite obvious that the Applicant had a concentration in excess of 80 mgs/100 mls, registering 103 mgs almost two hours after he was stopped.

Subsections 50.1 (2) of the HTA provide that a person may appeal the suspension if he failed or refused to comply with a demand to provide a sample ... because he/she was unable to do so for medical reason.

The registrar denies that any medical reason caused the Applicant's failure to provide the required breath sample, and this Tribunal agrees.

The Applicant was able to provide a suitable sample at roadside, and nearly two hours later provided a sample to P.C. Officer #1, registering 103mgs/100mls.

From personal knowledge of these testing procedures, the Tribunal finds that even if the Applicant had a "nose condition", that would not prevent him from providing a suitable sample by mouth. Furthermore, the Applicant states and this is confirmed by his physician, that the stitches in his nose were removed by his specialist on September 8, 2000, the day after the demand. Obviously, the stitches were removed because the tissue had healed, and would in no way have prevented compliance with the demand.

It would appear that the Applicant had no intention of providing a second sample at 22 Division.

The Tribunal must rely on objective evidence when making any decision. Section 13 of Regulation 574, R.R.O. 1990, as amended by Ontario Regulation 510/96 provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal."

It is the opinion of this Tribunal that the Applicant has failed to establish the merit of his appeal, providing no objective reasons for his failure to provide a sample.

Furthermore, the report submitted by Physician #1 fails to meet the criteria of Regulation 574. HTA, at subsection 15 (1), (2) and (3).

The Applicant refused to provide a breath sample under section 254 of the *Criminal Code of Canada*, according to the evidence submitted, and has failed to establish the merit of this appeal. The Tribunal is unable to address the plea from the Applicant regarding his need to maintain his licence in order to maintain his job, since this is beyond the scope of the Tribunal.

The decision of this Tribunal is based on the evidence of P.C. Officer #1 and S.C. Officer #2, and the Applicant, and particularly that the Applicant provided two samples, one roadside test that registered FAIL and one at 22 Division that registered 103m/100mls.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 8, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Gilles A. Lamarche, D.C.
Presiding Member

RELEASED: *October 20, 2000*

0280/ADLS/00/024

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: KYLE BIEL,
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: October 24, 2000 Toronto

DECISION

A hearing was held on October 24, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: *October 25, 2000*

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY M. LEE D.C.
Presiding Member

APPEARANCES: KYLE BIEL, Respondent
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF
HEARING: October 24, 2000

DECISION
RELEASED: October 25, 2000

REASONS FOR DECISION

A hearing was held on October 24, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on October 25, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to Section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was

dated October 5, 2000, and was received by the Tribunal on October 6, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters. The documents submitted to the Tribunal, with the consent of both parties, were entered into evidence.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal, dated October 5, 2000
- b) Exhibit # 2, Applicant's Medical Information
- c) Exhibit # 5 Applicant's Photographic material

By the Respondent:

- a) Exhibit # 3 MTO Submissions, received October 18, 2000
- b) Exhibit # 4 Video Cassette Recording, received October 24, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal.”

FACTS:

The Applicant took the stand, was sworn and gave the following testimony. On the evening of August 20, 2000, the Applicant was taken into custody by Peel Regional Police and transported to the police station for a breathalyzer test. The events leading up to this point, according to the Applicant, were paramount in his reasoning for not providing a sample of his breath for analysis when requested by police.

According to the Applicant, he had started out the evening by joining some friends for dinner. During the course of the meal, he consumed a large glass of beer and a glass of wine. After dinner, he and his friend E. G., went to a club in the Dixie/Matheson area. The time was around midnight. At the club, the Applicant denied drinking more alcohol as he stated that he was the designated driver.

When the Applicant and his friend left the club, they returned to the apartment parking lot. It was now approximately 2:00 a.m. Instead of going into the apartment, the Applicant decided to stay in his car and listen to his stereo. According to the Applicant, he had beer in the trunk. He was not drinking but his passenger, E. G. was. The Applicant stated that his keys were in the ignition in order to provide power to his stereo, but the car was not running. The Applicant testified that he was unaware of the Police presence. The Applicant claims that he has very limited hearing from his left ear and that this may have been the reason he did not hear the police officer when he was asked to step out of the vehicle. The Applicant testified that he only heard the officer tell him that he was under arrest. The Applicant then testified that he was pulled from the vehicle, punched in the back and then put on the ground. He testified that he heard the officer call for back up and within a very short time, more officers were surrounding him. The Applicant then testified that he was kicked in the legs and testicles. He attempted to see which one kicked him but could not. He was placed in a cruiser, told not to move and was transported to 12 Division and turned over to the breathalyzer technician, P.C. Officer #1, Badge Number (no.).

After he was released in the morning, the Applicant returned to his car, where he had his camera, took pictures of the area, himself and then went to the walk in clinic as he testified that he was not feeling well. He testified that at the walk in clinic he was examined and told that he had no broken bones and some abrasions for which he could apply some cream. The Applicant testified that at the clinic, a urine sample was obtained and indicated blood in the urine.

The Applicant was crossed examined by Mr. Kyle Biel, representative for the Respondent. Mr. Biel asked the Applicant if he co-operated with police. The Applicant answered that he was not given a chance, as he was pulled from the vehicle. His explanation was that he may have not heard police as he has limited hearing in his left ear. When asked if he provided a sample of his breath when asked, the Applicant stated that he was very upset and was having trouble with his breathing because of the punch to the back and chest as well as the kick to his groin area.

The Applicant had a copy of the videotape which was taken during his stay in the breath room at the police station. The video was played for the Tribunal. The videotape clearly showed the Applicant seated next to the breathalyzer machine and P.C. Officer #1 sitting to the Applicant's left, at the desk. The officer, explained to the Applicant the he was asking him to provide a sample of his breath to determine if he has alcohol in his blood. The Officer read the demand for breath and asked the Applicant if he did understand and the Applicant responded that he did. However, the Applicant stated that he was not going to blow into the machine. The Officer asked the Applicant if he wanted to speak with an attorney and that if he could not afford one, one would be provided. The Applicant answered that he did not want a lawyer and would deal with this himself.

The Applicant was asked at least four times if he would provide a breath sample, refusing each time. P.C. Officer #1 told the Applicant that if he did not provide a sample, he would be charged with a criminal offence and asked if he understood this, to which the Applicant replied, "yes, I understand". During the session with P.C. Officer #1, the Applicant was dabbing his forehead with a piece of paper towel, where it appeared there was an abrasion. The officer asked the Applicant. "Could you do the test if you wanted to?", to which the Applicant replied, "yes".

The Applicant testified that on the video he could see a "moment where he held his chest as though he had pain". The Applicant was excused from the stand.

P.C. Officer #1 was called to the stand, sworn and gave the following evidence.

P.C. Officer #1 testified that the taped session was an accurate representation of his dealings with the Applicant. P.C. Officer #1 also testified that the Applicant at no time appeared to be in any physical distress or verbally indicate to him that the Applicant was having difficulty because of a medical condition. According to P.C. Officer #1, had the Applicant indicated to him in any way that there was a medical problem and that he could not blow into the machine, the option of having a blood sample was available to him. P.C. Officer #1 testified that the photographs presented, are a true representation of how the Applicant appeared. He testified that he could not comment on the abrasions under the Applicant's shirt as the Applicant's shirt was not off during his interview with the Applicant.

P.C. Officer #1 asked the Applicant what his reasons were for not providing a breath sample, to which the Applicant replied "I will tell this to the courts".

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

The report from Physician # 1, written October 5, 2000, the physician who attended to the Applicant on August 20, 2000, fails to meet the specific requirements of Section 15 (1) of Regulation 574 of the *Highway Traffic Act* as set out below.

Physician #1 does not provide the Tribunal with any subjective test results to substantiate the Applicant's assertion that due to his medical condition, he was not able to provide a proper breath sample. The actual report/form written at the time, gave a brief history as related to the Doctor by the Applicant: "Police beat him with fists, and hit asphalt and hit in testes", with physical examination findings of "bruised and abrasion to molar area no++ clinical, U.A. gl + wbc "neg Bld +++ " There is also a note to have follow up in one to two days. No follow up was done as the Applicant did not return when requested.

The report dated October 5, 2000 does not indicate that his "injuries" would have prevented the Applicant from providing a breath sample.

The Tribunal has found that the report submitted by Physician #1 has not addressed the issue of how the Applicant's condition precluded him from providing a proper sample of his breath. Accordingly, the Tribunal attaches no weight to this report.

The evidence establishes that the Applicant refused to provide a sample of his breath but does not establish a medical reason for this refusal.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated August 20, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M .Lee D.C.
Presiding Member

RELEASED: October 31, 2000

SANKREACHA

PREHEARING

DILIP SANKREACHA

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: SHEENA MACASKILL, Vice-Chair

APPEARANCES:

DILIP SANKREACHA, representing himself
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program,
CHRIS REAIN, Counsel, representing Remington Homes
(Highglen) Inc., Added Party

DATE OF

PRE-HEARING: October 30, 2000

Toronto

CONSENT ORDER

FOLLOWING attendances on October 30, 2000 at a prehearing before the Licence Appeal Tribunal of Dilip Sankreacha, acting on his own behalf (the "Applicant"), and Netanus Rutherford, Counsel on behalf of the Ontario New Home Warranty Program (the "Program") and Chris Reain, Counsel on behalf of Remington Homes (Highglen) Inc., (the "Added Party");

WHEREAS at the commencement of the pre-hearing on October 30, 2000, the parties advised the Tribunal that they had reached a settlement;

Upon the application to the Licence Appeal Tribunal by the Applicant, Dilip Sankreacha, and Counsel for the Ontario New Home Warranty Program and Counsel for the Added Party, Remington Homes (Highglen) Inc. for issuance of a consent order by the Tribunal to settle the issues in this claim; and

Having reviewed the Minutes of Settlement signed by the Applicant and signed on behalf of the Ontario New Home Warranty Program and Remington Homes (Highglen) Inc., as to the disposition of these issues which is filed and attached hereto as Schedule "A";

NOW THEREFORE this Tribunal orders that all the issues in this matter are disposed of on the basis of the terms set out in Schedule "A" and the matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice-Chair

Released: November 2, 2000

SCHEDULE 'A'

DILIP SANKREACHA

APPLICANT

- and -

ONTARIO NEW HOME WARRANTY PROGRAM

RESPONDENT

- and -

REMINGTON HOMES

ADDED PARTY

MINUTES OF SETTLEMENT

The parties herein agree to settle all issues related to the within matter on the following grounds:

1. Reminton Homes (Highglen) Inc. agrees to pay \$1,500.00 to Dilip Sankreacha upon receipt of a full and final release executed by Dilip Sankreacha, on terms satisfactory to Reminton Homes (Highglen) Inc.

In witness where of, these Minutes of Settlement executed this 30th day of October, 2000.

MAYBEE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
KENNETH MAYBEE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: June 28th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KENNETH MAYBEE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on September 19, 2000;

AND WHEREAS, upon consent of the parties the hearing was adjourned to November 3, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto at 9:30 a.m., on Thursday, December 7, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 6th, 2000

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Presiding Member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

Applicant
(by teleconference call)

DATE OF MOTION: November 3, 2000 Toronto

ORDER

WHEREAS, the Registrar of Motor Vehicles (the "Registrar") did by written notice, dated October 12, 2000 order the impound of a certain Ford Mustang motor vehicle (the "motor vehicle");

AND WHEREAS, the Applicant as the owner of the motor vehicle has filed a Notice of Appeal to the impound of the vehicle;

AND WHEREAS such appeal is to be heard at 1 St. Clair Avenue West, Suite 1200, Toronto, Ontario, commencing at 1:45 p.m. on Friday, the 3rd day of November, 2000;

AND WHEREAS the Registrar has brought a motion, under section 7 of the Rules of Practice of the Tribunal, requesting:

- (a) that the hearing not be open to the public; and
- (b) that certain documentation to be submitted at the hearing not be accessible to the public.

AND WHEREAS the reasons for the Registrar's requests is that intimate personal matters may be disclosed at the hearing, of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof is in the interests of the Applicant's child and disclosure would be in contravention of the *Young Offenders Act* R.S.C., as amended;

AND WHEREAS, the representative of the Registrar has submitted to the Tribunal and The Applicant true extracts of the Ministry of Transportation records relating to the driver's record of the Applicant's child;

AND WHEREAS the Applicant informed the Tribunal that she has no objection to the making of an Order restricting the public's attendance at the hearing on November 3, 2000 and restricting the public's access to the true extracts of the Ministry of Transportation records relating to the driver's record of the Applicant's child;

NOW THEREFORE, the Tribunal orders as follows:

- (a) The true extracts of the Ministry of Transportation records relating to the driver's record of the Applicant's child shall not be accessible to the public and shall be kept separate from the public record;
- (b) Access by the public to such documents shall only be by the written order of the Tribunal or as otherwise authorized by law;
- (c) The true extracts of the Ministry of Transportation records relating to the driver's record of the Applicant's child shall be separated from the exhibits and/or Book of Documents and shall be placed in a sealed envelope by the Registrar of the Tribunal which she shall marked "Confidential";
- (d) In place of such removed documents there shall be a true copy thereof inserted, which copy shall have all or any references obliterated from them as to the Applicant's child's name, address, date of birth, sex and height as well as the child's driver's licence number and any driving offences and convictions registered prior to 1999.
- (e) The hearing of The Applicant 's appeal shall not be open to the public and the public shall not have access to the hearing.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: November 6, 2000

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: November 3, 2000

DECISION RELEASED: November 6, 2000 Toronto

REASONS FOR DECISION

A hearing was held on Friday, November 3, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	The Applicant (the "Applicant")
Motor Vehicle:	Ford Mustang, (the "vehicle")
Date of Appeal:	October 17, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship (Exhibit 2) as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 3, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Registrar of Motor Vehicles brought a Motion (Exhibit 3), under section 7 of the Rules of Practice of the Tribunal, requesting:

- (a) that the hearing not be open to the public; and
- (b) that certain documentation to be submitted at the hearing not be accessible to the public.

for reasons being that intimate personal matters may be disclosed at the hearing, of such a nature, having regard to the circumstances, that the desirability of avoiding disclosure thereof is in the interests of the Applicant's child and disclosure would be in contravention of the *Young Offenders Act* R.S.C., as amended.

The Tribunal granted and issued such Order under separate cover.

There were no further preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit 2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"The vehicle was taken from my driveway with out my permission by my child, who doesn't have a driving licence. Police caught my child and impounded my car. I'm driving to work every day 30 km one way. With out my car I have no means of getting to work.
My child is over 18 years old and I think I shouldn't be punished for the child's actions."

The Applicant is a wife and mother of two children ages 15 and 18 years old. She is also employed full-time as an assembler at St. Clair Technologies located in Wallaceburg, Ontario. Her hours of employment are from 11 p.m. to 7 a.m. Her place of employment is approximately 30 kilometers from home.

The day the vehicle was impounded, while the Applicant was asleep after working her shift, her child took the keys from her purse located in the closet and went for a drive with friends. In her testimony, the Applicant is against her child having care and control of her vehicle but did state that her child and friends enjoy driving the impounded vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 5 & 6):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by the Applicant's child;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of failing to stop for a police officer. Before commencing this hearing, the Registrar of Motor Vehicles brought a motion, under section 7 of the Rules of Practice of the Tribunal, requesting that

certain documentation to be submitted at the hearing not be accessible to the public since it would be in contravention of the *Young Offenders Act* R.S.C. Within these documents was evidence that a *Criminal Code* conviction was registered against the Applicant's child's driving record, which was the basis for the vehicle impoundment.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Tribunal may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while the child's or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Tribunal must determine whether it should set aside the Registrar's order to impound the vehicle on the basis that the owner of the impounded vehicle will suffer exceptional hardship.

The Applicant has appealed on the grounds of "exceptional hardship" under section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in hardships as described in section 22(2). In order for her appeal to be considered under section 22(2), she must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulations provides the criteria for demonstrating that every reasonable option has been considered respecting an alternative vehicle.

The Tribunal's consideration of subsections 22(3)(a), (b) and (c) follows.

- (a) **"no alternative to the impounded motor vehicle is available"** Contrary to ***Exhibit 2***, the Applicant testified that a 1989 Sundance is also registered in her name. A person employed by her and her husband as a hot dog street vendor uses

this vehicle. The Applicant also testified that her husband owns his own vehicle. The Applicant has testified that she has not called to determine whether there is public transit from Chatham to Wallaceburg.

- (b) **"the loss will be immediate, significant and lasting"** Contrary to ***Exhibit 2***, the Applicant testified that (i); she has not missed any days of work or lost any wages due to her vehicle's impoundment; (ii) her friends have been driving her to and from work each day; (iii) the Applicant's husband is employed two kilometers away from the Applicant's place of employment. His hours of employment are from 7 a.m. to 5 p.m. In the event the Applicant's friends cannot provide transportation to the Applicant, the Applicant has the option of walking, public transit, or a taxi to her husband's place of employment to borrow his car.
- (c) **"the impact of loss will be upon a person ordinarily transported by the motor vehicle"** The Applicant testified that her younger child, after school, is employed part-time at Burger King in Chatham. The Applicant's younger child has managed to get to work either by walking or taking a bike.

After considering the above requirement, the Tribunal finds that the Applicant has alternatives to the impounded vehicle.

None of the claims presented by the Applicant have been substantiated with sufficient evidence. None of the losses presented in the Applicant's submissions have been proven and/or have met the criteria required under the Regulation.

Accordingly, the Tribunal finds the Applicant has not established that she has or will suffer exceptional hardship as provided by Ontario Regulation 632/98, section 22.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: November 6, 2000

DIANA CAROL EMPEY

APPEAL UNDER SECTION 50.2 OF THE *HIGHWAY TRAFFIC ACT*,
R.S.O. 1990, CHAP.H.8 AS AMENDED (THE "ACT"), FOR AN ORDER
OF THE REGISTRAR OF MOTOR VEHICLES PURSUANT TO SECTION
55.1(3) OF THE ACT

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO, Member

APPEARANCES: KIM GROSSKURTH,
Representative of Registrar of Motor Vehicles
DIANA CAROL EMPEY, Applicant

DATE OF HEARING: November 2, 2000

ORDER

PURSUANT to the provisions of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended (the "Act"), Diana Carol Empey (the "Applicant") appealed a decision of the Registrar of Motor Vehicles (the "Registrar") made under section 55.1 of the Act to impound a certain 1986 Buick Century Estate Wagon motor vehicle, plate number 866 ZZL, the sole ground of appeal being that of exceptional hardship under subsection 50.2(3)(d) of the Act;

UPON MOTION, made by the representative of the Registrar for an order by the Tribunal dismissing the Applicant's appeal from the decision of the Registrar heard by this Tribunal on Thursday, November 2, 2000 at 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, with Applicant being present by teleconference.

ON READING the exhibits and hearing submissions of the representative of the Registrar as well as submissions by the Applicant, this Tribunal finds that the ground of exceptional hardship (section 50.2(3)(d)) upon which the Applicant relies in this appeal, does not apply by virtue of section 50.2(4) as a previous order to impound under section 55.1 was made with respect to another motor vehicle then owned by the Applicant.

THIS TRIBUNAL Orders that the appeal by the Applicant is accordingly dismissed and pursuant to the authority vested in the Tribunal under section 50.2(5) of the Act, the Tribunal hereby confirms the order of the Registrar to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: November 6, 2000

MAJID TAHERI

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the *Act*), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: K.M. BIEL,
Representative for the Registrar of Motor Vehicles

MAJID TAHERI, Applicant, not present
ARASH TAHERI, Representative for the Applicant

DATE OF HEARING: October 26, 2000

DECISION RELEASED: November 7, 2000 Toronto

REASONS FOR DECISION

A hearing was held on October 26, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (HTA or the *Act*).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the *Act*).

The Registrar of Motor Vehicles (the ARegistrar@), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Majid Taheri (the AApplicant")
Motor Vehicle: 1998 Toyota CRV, plate #AERY 988 (the Avehicle")
Date of Appeal: October 12, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the ATribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on October 26, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Arash Taheri, appeared before the Tribunal and provided a letter of direction to the Tribunal which indicated that the Applicant, Majid Taheri would not be in attendance and that his son, Arash Taheri would be representing him in the matter before the Tribunal. There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

To Whom It May Concern,

I, Majid Taheri, am the owner of the impounded vehicle make Toyota, year 1998, model CRV with license plate number AERY 988. My son has committed the offence of driving my car without my consent while under suspension. This car has been impounded under Section 50.2 of the Highway Traffic Act.

My wife and I are over the age of fifty and need to use this car for economical and personal reasons. My wife and I use this car as a form of transportation from and to work daily and we are used to this method and due to our age it is perhaps hard to make transitions from car to public transportation. We are both suffering due to this and ask for you to please help us out in getting back our car from Ottawa. It is understandable that another punishment for my wife and I is to go to Ottawa in order to get the car and drive back for approximately five to six hours. I beg of you to speed the process in order for us to get our car back because we are losing money as well as the hardship this has created for us. We need to go shopping, YMCA for our health, work and personal travelling and without our car we are paralysed. Please help us out.

On top of this a large dollar amount has to be paid for the release of the car in which my son will pay but we are not in a good financial position either. My son is having his own punishment set out for him in the court of law. He is extremely sorry but nothing is going to take us back in time or else everything would be fixed. Please be kind enough to at least help out my wife and I in this situation.

Yours truly,

Majid Taheri
October 12, 2000

The Applicant's Representative, Arash Taheri was sworn and gave the following testimony. It should be noted that Arash Taheri was also the suspended driver who was in the Applicant's vehicle at the time that the order to impound was made.

Arash Taheri stated that he was the driver of the impounded vehicle which was impounded in Ottawa on October 8, 2000. He testified that he was in fact under suspension when the vehicle was stopped and subsequently impounded. He testified that he was appearing before the Tribunal because he had caused his parents enough grief and felt that they should not have to endure any further hardships or embarrassment because of his actions.

Arash Taheri testified that his parents were appealing the impound because they could not afford the costs involved and that this was an exceptional hardship on them. Mr. Taheri testified that his parents are in their early 50's and in a somewhat fragile state of health. Mrs. Taheri is an office cleaner and has weekly income between 500 and 600 dollars. Mr. Taheri, a taxi driver also generates about the same or maybe more. The household income is somewhere around \$4,000.00 to \$5,000.00 per month. They reside in an apartment at Don Mills and York Mills avenues. They attend work daily but have had to take public transportation to and from their work which they find very difficult. There is no other vehicle available to them to replace the impounded vehicle. They believe that due to their limited income, they just could not afford to rent or lease a vehicle for the duration of the impoundment. Mr. Taheri stated that his parents have lost work because of this situation albeit only the day after they learned of the impoundment of their vehicle. Mr. Taheri testified that his mother has had to stop attending her E.S.L. which is located in the Bathurst/Lawrence area.

The Representative for the Respondent, Mr. Kyle Biel cross-examined Mr. Taheri. Mr. Taheri was asked if there were any other vehicles owned by his father. The representative, Arash Taheri stated that there were not. However, Mr. Biel produced a vehicle records search indicating that in fact there was a 1997 Chevrolet Cavalier plated until the year 2001, registered in Mr. Taheri's name. Arash Taheri explained that this was in fact his brother's vehicle whom his father put in his name because his son had some difficulties but that his brother did not reside at the same address and lived downtown. Mr. Taheri also stated that having his brother come and pick up his parents was not an option available to them as this presented a hardship for his brother and was unrealistic. When asked if his parents had missed any time off work and how did they get there, Arash Taheri testified that his parents have used public transportation and have not missed time from work except for the day after the impoundment as they were too upset to attend work. The Respondent had no further questions for Mr. Taheri and the witness was excused from the stand.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Arash Taheri;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of dangerous driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until November 4, 2000.

The representative for the Respondent did not take the stand and stated that all of the evidence had been submitted to the Tribunal and he had no witnesses to call.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship under section 50.2(3)(d)?

Section 22(1) of Regulation 574 R.R.O. 1990 as amended by Regulation 632/98 states that when an owner appeals on the basis of exceptional hardship, the Tribunal shall consider whether no alternative to the impounded motor vehicle is available.®

The Applicant has submitted evidence in the form of a statement indicating that (i) the vehicle is used for economical and personal reasons, (ii) the Applicant uses the car as a method of transportation, (iii) it is difficult to make the transition to public transportation (iv) there will be economic loss due to the cost of returning the vehicle from the impound facility, (v) the Applicant and his wife require the vehicle for shopping, YMCA for his and his wife's health and personal travel, and (vi) without the vehicle "we are paralyzed."

On the evidence before the Tribunal, it is clear that an alternative is available to the Applicant and being used by the Applicant and his wife. That alternative is public transportation. The Applicant has used this method of transportation and will continue to utilize this method during the impound of his motor vehicle. Albeit an inconvenience, the Applicant and his wife will suffer no hardship due to the availability of this alternative.

The Applicant has provided no supporting evidence to support his claim that the impoundment of his vehicle will result in a threat to the health or safety of any one transported by his vehicle, including himself, as described in Regulation 632/98 22(1)(a).

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: *November 7, 2000*

WHITTON

JOHN DAVID WHITTON

APPEAL FROM A PROPOSAL OF THE REGISTRAR
OF THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: BEVERLEY J. READE, Vice-Chair

APPEARANCES:

DONALD ELLIOTT, Counsel, representing the Applicant
MITCHELL GOLDBLOOM, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: October 30, 2000

By Teleconference

ORDER

Following attendances on October 30, 2000 at a hearing by teleconference before the Licence Appeal Tribunal of Donald Elliott, Counsel, representing John David Whitton (the "Applicant") and Mitchell Goldbloom, Counsel, representing the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

WHEREAS, this matter was scheduled to be heard by the Tribunal in London on October 30, 2000;

AND WHEREAS, on that date, counsel for the parties agreed to the following order:

1. The Appeal from the Proposal of the Registrar of the *Motor Vehicle Dealers Act* to Refuse Registration is withdrawn, without prejudice to the filing of a further Appeal by Mr. Whitton in the future.

NOW THEREFORE, this Tribunal orders that this matter is hereby concluded.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade
Vice-Chair

Released: November 9, 2000

MANZ

JACOB MANZ AND LILLIAN RUEL-MANZ

MOTION TO CONSIDER AN APPLICATION
FOR EXTENSION OF TIME

TRIBUNAL: BEVERLEY J. READE, Vice-Chair, presiding

APPEARANCES:

JACOB MANZ AND LILLIAN RUEL-MANZ, representing
themselves, Applicants
NETANUS RUTHERFORD, Counsel, representing the Ontario
New Home Warranty Program

DATE OF

HEARING: November 6, 2000

By Teleconference

REASONS FOR RULING AND ORDER

This is an application to the Licence Appeal Tribunal to extend the time for the Applicants, Jacob Manz and Lillian Ruel-Manz to file an appeal from a decision of the Ontario New Home Warranty Program ("the Program") pursuant to section 16(2) of the *Ontario New Home Warranties Plan Act* ("the Act").

The hearing of this motion proceeded on consent as an electronic hearing. The Tribunal received material and heard evidence from the Applicants setting forth their reasons for requesting an extension. The oral evidence included information from Mr. Dain, who was contacted to clarify an engineering report he had provided to the Applicants. The Program did not file material on the motion but opposed the application to extend time, referring to the Applicants' evidence and the original decision letter under appeal.

The Tribunal makes the following findings:

The Applicants purchased the home in question in March, 2000. The original owners' date of possession for the home was August 9, 1993. The Applicants contacted the Program after they moved in and made a claim that there were numerous deficiencies in the home. Because the previous owners had not notified the Program of the alleged defects prior to the Applicants taking possession, the first notice of the claim was made over six years from the date of original possession.

The Program inspected the home on June 14, 2000 and the Program, which refused the claims on the basis that they did not constitute major structural defects, issued a Decision Letter dated July 5, 2000. The Applicants received the Decision Letter on July 13, 2000.

The Decision Letter notified the Applicants that if they wished to appeal the decision, they must deliver a notice in writing to this Tribunal within 15 days. An informational

brochure about the Tribunal and its process was provided, together with the address for service.

On August 3, 2000, the Tribunal received the Notice of Appeal, relating to damage around windows and doors as a "Claim for Major Structural Defect". The notice was sent by regular mail and is dated July 28, 2000. It states, "We apologize for the short delay in submitting this to the Tribunal, however our Engineer was away on holidays and just got the letter to us."

The Engineering Company employs Mr. Dain, the author of the report in question, but he is not an engineer. He indicated that the damage is not a major structural defect within the meaning of the Act. It is his opinion that the damage has been caused by poor framing around the windows and doors, and that the damage could have been prevented had proper painting and caulking been performed by the builder and by the previous owners.

Under Section 7 of the *Licence Appeal Tribunal Act*, 1999, an Applicant may request an extension of time for giving notice requiring a hearing. This section reads:

7. Despite any limitation of time fixed by or under any Act for the giving of any notice requiring a hearing by the Tribunal or an appeal from a decision or order of the Tribunal under section 11 or under any other Act, if the Tribunal is satisfied that there are reasonable grounds for applying for the extension and for granting relief, it may,
 - (a) extend the time for giving the notice either before or after the expiration of the limitation of time so limited; and
 - (b) give the directions it considers proper as a result of extending the time.

In determining whether there are reasonable grounds for applying for the extension and for the granting of the relief, the Tribunal takes into account the factors set forth in the decision of the Commercial Registration Appeal Tribunal in Re Bilodeau and ONHWP (1994), 26 CRAT 930:

1. That there was an intention to appeal within the time limited;
2. That the reason the notice of appeal was not served on time is such that the Applicants should be excused for not doing so and allowed to do it later if they did so as soon as the true situation was apprehended;
3. That there is not some overriding prejudice to the Respondent in allowing the application;
4. That there is a substantial point in issue and the Applicant has some reasonable chance of success.

This Tribunal notes that the fundamental principle in deciding whether to allow an extension is to see that justice is done.

It appears that the Applicants did have the intention to appeal within the time limited. They were out of time by only a matter of days, apparently not understanding the clear mandate to file the notice within 15 days. The Tribunal is unable to find any substantial prejudice to the Respondent if the matter were to proceed. However, in the

circumstances of this case, it is impossible to find that the Applicants have some or any reasonable chance of success. Their claim is for a major structural defect in their home and the evidence they intend to rely on is clearly not sufficient to fall within the definition of major structural defect within the meaning of the Act.

Under these circumstances, it is not appropriate for the Tribunal to exercise its discretion and order that the time for giving the notice be extended, as there are no reasonable grounds to do so.

ORDER:

Accordingly, pursuant to the authority vested in it by the *Licence Appeal Tribunal Act, 1999*, the Tribunal orders that the application to extend the time for filing of the Appeal by the Applicants be dismissed.

LICENCE APPEAL TRIBUNAL

Beverley J. Reade
Vice-Chair, Presiding

Released: November 9, 2000

JOSEPH McGRAW

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

JOSEPH McGRAW, Applicant
unrepresented

DATE OF HEARING: November 2, 2000

DECISION RELEASED: November 7, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 2, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Joseph McGraw (the "Applicant")
Motor Vehicle: 1994 Ford Pick up, plate YWR 636 (the "vehicle")
Date of Appeal: October 16, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 2, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals.

All documents were submitted into evidence with the consent of both parties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

IMPOUNDMENT WOULD CAUSE EXTREME FINANCIAL HARDSHIP IF UNABLE TO
WORK CANNOT PAY BUSINESS OVERHEAD, HOME MORTGAGE AS I AM SOLE
OWNER OF BUSINESS AND LIABLE FOR ALL EXPENSES WOULD ALSO HAVE TO

LAY-OFF HELPER PUTTING HIM OUT OF A JOB. ONLY OWN THIS ONE TRUCK & WITHOUT SAME AM UNABLE TO OPERATE BUSINESS WHICH WOULD LEAD TO BANKRUPTCY.

The Applicant stated that the impounded vehicle is the only vehicle owned by him, and that it is used for a business that he also owns. He further stated that he was the driver of the vehicle at the time of the impoundment. Furthermore, as the loss of this vehicle has caused great hardship to his business, it has also put him under great financial hardship.

The Applicant's wife does not rely on the impounded vehicle for transportation, as she has a vehicle provided for her by her employer. The Applicant further stated that he had not inquired into the use of alternatives to the impounded vehicle, as he felt that due to his current financial situation, none would be affordable.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Joseph McGraw;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of failing or refusing to provide breath or blood sample under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 7, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself. In the matter before this Tribunal, there was no evidence before the Tribunal that the impoundment had contributed to the pre-existing financial hardships or uncertainty that the Applicant and his company have had to endure.

The Applicant has claimed that the impoundment has affected his business' prospects and financial situation, and thus his own. However, section 22(3)(d) of Regulation 632/98 precludes the Tribunal from considering the impact of any loss as a result of the impoundment that may be upon the person who was driving the vehicle at the time of the impoundment while their driver's licence was then under suspension. Here, the Applicant was the driver of the vehicle at the time of the impoundment. Therefore, the Tribunal may not consider the impacts of the loss that may be experienced by the Applicant.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), he must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. The Tribunal finds that the Applicant's statement that an alternative is simply not possible due to his financial limitations, and therefore was not inquired into, is insufficient in meeting the onus under this section of the Regulation. The Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork
Presiding Member

RELEASED: *November 7, 2000*

HYRSKI

DAVID J. HYRSKI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TRIBUNAL: MARJORIE L. HILEY, Vice-Chair

APPEARANCES: WILLIAM HYRSKI, Agent, representing the Applicant
MICHAEL BADER, Counsel, representing the Ontario New Home
Warranty Program
No one appearing for the Added Party, Embi Homes Inc.

DATE OF
HEARING: October 2, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal by David Hyrski (the "Applicant") of a decision dated May 16, 2000 of the Ontario New Home Warranty Program (the "Program") under the *Ontario New Home Warranties Plan Act* (the "Act"), respecting a home purchased by the Applicant. The home is located at 1431 Upper Sherman Avenue, Hamilton, Ontario (the "home").

This matter was originally set for a hearing on September 25, 2000 and to continue on September 26 and 27 as necessary. It was adjourned upon the written consent of all of the parties to commence on October 2, 2000 and continue on October 3 and October 4 as necessary. The Added Party by its letter of September 25, 2000 then stated that it could not attend for the hearing on October 2 as had been previously agreed upon. The Registrar, by a letter dated September 26, 2000, stated that the hearing could not be adjourned unless there was consent of all of the parties in writing to the adjournment and the consent of all of the parties to the new hearing dates. Such consent was not obtained and the hearing commenced on October 2, 2000.

The Added Party was not in attendance at the commencement of the hearing. Counsel for the Program stated that he had attempted to serve the Added Party with a summons by mail at the last known address, that being Embi Homes Inc. 1550 Upper James Street 9-314 Hamilton, Ontario L9B 2R8.

The Applicant was not in attendance at the hearing. He had sent his father to be his agent. The father produced a handwritten note to that effect which was made an exhibit. David Hyrski is a paraplegic. He was in hospital at the time of the hearing awaiting an operation. According to his parents he would not be available to attend at a hearing for a number of months and he wished the hearing to be held in his absence.

The Applicant and builder appear to have discussed an agreement for the purchase of the home in January 1998. This agreement was not finalized. The Applicant took possession of the home in March, 1998 under a "licence to occupy" document. On June 10, 1999 an Agreement of Purchase and Sale of the home dated June 10, 1999 was signed by the Applicant and the builder, and the sale was closed later that month.

ISSUES:

1. Is the Applicant entitled to make a claim based on section 14(1)(b) of the *Ontario New Home Warranties Plan Act*?
2. If so, were the claims made by the Applicant within the statutory time limits under the *Ontario New Home Warranties Plan Act* and in compliance with Regulation 892, Part II, section 4(1) as to providing written notice of the claim to the Program?
3. If so, does the Applicant have warrantable claims regarding the garage floor and the cement wheelchair ramp attached to it and regarding the paving of the driveway?
4. Has the Applicant received any benefits which would affect the assessment of damages under the warranties?

THE EVIDENCE:

Opening Statement of the Program:

Counsel for the Program stated that the position of the Program was that the Applicant was not able to make a claim based on the definition of "vendor" under the *Ontario New Home Warranties Plan Act*. The Program took the position that the home purchased by the Applicant was not covered by warranty under the Act because it had been previously occupied and, therefore, there was no basis for a claim under section 14(1)(b). If it is held that this is not the case, then the Program took the position that the warranties take effect from the date of possession and that the Applicant had waited over one year to make a claim in writing to the Program. That being the case, the paving of the driveway would be out of warranty but the issue of the wheelchair ramp would be within the warranty period as it is a health and safety violation. The Program knew that David Hyski was a paraplegic prior to his occupancy of the home.

Further, Counsel for the Program stated that the Program relied upon section 14(6) of the *Ontario New Home Warranties Plan Act* and took the position that the Applicant had received a benefit by living in the home rent free for a period of time. It was the position of the Program that the benefit of the rent free period received by the Applicant exceeded the cost of the repairs, and the Applicant suffered no loss.

Testimony of William Hyski:

Mr. Hyski testified that he is the father of the Applicant, David Hyski. The Applicant was injured in a motorcycle accident in May, 1993. He wanted to own his own home after years of residing in the home of his parents. Mr. Hyski testified that David lived with him and his wife from August, 1993 until March, 1998. At that time, David went to

live at the home at 1431 Upper Sherman Avenue in Hamilton. Mr. Hyrski stated that the settlement respecting his son's motorcycle accident was not completed at that time, but the builder told his son to move into the house. David had hoped he would be able to purchase the home soon after the move. Mr. Hyrski had not known of the "licence to occupy" document until he saw it in the Program's Book of Document for the hearing.

Mr. Hyrski was not aware of any arrangements whereby the Applicant paid rent for living in the house from March, 1998 until June, 1999. Mr. Hyrski had never seen the January 30, 1998 Agreement of Purchase and Sale that his son had signed for the purchase of the house. The Applicant had not been able to use the upstairs in his parents' home and his parents, had renovated their home to install a lift and put a bathroom in the basement. Mr. Hyrski was not aware of any inquiries being made to the Program prior to the closing of the house deal in June, 1999. He knew that the two lawyers involved in the real estate transaction and the builder had all said there was New Home Warranty coverage.

Mr. Hyrski stated that in the fifteen months that David lived in the home prior to the closing, the builder did not complete the repairs that David and he and his wife had requested. The builder had agreed to look after the expenses of the home when David lived there while David waited for the funds from the insurance settlement. Mr. Hyrski estimated that the cost of the repairs was approximately six thousand dollars. The builder had said he would fix the house within ninety days of the closing, but that never happened.

Mr. Hyrski repaired a number of the items that had been listed as claims with the Program. He built a deck at the back, put on a railing on the front porch, did the curbing for the driveway, and installed the sod. The cost of these repairs was approximately \$3,850.00. As David is on the provincial disability plan, he had to ask for reimbursement of this amount from David's insurance settlement funds.

Regarding the existing items, Mr. Hyrski estimates it will cost \$3,200.00 to pave the driveway. This is based on two estimates he received. He does not know what would be the repair cost for the garage floor and the wheelchair ramp. At the present time, David needs help in order to get his wheelchair over the ramp from the garage into the house.

Testimony of Ann Hyrski:

Mrs. Hyrski stated that she had talked to the builder during the time that her son was living in the house prior to closing about doing some of the necessary repairs. She mentioned to the builder that David needed to have the ramp fixed so he could enter and exit his home without assistance. She also mentioned to the builder about a ramp at the back of the house, paving the driveway and doing the sod work. She had talked to the builder about these matters on several occasions between March, 1998 and June, 1999. As well, letters had been sent by her son's lawyer to the builder about these items.

Despite the problems with the lack of repair, David did not discuss with her ever leaving the house and returning to live with his parents in their home.

Testimony of Bob Thoburn:

Mr. Thoburn is a warranty representative for the Program, working out of their Brampton office. He has been with the program for nine years. Prior to that time he had spent many years in the construction industry as a site supervisor, a project manager, and in customer service in a variety of projects including high rise, townhouse and wood frame residential. He did the conciliation report on this application.

Mr. Thoburn testified that the Program received the request for conciliation plus the homeowner complaint form and a three page undertaking form relating to the house purchase on November 23, 1999. Mr. Thoburn inspected the house on February 15, 2000 and his report is dated March 7, 2000. At the time that Mr. Thoburn inspected the house, the builder would not enter the property, and he had to meet with the builder privately after completion of the house inspection. He did not have a copy of the Agreement of Purchase and Sale at the time he did the inspection. After that time he got a number of legal documents from the builder including the Agreement of Purchase and Sale dated June 10, 1999, the licence to occupy dated March 27, 1998, and one page of an Agreement of Purchase and Sale with the date of January 30, 1998 but no signatures. Since then, Mr. Thoburn received other documents from Mr. David Hyrski's lawyer relating to the real estate closing in June of 1999. Mr. Thoburn also has a certificate of completion and possession that has the date stamp of the Program of November 23, 1999. This certificate has two dates for occupancy, that being March 27, 1998 and June 21, 1999 plus two sets of initials beside those dates.

Mr. Thoburn stated that of the eleven items that David Hyrski had complained of to the Program, he would have warranted ten of them (he did not find a problem with item #7 that being the main bathroom floor) if it were not for the problem that these complaints did not fall under the auspices of the *Ontario New Home Warranties Plan Act*.

Mr. Thoburn combined items 1 and 2 dealing with the garage floor and the wheel chair ramp from the garage floor. He felt these defects were under the Ontario Building Code as health and safety violations and could also be major structural defects. Item # 3, the railing on the front porch, had been done by David's father. The window well defect (item #4) was a first year warranty. Item #5, the back deck, was a first year warranty. The water leakage (item #6) was inconclusive but could have been under section 14 of the Regulation. He found no problem with the main bathroom floor (item #7). The unpaved driveway (item #8) was a first year warranty matter. The laying of sod (item #9) was a first year warranty item. Both item # 10 (drywall separation in master bedroom ceiling) and item #11 (eavestrough leakage) were first year warranty items.

It was the opinion of Mr. Thoburn that the garage floor would have to be removed and rebuilt. Besides the concrete floor, the ramp would need to be rebuilt as a wooden ramp. It was Mr. Thoburn's estimate that such repairs could cost in the neighbourhood of \$7,000.00 to \$8,000.00. Mr. Thoburn felt the gravelled driveway was acceptable and to pave it would cost approximately \$3,000.00.

CLOSING ARGUMENTS

William Hyrski

Mr. Hyrski felt that builder had acted in bad faith respecting his son. The problems were safety issues for someone who is a paraplegic. They are major problems.

Counsel for the Program

There are two issues outstanding. The paving of the driveway is a first year warranty and the garage floor and ramp are second year warranties. The case is decided on the interpretation of the statute. One needs to look at the vendor definition which includes "a home not previously occupied". Here the Applicant took occupancy of the home under a licence agreement prior to purchasing and closing the sale of the home. There was no evidence of representations by the Program that these matters were under its jurisdiction.

The Peter Schatz case CRAT May 21, 1998 dealt with section 14(1) (a) of the Act and the definition of vendor. It was found that the Applicant did not fall within that section.

In the Josip Muncic case CRAT April 1985 it was determined that the certificate of possession was the best evidence of date of possession but not the only evidence to determine that issue.

The Octavio and Maria Carvalho case CRAT March 16, 1999 found that the free rent was a benefit that needed to be considered under section 14 (2) of the Act.

The Russell Lazarus and Rhonda Roth case CRAT August 28, 2000 case discussed the difference between failure to perform under section 14 (1) (a) and a breach of contract.

THE LAW:

The relevant statute is the *Ontario New Home Warranties Plan Act* .

Section 14 (1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty;

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage to such limits as are fixed by the regulations.

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

Section 1

“owner” means a person who first acquires a home from its vendor for occupancy, and the person’s successors in title.

“vendor” means a person who sells on his, her or its own behalf a home not previously occupied to an owner and includes a builder who constructs a home under a contract with the owner.

Section 13

(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(3) The vendor of a home shall deliver to the owner a certificate specifying the date upon which the home is completed for the owner’s possession and the warranties take effect from the date specified in the certificate.

(4) A warranty under subsection (1) applies only in respect of claims made thereunder within one year after the warranty takes effect, or such longer time under such conditions as are prescribed.

Regulation 892

Section 4

Each person with a claim under the Plan shall give written notice of the claim to the Corporation.

Section 15

(1) Every vendor of a new home warrants to the owner,

.....

(d) that the home is free from violations of the Ontario Building Code regulations under which the Building Permit was issued, affecting health and safety, including but not limited to fire safety, insulation, air and vapour barriers, ventilation, heating and structural adequacy;

APPLICATION OF THE LAW TO THE FACTS:

There are no fundamental disagreement between the parties as to the facts of this case. David Hyrski entered into an Agreement of Purchase and Sale to be completed by the end of January, 1998. He could not close at that time as his settlement funds were not in place, and that agreement expired. He entered into a short term licence to occupy the home dated March 27, 1998. At that time the Applicant lacked the funds needed to purchase the home, but the builder allowed him to occupy the house. David lived in the house from the end of March 1998. It would appear that he lived rent free. There is nothing in the Statement of Adjustments which could be attributed to rental costs. His parents understood that he lived there rent free. He entered into an Agreement of Purchase and Sale dated June 10, 1999, and he closed the sale later in that month. Both David and the builder hoped that his settlement funds would have been released much earlier than June of 1999.

David Hyrski is a paraplegic. He has to use a wheelchair. He needs assistance from his parents and others for his daily living routines. The house has had a number of repair issues ever since David moved into it. The builder never repaired the problems despite complaints from David, his parents and letters from David's lawyer to the builder's lawyer. David's father did many of the repairs. The outstanding repairs include the paving of the driveway and the repair of the garage floor and more particularly the wheelchair ramp from that floor to the entrance to the house. Due to defects with this ramp, David requires assistance to enter his home. It is agreed by all the parties that this is a health and safety issue.

The Tribunal must consider a threshold issue that being the definition of vendor. In order for the Applicant to have a claim under section 14(1)(b) of the Act, he must be acquiring a home from a vendor as defined under the Act. Under section 1 of the Act, the type of vendor covered by the Act is a vendor who sells a home not previously occupied. In this case David had occupied the home on a rent free basis for fifteen months prior to entering into the agreement to purchase the home in June, 1999.

The Tribunal notes that the Program has instituted a policy (not found in the Act) which extends warranty coverage for occupancy prior to selling the property if it is a type of rent- to-buy scheme as approved by the Program, which is not the case here. The document which intercedes between the two Agreements of Purchase and Sale, the licence to occupy document, makes it clear that this is not a tenancy type occupancy. As well, there is no evidence that the Applicant paid any rent during that fifteen months of occupancy. Accordingly, the Tribunal cannot hold that this situation is akin to those who occupy a property whereby the rent paid is to be accredited towards the purchase price of the home as provided by the Program's policy, which is more generous than the wording found within the legislation.

The builder in this case is not selling a "home not previously occupied", and not a "vendor" as required by the Act. Accordingly, the Applicant, David Hyrski, is not then an "owner" as defined in the Act, and he cannot ask for the relief found in section 14(1)(b) of the Act. The *Ontario New Home Warranties Plan Act* is not legislation which covers homeowners for each and every problem they may experience with their builders. It has limited coverage. It requires written notice within set time periods. It permits the Program to offset any other benefits provided to a homeowner. It has restrictions on what kinds of situations will allow for warranty claims.

The Tribunal is most sympathetic to this Applicant. His parents were very credible witnesses. They have been most supportive to their child and obviously are concerned with his best interests. It is an unfortunate situation. The Tribunal understands that the Program must act within the confines of the legislation.

ORDER:

Accordingly, for the reasons stated above, pursuant to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, the Tribunal directs the Ontario New Home Warranty Program to disallow this claim.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

RELEASED: November 8, 2000

CORNALE

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
FRANCES CORNALE

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

FRANCES CORNALE

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

KANEFF HOMES CORPORATION

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a pre-hearing in the above matter on October 31, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the pre-hearing *peremptory against the Respondent* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, November 20, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 8, 2000

ENTERPRISE RENT-A-CAR CANADA LIMITED

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding member
ELAINE ARGUE, Member

APPEARANCES: CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

PAUL WANAMAKER, Agent for the Applicant,
Enterprise Rent-a-Car Canada Limited

DATE OF HEARING: November 1, 2000

DECISION RELEASED: November 9, 2000 Ottawa

REASONS FOR DECISION

A hearing was held on November 1, 2000, at Ottawa, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Enterprise Rent-a-Car Canada Limited (the "Applicant")
Motor Vehicle:	2000 Chevrolet Cavalier, plate #AHMZ 485 (the "vehicle")
Date of Appeal:	October 12, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on November 1, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal reviewed the written and oral evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Licence Suspension Appeal Tribunal

BETWEEN:

Enterprise Rent-A-Car Canada Limited

Owner/Appellant

-and-

Ministry of Transportation for Ontario

Respondent

Appeal of Impoundment Order

DATED: October 13, 2000

Enterprise Rent-A-Car Canada
Limited
1916 Merivale Road Suite 200
Nepean, ON K2G 1 E8

Paul Wanamaker
Group Loss Control Supervisor
(613) 228-2998 phone
(613) 228-1285 fax

Schedule "A"

Owner's Position on Appeal

BACKGROUND FACTS

Enterprise Rent-A-Car Canada Limited, the owner of the 2000 Chevrolet Cavalier seized on October 2, 2000 disputes the seizing of its vehicle under the Impoundment Order for the following reasons:

- The vehicle was subject to a rental agreement number D062900 entered into between Djohara Osmon and Enterprise Rent-A-Car Canada Limited. This contract provided that Ms. Osmon was the only authorized driver of this vehicle. When the vehicle was impounded it was alleged that it was being driven by Ayanle Aden, who was not authorized to drive the car.
- The rental agreement specifically states that the renter, Djohara Osmon, was the only authorized person allowed to drive the vehicle.
- Ms. Osmon at all material times had a valid Ontario drivers license (bearing Ontario permit #080421713686020)
- Pursuant to the terms and conditions of the rental agreement, there were no other authorized drivers and that the renter, Ms. Osmon, was made aware that she was not to permit anyone else to drive the car.
- Ayanle Aden is cited as the operator of the subject vehicle. He has reportedly been charged with driving with a suspended license with the possibility of more charges to be laid after-the-fact.

OWNER'S POSITION AND LEGAL ARGUMENT

Stolen vehicle appeal argument:

The legislation permits as one of the grounds of appeal *"that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made"*.

Section 55.1(2) of the Act states:

Where a police officer or officer appointed for carrying out the provisions of this Act is **satisfied** (emphasis added) that a person was driving a motor vehicle on a highway while his or her driver's license is under suspension under section 41 or 42, even if it is under suspension at the same time for any other reason, the officer shall,

(a) (a) notify the Registrar of the fact or cause the Registrar to be notified; and

(b) (b) detain the motor vehicle that was being driven by the person whose driver's license is under suspension until the Registrar issues an order under subsection (3).

For the purposes of this ground for appeal that the subject vehicle was stolen at the time of the order, the lack of a definition of "satisfied" is not critical. It is enough to know that the officer's satisfaction determines the applicability of the Act. The officer's judgment is enough to determine "guilt" for purposes of imposing the penalty described in the Act. One must necessarily assume that at the time of the order, the officer was acting competently and with a clear understanding of the facts at hand.

Taken from a decision released by the Tribunal of Derek Israel, Stuart Cork, and John Oostrom on March 14, 2000, a definition of "stolen" from the Shorter Oxford Dictionary is submitted:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance.

The previously rendered decision also volunteered a definition of "stolen" from Black's Law Dictionary (Sixth edition), page 1419-1420:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen " if the defendant there after forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 US. 407, 417, 77 S. Ct. 397, 402. 1L.Ed. 2d 430.

Finally, Section 322 of Martin's Criminal Code, 1994 defines "Theft" as:

322. (1) *Every one commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his use or to the use of another person, anything whether inanimate or inanimate, with intent,*

(a) (a) *to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it, of the thing or of his property or interest in it:*

Enterprise Rent-A-Car rental agreement D062900 documents a contract between Djohara Osmon and Enterprise Rent-A-Car Canada Limited. There are no other authorized drivers permitted. Because the vehicle was impounded on authority of section 55.1(2), it must follow that the officer was satisfied that the driver's license of Ayanle Aden was suspended under section 41 or 42. It is a "FUNDAMENTAL BREACH OF THE CONTRACT if the car is used or driven:

- (e) By any person other than the renter without written consent of owner and/or
- (g) Under authority of any license other than his own. Renter warrants that the license shown to owner at time the car was rented is their own and fully valid."

Furthermore, if a renter were to request an Additional Driver, they would have to consent to the following:

"I request owner's permission to allow (additional driver) to drive the vehicle rented by me. I understand and agree they are under my control and direction and that I am responsible for their acts and for the complete fulfillment of all the terms and conditions of this rental agreement. "

Thus, it is clear that in no circumstance would Enterprise Rent-A-Car Canada Limited ever rent to or consent to allowing a person who is subject to section 55.1(2) of the Act to drive the rental vehicle. One can only conclude that for such a person to drive a rental vehicle would constitute an attempt to *'fraudulently and without colour of right convert to his use or to the use of another person, anything whether animate or inanimate, with intent, a) to deprive, temporarily or absolutely, the owner of it, or a person who has a special property or interest in it...'* (Martin's Criminal Code, section 322).

By definition, in particular, those suggested by the past tribunal, the subject vehicle is "stolen" if obtained by theft. In addition the subject vehicle is deemed to be stolen if acquired or possessed as a result of some wrongful or dishonest act or taking. Finally, the subject vehicle is deemed stolen if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. Since Ayanle Aden made no attempt to obtain permission to drive the vehicle from its owner, and since the owner would never consent to Ayanle Aden's driving of that vehicle while his license was suspended, the vehicle must be declared to be stolen at the time that the charge was laid (driving with a suspended license).

Due diligence appeal argument:

The legislation permits as one of the grounds of appeal, that *"the vehicle owner exercised due diligence (ie. all reasonable efforts) to determine that the driver's license was not suspended."*

Due diligence has been defined by the Ontario Court of Appeal to be the following:

*"[T]he defence of due diligence may take one of two forms: (1) holding a reasonable belief in a mistaken set of facts, and (2) **taking all reasonable steps to avoid the offending event** " (emphasis added)*

In the context of regulator offences the Court in *R. v. Bata Industries Ltd.* (No. 2.X 1992), 70 C.C.C.(3d)394(Ont. Prov. Div.) held that in order to establish the defence of "due diligence" in relation to a charge under an environmental protection statute [which the owner submits is analogous to the *Comprehensive Road Safety Act*] the accused must establish that he/she/it exercised all reasonable care by instituting a proper system to prevent the commission of the offence and by taking reasonable steps to ensure the effective operation of such a system.

By taking the steps outlined in the background facts, it is Enterprise's position that they in fact met the standard of due diligence for the following reasons:

- It entered into an agreement with a person who had a valid Ontario driver's license. Pursuant to the contract that was in place, no other drivers were permitted. This specific box was signed by Ms. Osmon indicating that this clause had been explained to her and that she understood that there were no other permitted drivers. At this point, Enterprise allowed its vehicle to be rented on the basis of the above conditions.
- When the vehicle was impounded, it was impounded because it was alleged to have been driven by Ayanle Aden. Ayanle Aden was not an authorized driver under the rental contract. At no time did Enterprise allow Ayanle Aden to gain access to the keys, nor at any time was Ayanle Aden an authorized driver.

Thus the owner submits that prior to the vehicle leaving its lot, it had ensured that the only person allowed to drive the vehicle had a valid driver's license. The contract specifically prohibited other drivers. By checking the license in the manner in which they did and ensuring the rental agreement was understood, the owner submits that within the meaning of the legislation "it took all reasonable steps to avoid the happening of the event."

Owner's Position On How The Legislation Impacts On The Car Rental Industry In Relation To The Legislation's Intended Goal

The intent of the *Comprehensive Road Safety Act, 1997*, according to its preamble is to promote road safety by ... impounding vehicles of suspended drivers. The intent of the actual "Order to Impound" according to s.55(1)(4) of the legislation is to "promote compliance with this Act and to thereby safeguard the public." The owner submits that these are laudable goals of the legislature. However, the owner disputes that the impounding of this owner's vehicle promotes either of the above two goals for the following reasons:

- It would be expected that the impounding of the vehicle being driven by a suspended driver, will usually impound the vehicle owned by the driver, which would promote safety as the person whose license is suspended has now lost the vehicle that they own.
- The impounding of the vehicle being driven by a suspended driver, but not owned by the driver, punishes the person who gave his/her consent to the suspended driver to drive their vehicle. This too promotes safety as one would expect that the owner upon paying the over \$1000 fee for storage etc. and losing their vehicle for a minimum of 45 days, would not likely allow this person, or indeed any other person, to drive their vehicle without showing proof of a valid driver's licence. This too makes common sense and promotes compliance with the Act and safeguards the public.

However, the impounding of an innocent third party's vehicle, notwithstanding their complete compliance with the obligations to ensure that the persons who rented the vehicle had a valid licence, does not promote compliance with the Act, or increase road safety.

In this instance that goal is not met, due to the fact that neither the suspended driver nor the renter have lost a vehicle that they own, nor are they going to have to initially pay the fine. The owner, which in this case is a car rental company, has done nothing wrong, and has in fact ensured in the only feasible and plausible manner available to it, that only an authorized driver was driving their vehicle. To impound their vehicle in no way promotes road safety as it does nothing to penalize the renter or owner, who the car rental company must pursue to try and recover the impound fee and lost rental income.

Impounding a car rental company's vehicle is in no way a deterrent as the car rental company has to continue renting vehicles to the public in order to provide a

necessary service to the public as well as continuing its business. Absent requiring an up front deposit equal to the impound fees plus the lost income due to the duration of the penalty (45-180 days), an amount possibly exceeding \$7000.00, on every vehicle rented, there is no way that the car rental company can protect itself from having its vehicle impounded, if a renter who is authorized to drive the vehicle gives the keys to a third party who is not, and the car is then impounded.

Assuming that the car rental company has taken reasonable steps to confirm that the renter has a valid driver's license, the appropriate remedy for a situation such as this, is the creation of a strict liability offence for the renter of the vehicle, creating an onus on the renter to establish that they exercised due diligence in giving their keys to someone else. The renter would be assessed the same fine the owner currently faces (the storage and impound fees amount to a de facto fine of approximately \$1000 since this amount must be paid in full in order to regain possession of the car), and be responsible for the fine, and the car would then be released back to the rental company. This system would create the necessary deterrent for the renter, and protect those companies that have exercised due diligence in the renting of these vehicles.

Absent a provision such as this, car rental companies will become the dupes of persons who rent vehicles with valid licenses, but give them to people that do not have valid licenses. The renter faces no immediate consequences as they do not lose his or her car for 45 days or more, nor does the renter have to pay the impound fee etc. The car rental company as a condition for the release of the car pays these fees up front. Other than being sued civilly for the approximately \$3000-\$7000 dollar charge for every impounded vehicle (includes loss of use while the vehicle is impounded) which assumes, that this charge can even be recovered from a renter, there is no deterrent as the legislature had intended, as the renter can go out the next day and simply rent another car from somebody else, and give the keys to the same person whose license is suspended.

It would appear that the legislature did not contemplate the drastic impact that this legislation will have on all vehicle rental businesses in the Province of Ontario, if there isn't consideration given by the License Suspension Appeal Board for situations such as this one.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 13TH DAY OF OCTOBER 2000.

Enterprise Rent-A-Car Canada Limited
1916 Merivale Road Suite 200
Nepean, ON, K2G 1 E8

(613) 228-2998 phone
(613) 228-1285 fax

Paul Wanamaker
Group Loss Control Supervisor

At the hearing, Paul Wanamaker, representative of Enterprise Rent-A-Car Canada Limited, emphasized that the impounded vehicle was rented to Ms Djohara Osmon. Mr. Wanamaker produced a copy of the rental agreement showing Osmon was the only authorized driver.

In his argument, Mr. Wanamaker contends, on behalf of Enterprise, that since the vehicle was driven without the consent of the owner, and further that the owner, i.e. Enterprise would never allow the vehicle to be driven by a suspended driver, the vehicle is deemed stolen.

Enterprise registered a complaint with the Ottawa police. Complaint number # 00206802 was taken by Constable E. Matthews, and a charge against the suspended driver of "taking a vehicle without consent" is pending. No other evidence as to the facts relating to the taking of the vehicle is before the Tribunal.

Mr. Wanamaker argued that other than by way of the above mentioned terms and conditions for rental being given to every renter, Enterprise Rent-A-Car Canada Limited was not, in any way, in a position to predict and/or prevent that another person would be driving the vehicle. Thus, it is not reasonable to expect Enterprise to carry out due diligence.

Mr. Wanamaker, the representative for Enterprise Rent-A-Car submitted a copy of the rental agreement and documents.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Ayanle Hassan Aden;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified or prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 10, 2001

At the hearing, the Respondent re-iterated the applicable law.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Board.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Board may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (c).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of “stolen” as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black’s Law Dictionary (Sixth edition), page 1419-1420 provides the definition of “stolen” as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word “stolen” as used in the crime of interstate transpiration of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed “stolen” if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of “due diligence” as follows:

Due: **A.** adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the due diligence ground of appeal as provided in subsection 50.2(3)(c) of the Act.

To succeed in this appeal under section 50.2(3)(c), the Applicant must establish that the Applicant "exercised due diligence in attempting to determine that the driver's licence of

the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension". The exercise of due diligence is with respect to the status of the driver "at the time in respect of which the order [of impoundment] was made". Here, that is Ayanle Aden. Ayanle Aden, it is agreed, was unknown to the Applicant, and the Applicant made no determination respecting the status of Aynale Aden's driver's licence. That being the fact, the Applicant can not succeed under section 50.2(3)(c) which requires not only that the Applicant make this determination but do so with due diligence. The statute clearly states in subsection 50.2(3) that the only grounds of appeal are those set out in that subsection. The Tribunal has jurisdiction only to deal with the wording of the statute before it.

The Tribunal notes that Enterprise Rent-A-Car Canada Limited ensured that the renter Ms. Djohara Osmon, was the holder of a valid driver's licence, prior to renting the vehicle. However, the law requires that due diligence be carried out upon the driver of the motor vehicle, at the time of impoundment. Mr. Ayanle Hassan Aden, was the driver when the vehicle was impounded, Enterprise failed to carry out diligence to ensure Mr. Aden was the driver of a valid driver's licence.

The second ground of appeal argued by the Applicant is that the motor vehicle was stolen as provided in subsection 50.2(3)(a). The criteria needed to establish "Stolen" are set out above and include not only the taking of a vehicle but an intent to deprive the owner of the rights and benefits of ownership permanently.

Was the vehicle stolen at the time of impoundment?

No charge of theft were laid against the suspended driver. A charge is pending of "taking a vehicle without consent". Little evidence directly relating to the taking of the vehicle is before this Tribunal. The Tribunal finds that there is insufficient evidence before it to support the ground of appeal that the vehicle was stolen at the time of the impoundment, as described by section 50.2(3)(a) of the Act. Accordingly, the Applicant's ground of appeal based on the vehicle being stolen is dismissed.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Elaine Argue,
Member

RELEASED: November 9, 2000

WILLIAMS and MAXAM

SHARON WILLIAMS AND DANIEL MAXAM

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

SHARON WILLIAMS, appearing on her own behalf
KAREN JONES, Counsel, representing the Ontario New Home
Warranty Program
No one appearing for Chahal & Son Contractor Inc., Added Party

DATE OF
HEARING: November 8, 2000 Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31 as amended, Sharon Williams and Daniel Maxam, (the "Applicants") appealed a decision of the Ontario New Home Warranty Program set out in a decision letter dated April 25, 2000;

UPON MOTION, made by counsel for the Ontario New Home Warranty Program (the "Program") at the onset of the hearing on November 8, 2000, that the Tribunal allow the matter to be adjourned and that the Tribunal exclude material produced by the Applicants at the commencement of the hearing, on the basis of untimely disclosure, and upon hearing submissions,

This Tribunal Orders that:

- a) An adjournment is granted so that Counsel for the Program may consult an expert for the purposes of examining the said material;

- b) Counsel for the Program is to forthwith provide the Registrar of this Tribunal with the earliest dates of its expert's availability, so that the Registrar may fix a date for the hearing of this matter by this Tribunal (the "hearing");
- c) The Applicants are to provide the Program with reasonable access to the Applicants' premises to verify the Applicants' photographic and videotaped material on which they intend to rely at the hearing;
- d) The Applicants are to provide to the Program the Curriculum Vitae of any expert witness upon whom they intend to rely at the hearing.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: November 8, 2000

AMAN ENTERPRISES 1989 LTD.

IN THE MATTER OF an Application by **Aman Enterprises 1989 Ltd.** dated July 12, 2000 for a hearing before the Licence Appeal Tribunal pursuant to Section 50(1) of the *Highway Traffic Act* appealing the Suspension Order of the Deputy Registrar dated July 10, 2000;

AND IN THE MATTER of the *Highway Traffic Act* R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator Registration CVOR #113-874-580 issued to **Aman Enterprises 1989 Ltd.**;

AND IN THE MATTER of the plate portion of permits and number plates for all commercial motor vehicles and trailers registered in the name of **Aman Enterprises 1989 Ltd.** and **Sanghera, Kultar, S.** ;

AND IN THE MATTER of the Commercial Vehicle Operating Record of **Aman Enterprises 1989 Ltd.** and **Sanghera, Kultar, S.**;

BETWEEN

AMAN ENTERPRISES 1989 LTD.

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TO APPEAL A SUSPENSION AND SEIZURE ORDER

TRIBUNAL: BRIAN K. MAROTTA, Vice Chair
CHARLES SANDIFORD, Member
MALCOLM FEALING, Member

APPEARANCES: PATRICK DI MONTE
Counsel for the Applicant

MURRAY FORBES
Counsel for the Respondent

DATES OF HEARING: October 23, 24, & 25, 2000

Toronto

GLOSSARY OF TERMS

CVIR:	Commercial Vehicle Inspection Report
CVOR:	Commercial Vehicle Operator's Registration
HTA:	<i>Highway Traffic Act</i> , R.S.O. 1990, Chap. H.8 (as amended)
MTO:	Ministry of Transportation, Ontario
SPPA:	<i>Statutory Powers and Procedures Act</i> , R.S.O. 1990, Chap. S.22 (as amended)
Tribunal:	Licence Appeal Tribunal
Registrar:	Registrar of Motor Vehicles
CVSA:	Commercial Vehicle Safety Alliance

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by Aman Enterprises 1989 Ltd. (the "Applicant" or the "Company") respecting the decision of the Registrar of Motor Vehicles (the "Respondent") dated July 10, 2000, pursuant to section 47, 47 (10) and 47.1 of the *Highway Traffic Act*, (Ontario) (HTA" or the "Act"), that CVOR certificate # 113-874-580 issued to Aman Enterprises 1989 Ltd. and plate portions of permits for all commercial motor vehicles and trailers registered in the name of Aman Enterprises 1989 Ltd. and Sanghera, Kultar, S., will be suspended for a period of thirty days.

Based upon the review of the safety records of Sanghera, Kultar, S., and Aman Enterprises 1989 Ltd., a Notice of Suspension and Seizure dated the 4th day of May 2000, was issued proposing a thirty day suspension of CVOR certificate # 113-874-580 issued to Aman Enterprises 1989 Ltd. and plate portions of permits for all commercial motor vehicles and trailers registered in the name of Aman Enterprises 1989 Ltd. and Sanghera, Kultar, S. The notice was sent by fax and courier to both parties at the head office of the Company located in Surrey, British Columbia. The notice was based upon the safety records of Sanghera, Kultar, S. and Aman Enterprises 1989 Ltd. including Section Analysis/Record Summary/Performance Analysis Reports, Commercial Vehicle Operator Record (search dated April 28, 2000), Safety Net Inspection Reports, Accident Reports and ICON Inquiry Report of Outstanding Fines dated April 27, 2000. It provided for an opportunity to attend a meeting with the Deputy Registrar on the 30th day of May 2000, to show cause why the Suspension and Seizure Order should not be issued.

On May 30th, 2000, a Show Cause Meeting was held at the Ministry of Transportation in St. Catharines. Present were Greg Beatty, Deputy Registrar of Motor Vehicles, Margaret Mooney, Head of Control and Sanctions, William Herale, Carrier Safety Rating Administrator and Kultar Sanghera. Mr. Sanghera stated that he was operating under a Power of Attorney by the owners of the Company who were his brother, Sukjinder

Sanghera and Kuldip Sanghera, who both resided in England. The Ministry records indicated that the President was Kultar Sanghera, although he stated that it was actually his brother, Sukjinder Sanghera. At this meeting, Mr. Sanghera was to produce all documentation upon which he intended to rely; however, he indicated that the suitcase that he brought to Ontario with him containing all of his material to present at the meeting had been lost by the airlines. Accordingly, he presented no documents at that meeting, although matters were discussed. He was given an extended period of time to produce his documentation. Mr. Sanghera reviewed the documentation of the Ministry of Transportation.

The Sanction Analysis of May 2000, was done both on Kultar S. Sanghera and Aman Enterprises 1989 Ltd. Mr. Sanghera clarified that he personally was not a registered CVOR holder but held a Competency Certificate. Therefore, Mr. Sanghera stated that all events appearing on his personal operating record should be transferred to Aman Enterprises 1989 Ltd.'s CVOR as he is not a registered CVOR holder and owns no vehicles.

Mr. Sanghera was not able to accurately state the number of power units operated by the Company at the present time, or the number of double shifted vehicles, or the percentage of travel over the past two years. Mr. Sanghera stated that Aman Enterprises 1989 Ltd. had purchased ten new Mac trucks this year, replacing some of their own fleet, and that there had been a U.S. D.O.T audit in May of 2000 showing an improvement since the last audit. Also, he had hired Sandy Power as a Safety Supervisor and felt that his Company had improved its level of compliance. In his opinion, there was now better record keeping. Log books/hours were being monitored.

Mr. Sanghera testified that an Accident Review Committee had been set up. All of the Company's accidents had occurred in Ontario except for one and that there had been none in the past six months. It was brought to his attention that U.S. reports had indicated numerous accidents in the United States in the past two years. Mr. Sanghera was unaware of the outstanding fines and indicated he would resolve them.

By June 16, 2000, the Ministry had still not received the information that was requested from Mr. Sanghera during the meeting of May 30, 2000. An updated operating record for Aman Enterprises 1989 Ltd. including events added since the last meeting was sent to Mr. Sanghera.

On June 22, 2000, Mr. Sanghera responded to the Ministry and enclosed much of the information requested. In the response, Mr. Sanghera also reiterated how Aman Enterprises 1989 Ltd. was committed to safety and some of the steps that the Company

had taken to improve compliance and safety at the Company. Among the documents was a Power of Attorney given May 6, 1996 by Kuldip Singh Sanghera appointing Baland Iqbal Singh Sanghera, Dispatcher, to be his Attorney in accordance with the Powers of Attorney Act. Further information was requested by Mr. Herale of the Ministry and was responded to by Sandy Power on July 6, 2000. The outstanding fines were paid.

On July 10, 2000, the Deputy Registrar of Motor Vehicles issued the Suspension and Seizure Order which is the subject matter of this appeal. That Suspension and Seizure Order, dated July 10, 2000, states as follows:

SUSPENSION AND SEIZURE ORDER

WHEREAS a Notice of suspension and Seizure dated the 4th day of May, 2000 was issued proposing a 30 day suspension of CVOR certificate # 113-874-580 issued to Aman Enterprises 1989 Ltd. and plate portion of permits for all commercial motor vehicles and trailers registered in the name of Aman Enterprises 1989 Ltd. and Sanghera, Kultar, S.

AND WHEREAS provided in the Notice, you had the opportunity to attend a meeting with the Deputy Registrar on the 30th day of May, 2000 to show cause why the Suspension and Seizure Order should not be issued. You attended on that day, however your submissions were in a suitcase lost in transit. You were supplied additional time to replicate your submissions and were requested to supply specific documents as outlined in my letter dated June 16, 2000. A written submission dated June 22, 2000 was received and a fax dated July 5, 2000 was sent providing additional information.

AND WHEREAS I have reviewed your written submission dated June 22, 2000, fax dated July 6, 2000, your safety records including your record of convictions, accidents, vehicle inspections, and history of past dealings with the Ministry and I remain concerned for highway safety.

NOW THEREFORE IT IS ORDERED that pursuant to Sections 47, 47(10) and 47.1 of the *Highway Traffic Act*, that as of the 17th day of July 2000, CVOR certificate # 113-874-580 issued to Aman Enterprises 1989 Ltd. and plate portion of permits for all commercial motor vehicles and trailers registered in the name of Aman Enterprises 1989 Ltd. and Sanghera, Kultar, S. will be suspended for a period of 30 days.

AND TAKE NOTICE that the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits and the number plates, will be seized.

This Suspension and Seizure Order will be effective at 8:00 a.m. Eastern Daylight Savings Time on the 17th day of July, 2000 to 7:59 a.m. Eastern Daylight Savings Time on the 16th of August 2000.

On July 12, 2000, Aman Enterprises 1989 Ltd. appealed the decision of the Ministry of Transportation upon the following basis:

1. CVOR # 113-874-592 was used by inspection official when CVOR # 113-874-580 should be used. CVOR # 113-874-580 was issued to Aman Enterprises 1989 Ltd. and all our trucks and trailers are registered to Aman Enterprises 1989 Ltd. It was not our mistake and we clarified it.
2. Aman Enterprises 1989 Ltd. have improved its safety records over the years. We have full time Safety Manager on duty to check log books, etc.
3. At Aman Enterprises 1989 Ltd. we feel this is very harsh penalty to shut down a Company for thirty days. If Aman Enterprises 1989 Ltd. loses its certificate to operate in Ontario (which is part of our route) we will be forced to shut down and over fifty-five people can lose employment.
4. Aman Enterprises 1989 Ltd. last U.S. D.O.T. review in May/00. The Company got satisfactory rating, which reflects an improvement.

On August 28, 2000, there was a Pre-hearing Conference between the parties at the offices of the Licence Appeal Tribunal. Mr. Forbes was present as Counsel for the Respondent and Sandy Power as Agent for the Applicant via teleconference. The Pre-hearing Conference was held before Vice Chair Marjorie Hiley, and an Order was released on August 29, 2000. In that Pre-hearing Order, the hearing dates of October 23, 24, and 25, 2000, were established as well as the filing dates for submissions and disclosure of evidence from both the Applicant and Respondent.

PRELIMINARY MATTERS:

At the outset of this Hearing before the Licence Appeal Tribunal on October 23, 2000, the Solicitors for both parties requested a recess to see if any of the issues could be narrowed. Upon the resumption of the Hearing shortly thereafter, the Solicitors for both parties had agreed that the CVOR Certificate of Kultar Sanghera was not in issue as he was not the owner of any vehicles. The safety analysis on Kultar Sanghera with the incidences reported thereunder were transferred to Aman Enterprises 1989 Ltd. Mr. Di Monte on behalf of the Applicant advised the Tribunal that the CVOR competency certificate of Kultar Sanghera would be surrendered to the Ministry.

Both Mr. Forbes and Mr. Di Monte chose to give opening statements. In Mr. Di Monte's opening statement, he took the position that the purpose of the legislation was to protect the public and that steps taken by Aman Enterprises 1989 Ltd. prior to and after the meeting with the Deputy Registrar would show that what the legislation sought to achieve had already been achieved. The Company had put into place measures before the hearing which have shown results and demonstrated that the Company was no longer a risk to the public.

Mr. Forbes objected to any new evidence being introduced and relied upon Regulation 574, section 3 (6) and (7). He argued that any evidence to be given at this time must be restricted to evidence that was before the Registrar at the time the Order was made.

Mr. Di Monte argued that the Company would not be producing any fresh evidence to show that there was anything wrong in the material which was before the Registrar, to which he did not object. The evidence would only be to show that measures that had been put in place by the Company and that were before the Registrar, had produced better safety results and were continuing to produce those results.

The Tribunal ruled that the results of continuing procedures which were started before the Show Cause Meeting were relevant and the Tribunal would hear the Applicant's evidence in that regard. The Tribunal has noted that Section 3(7) does not speak of the evidence being only submitted in the forum of a show cause meeting. It refers to "...such evidence as was submitted to the Minister or the Registrar...". It, therefore, appears appropriate that any evidence submitted to the Minister or Registrar at any time leading up to any hearing can be reviewed by the Tribunal as long as that evidence deals with relevant issues which have a nexus with the facts existing at the time of the Registrar's order and meet the timely disclosure requirements of the Tribunal. The relevant issues are those which were under consideration or discussed at the time of the show cause meeting and when the decision of the Registrar was rendered following the show cause meeting. The Tribunal is, therefore, not restricted to hearing only the evidence that was before the Minister or the Registrar at the show cause meeting, providing that the above requirements are met. The Tribunal has the jurisdiction to accept evidence that it finds credible and pertinent to the issues. The information before the Registrar includes, among other things: accidents, convictions, inspections and a comparison of the violation rates and measures taken by the Applicant to improve its safety record which may need time to produce results. Therefore, the results of changes in safety measures implemented by the Applicant at the time the Registrar is formulating the Registrar's decision are relevant to this hearing.

FACTS:

Testimony of William Herale

Mr. William Herale was the only witness presented on behalf of the Registrar of Motor Vehicles. Mr. Herale is a Carrier Safety Rating Administrator. In that position, he researches and compiles materials on operators for presentation to his superior, Margaret Mooney, for further clarification and review. The materials are then presented to the Deputy Registrar.

Mr. Herale explained the workings of the commercial vehicle operator registration (CVOR) system, which was first initiated in 1987 and has been updated since that time. A goal of the CVOR system is to promote safe operation of commercial motor vehicles as defined by the Act. The CVOR system monitors a two-year time frame based upon certain computer data which is updated regularly and entered into the CVOR system. The updating of the system is a continual process.

The system works upon a point rating system. An example is that convictions are rated from 0 to 30 points for violations with the more serious violations having the higher points assigned to them. The accidents are rated on a range from 0 to 12 points depending upon the seriousness and the driver impropriety involved. The out of service (OOS) has a 2 point maximum if two OOS items are reported on a vehicle inspection.

The Commercial Vehicle Safety Alliance (CVSA) is a North American committee of government and industry representatives. It establishes criteria as to truck hazards and as to the OOS criteria whereby a vehicle is detained until repairs are made. Codes are used to distinguish the various OOS defects.

All operators in Ontario must register in the CVOR system. The CVOR system shows only events occurring in Ontario. Upon registration, a CVOR certificate is issued to the operator and each motor vehicle would have a photocopy of the CVOR certificate. The system, which has again been recently updated, continually monitors the operators, and a number of steps are involved. In the first step, warning letters are sent to the operators. This usually occurs when the overall violation rate is over 35%. At 65%, the computer again will bring the record of the operator forth and a facility audit is recommended. At the 80% overall violation rate, the computer again generates a record which results in an interview with a Ministry official. If the overall violation rate does not improve or if there is no compliance by the operator, sanctions will be imposed.

The CVOR system's thresholds were established by taking the worst 5% of the records of operators in Ontario. Therefore, if any CVOR holder is above the threshold, that means that the holder is in the top 5% of the worst records in Ontario. The thresholds are adjusted in accordance with the information received on the operator and its vehicles, and are adjusted in accordance with the number of vehicles and the percentage of distance traveled in Ontario.

In May 2000, there was a sanction analysis of Kultar Sanghera and Aman Enterprises 1989 Ltd. done by Mr. Herale. The time period examined was from March 29, 1998 to March 28, 2000. The operating record (CVOR) of Kultar Sanghera showed an actual violation rate of 132.22% and an actual violation rate of Aman Enterprises 1989 Ltd. of

127.77%. It was explained by Mr. Herale that Kultar Sanghera held a competency certificate and had a CVOR number assigned to him, but he did not hold a CVOR certificate. By error, some events that were recorded were done so under Mr. Sanghera's CVOR number instead of the CVOR number of Aman enterprises 1989. This was not corrected until after the meeting on May 30, 2000, wherein Mr. Sanghera advised the respondent of the mistake and that he was not a vehicle owner and did not hold a CVOR certificate. This was despite the fact that Mr. Sanghera was sent a warning letter on April 29th, 1997 to which he did not respond.

The chronology of events regarding Aman Enterprises 1989 Ltd. is as follows:

1996.12.06	Warning letter to the operator;
1997.11.20	Letter to British Columbia requesting corrective action;
1998.01.12	British Columbia indicated that an audit would be conducted;
1998.03.06	A wheel separation occurred (charged/convicted);
1998.04.22	Trailer inspected with critical defects at a non impound location;
1999.01.25	CVOR interview;
1999.11.03	Safety rating letter sent proposing a "conditional" rating;
1999.11.03	Letter to British Columbia requesting an audit;
1999.11.03	U.S. D.O.T. compliance review (unsatisfactory);

The sanction analysis, taking into account both Aman Enterprises 1989 Ltd. and Kultar Sanghera, established that there had been compliance interventions by Ontario, British Columbia and the United States and that current combined overall violation rate was 127.77%. There were six accidents within the past two years indicating an impropriety on behalf of the driver. The carrier also had outstanding fines.

In the CVOR interview of January 25, 1999, Kel Sanghera attended on behalf of the Company as his brother, Kuldip Sanghera was living in England. Mr. Herale reported that there were a number of items which were discussed and agreed upon at that meeting. One of the stipulations was that the operator would inform the Ministry in writing about progress made in implementing the action plan every four months beginning in April, 1999. Mr. Herale reviewed the items listed on the action plan and on most of the items; he could not verify any compliance by the operator as reports had not been received from the operator. His records showed that there were a number of driving convictions after April, 1999 which indicated noncompliance by the operator.

On November 3, 1999, the company was given a conditional safety rating which it did not dispute. Another letter was sent to British Columbia requesting an audit of the company. In December 1999, there was a U.S. D.O.T. compliance review of Aman enterprises 1989 Ltd. in which it was given a rating of "unsatisfactory". It was reported to Mr. Herale that that rating remained current in March of 2000. On April 27, 2000, an icon inquiry report of outstanding fines indicated that the company had fines outstanding at that time. Mr. Herale reviewed the safety net inspection reports (April 1, 1998 to March 31, 2000), the CVOR record search dated April 28, 2000 and prepared the sanction analysis of CVOR record, together with record summary and performance analysis reports dated May 2000.

The notice of suspension and seizure for thirty days, dated May 4th, 2000 was then issued. As a result of the show cause meeting of May 30th, 2000 and the subsequent information received from the applicant dated June 16th, 22nd and July 6th, 2000, the Suspension and Seizure Order was issued July 10th, 2000.

The notice of appeal dated July 12th, 2000 and its contents, as well as the Pre-hearing Order of August 29th, 2000, has been described above.

As a result of the information received from Kultar Sanghera at the May 30th, 2000 meeting, subsequent information received, and the CVOR update of information, Mr. Herale compiled an updated sanction analysis in September, 2000.

The updated sanction analysis of September, 2000 prepared by Mr. Herale took into account the transfer of the record of Kultar Sanghera to Aman Enterprises 1989 Ltd., pursuant to the information given by Kultar Sanghera. It reflected the fleet size of 25 vehicles (6 owned and 19 owner/operators) with 18 of those units being double shifted.

Ontario travel represented 16.4% of the total kilometers based on IFTA reports. As the Suspension and Seizure Order was signed on July 10, 2000, the two year period taken into account was July 10, 1998 to July 9, 2000. The operating record of Aman Enterprises 1989 Ltd. over that period of time showed a decrease in the violation rate of convictions and inspections, but an increase in the accident threshold. Mr. Herale gave evidence that when the overall threshold reaches 100%, the operator is within the top 5% of the worst offenders in Ontario. The violation rate of the overall threshold of Aman Enterprises 1989 Ltd. was 185%. The accident threshold of Aman Enterprises 1989 Ltd. was 267.9%. Mr. Herale stated that this was the worst record that he had seen in all his years of involvement with the CVOR program.

In cross-examination, Mr. Herale gave evidence that the Suspension and Seizure Order of the Registrar is not vehicle specific and does not discriminate between poor or good drivers and rigs. The order captures all vehicles and drivers operating under that particular CVOR number. It would be possible for an owner/operator to still operate his rig in Ontario if he was under a different CVOR number; however, it would be usual that any new company would screen a driver before hiring, which would reduce the chance of that happening. Also, Mr. Herale agreed that the material he requested on July 6, 2000 was promptly responded to, but the material sent did not significantly change the figures but, reinforced the figures that had been produced by the Ministry. Mr. Herale confirmed that the time period monitored is a two year time frame, but the Ministry also looks at the trend of violations and what occurred in the last six months. The violation rate of Aman Enterprises 1989 Ltd. actually increased when combined with the violation rate of Kultar Sanghera and the additional violations that were reported late.

Mr. Herale stated that according to the operating record of the Company, it appeared that Aman Enterprises 1989 Ltd. was having a problem with poor drivers. When he was advised that all but two of the drivers with convictions were no longer working for the company, he agreed that this was not brought to the attention of the Deputy Registrar at the show cause meeting. He stated, however, that the onus is on the Company to show the Deputy Registrar why the Suspension and Seizure Order should not be carried out and, therefore, it was up to the Company to bring that to the attention of the Deputy Registrar. Mr. Herale agreed that the record summary of Aman Enterprises 1989 Ltd.

showed an improvement in 2000 over the previous years in most matters; however, there was not a sufficient time frame or number of inspections to show any trend.

Mr. Herale testified that although there had been no repeat of the wheel separation incident of 1998, there were three infractions for failure to maintain logs which indicated that the Company needed quality control. He indicated that the Company should not just hand out a driver's manual but make sure that the drivers comply with it. When Mr. Herale was referred to the dramatic decrease in the number of speeding violations in 1999 and 2000 over the 1998 year, he replied that the year 2000 was only a little more than half over at the time of those records, and conceded that it was too early to see if that was a trend.

Mr. Herale was referred to the U.S. D.O.T. rating which upgraded Aman Enterprises 1989 Ltd. to "satisfactory" in a May 17, 2000 audit. Mr. Herale stated that the Ministry was aware of this audit from the submissions that were put forth by the company, and the Deputy Registrar had knowledge of this at the Show Cause Meeting. The Deputy Registrar, however, has discretion as to the weight to give that fact. Mr. Herale denied that he had made any recommendations to the Deputy Registrar and stated that it was totally within the Deputy Registrar's discretion whether or not to issue an order based on the records that are submitted to him. The Commercial Vehicle Operator Record of the Company strictly relates to Ontario convictions and does not take into account the convictions in any other jurisdiction. In Ontario, the CVOR holder is responsible for the actions of all its employees and owners/operators signed on with it under the CVOR number.

Testimony of Sandeep Powar

Mr. Powar was the only witness presented on behalf of the Applicant, Aman Enterprises 1989 Ltd. Mr. Powar was a third class stationary engineer who started working for Aman Enterprises 1989 Ltd. as full time Safety Manager in April 1999. He obtained a certificate for transporting dangerous goods and drug and alcohol training from the British Columbia Trucking Association.

Mr. Powar testified that all drivers for the Company are hired by him and that he personally takes a thorough history, including prior employee information for five years, which he follows up by faxing or calling prior employers.

On the driver's return from trips, Mr. Powar personally checks all drivers' papers and log books and has four levels of warning for infractions. The first level is a verbal warning, the second level a written warning, the third level is a one week suspension or fine, and the fourth level is termination. He stated that this same system was in force when he started to work for the company in April of 1999.

Mr. Powar testified that he sends all drivers for drug tests before they are hired, presents them with the safety driver's handbooks which they must read, and shows them how to fill out log books. He also stated that all drivers that had poor driving records are no longer with the company except for two drivers which were listed on the Ministry's reports.

The Company, Mr. Powar testified, currently had 23 units of which 7 do not come to Ontario. He thought that about 16% of the total distance driven by the Company's drivers was in Ontario, but he agreed that whatever was in the Ministry records was accurate.

Mr. Powar said that the owners/operators are charged a dispatch fee of 12% and they are responsible for their own units. All Company units are checked by the Company's mechanic when they come in from each trip. The trailers are checked in the yard after every trip and every six months they are inspected by Surrey Inspection, an independent, and are given a Safety Inspection Certificate. This procedure was also in place when he was hired in April 1999, and he has continued the practice. There was also a training program in place when he commenced employment with the Company, but he has made the program more intense. He referred to the Driver's Handbook, which was written by Iqbal Sanghera, but that Handbook was also in place before he started employment in April 1999 and has not been revised.

Mr. Powar produced a number of warning letters as examples of the type of letters sent out to his drivers for infractions committed by them. The Company also had a Safety Committee in place which investigates all accidents.

Mr. Powar referred to the change in the U.S. D.O.T. audit in May of 2000, which rated the Company as "satisfactory" as opposed to the November 1999 audit which rated the Company "unsatisfactory". He stated that the U.S. audits were very thorough and the Auditor spent five days at the Company's head office in 1999 and three days in May of 2000. The U.S. D.O.T. auditor went through all files, driver's records, accident reports, driver's logs and maintenance records. He did not pay too much attention to the Ontario rules because, Mr. Powar testified, the U.S. rules were more strict and if he complied with the U.S. rules, then he would have to be complying with the Ontario rules.

On cross-examination, Mr. Powar clarified that the owners of Aman Enterprises 1989 Ltd. were Kuldip Sanghera and Sukjinder Sanghera, the latter being President of the Company. Both reside in England. The general manager of the Company is Kultar S. Sanghera who operates the Company under a Power of Attorney given by Kuldip Sanghera. Iqbal Sanghera is the operations manager who also operates under Power of Attorney from his brother.

Mr. Powar testified that if the Tribunal confirms the Suspension and Seizure Order of the Deputy Registrar, that would bankrupt the Company. The Company has a contract for twenty loads a week from Ontario and has eleven owner/operators in Ontario which would leave and go to another Company. Mr. Powar did not produce the contract or any financial information to substantiate his evidence. He referred to a letter dated September 26, 2000 from Shiraz Kaba & Company Ltd., Public Accountants. The letter was addressed "to whom it may concern" regarding Aman Enterprises 1989 Ltd. The author of the letter, S. Kaba, stated that the Company's operation in Ontario was critical and to shut down the operations in Ontario would have the same effect as shutting down the whole operations of the Company for one month. In his opinion, the Company would lose customers and hundred of thousands of dollars. Mr. Kaba did not attach any contracts, financial information or any other material to substantiate the opinions expressed in his letter.

Mr. Powar testified that another person was Safety Manager before him who went to another Company, but that person remained available for information purposes after Mr. Powar was hired in April, 1999. Mr. Powar admitted that when he was hired in April, 1999 he was not advised of the safety concerns of the Deputy Registrar that were discussed with Mr. Sanghera in the meeting with Ministry representatives at the CVOR interview of January 25, 1999. Also, Mr. Powar was not present at the Show Cause Meeting of May

30, 2000, but he testified that Kultar Sanghera discussed the meeting with him upon his return to British Columbia.

ISSUES:

1. Was the Registrar justified in issuing a thirty-day Suspension and Seizure Order, and should the Tribunal confirm, modify or set aside the Registrar's order.
2. Would the Suspension and Seizure Order result in an exceptional hardship to the Applicant which would justify modification or setting aside the Registrar's order.

LAW:

- 47(1) Subject to section 47.1, the Registrar may suspend or cancel,
- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) CVOR certificate, on the grounds of,
 - (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).
- (10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to section 22(e) HTA:

- 22(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Tribunal by virtue of s. 50(1) of the HTA which provides:

- 50(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574, also addresses appeals to this Tribunal;

- 3(3) Upon receipt of a notice of appeal under subsection (1) the Board shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the Board with all the relevant documents and other material in his or her possession.
- 3(6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.
- 3(7) At any hearing under this section, the Board shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute.®

APPLICATION OF LAW TO THE FACTS:

Section 47 of the *Highway Traffic Act* provides that the Registrar may suspend a CVOR certificate on the grounds set out in that section.

The Tribunal has reviewed the considerable volume of evidence brought before it, both as exhibits and through oral testimony. The Tribunal has some concerns that the only witness produced on behalf of the Applicant was a person who had only been employed with the Applicant since April of 1999, who did not have a full knowledge of the business practices of the Applicant and was not an officer or director of the Applicant.

Although, Sandeep Powar was the Safety Manager of the Applicant, he had only been employed there since April 1999. He was not aware of the details of the CVOR interview of January 25, 1999 and was not even advised of that interview when he was hired by the Applicant. It was not explained why the Applicant did not follow through with the Action Plan and inform the MTO in writing about progress made in implementing the Action Plan.

This was to be done every four months beginning in April 1999. He was not present at the show cause meeting of May 30, 2000.

Mr. Powar had very limited knowledge of the current financial situation of the Company to support its allegation that the penalty was too harsh and would result in the Company

being forced to shut down. He gave general evidence as to what he thought was the number of contracts in Ontario, but no evidence established such contracts was produced to the Tribunal. The only evidence before the Tribunal was a letter from an accounting firm in British Columbia with an opinion of a member of the firm as to what would happen with the Company if its Ontario operations ceased for one month. The letter made reference to the Company losing hundreds of thousands of dollars, but attached no financial information or any supporting information. The Tribunal has given very little weight to this unsubstantiated letter.

Mr. Powar was knowledgeable in regard to the safety operations of the Company during the limited time that he was employed there as Safety Manager. He referred to the Record Summary to substantiate a decrease in convictions in 1999 over 1998 and a further decrease in the 7.4 months of the year 2000. This was in relation to the overall convictions, although there was an increase in convictions of some areas and an increase in 2000 over 1998 in the careless driving convictions. His evidence was that he personally checks all drivers' papers and log books and has four levels of sanctions for infractions. This was not something which he had initiated; rather, he was carrying on the same system that was in force when he started to work for the Company. The Company also had a Driver's Handbook written by Iqbal Sanghera which was given to each of the drivers, however, this was also not something that was new to the Company and the Handbook had not been updated. He testified that all Company units were checked by the Company's mechanic after each trip and inspected independently every six months. This procedure was also not new and was in place when he was hired in April 1999. The Tribunal had considerable concerns that despite the fact that it was not denied that the Company had a deplorable safety record in the past, there was no evidence given that any new procedures had been initiated by the Company to improve the situation.

One of the items objected to by the Applicant was that the CVOR number of Kultar Sanghera had a number of infractions recorded against it and these should have been under the CVOR number of Aman Enterprises 1989 Ltd. When this was corrected at the request of the Applicant in the Updated Sanction Analysis of September 2000, the Actual Violation Rate of the Applicant increased from 176.5% over the original analysis period to 187.6%. The Tribunal accepted the evidence of Mr. Herale that when the violation rate of the overall threshold reaches 100%, the operator is within the top 5% of the worst offenders in Ontario. The overall threshold of the Applicant was 185%.

The Tribunal recognizes that under the *Highway Traffic Act* and its regulations, there is an obligation of the Registrar to ensure the safety of the public. The primary purpose of such legislation is to ensure that those involved in the movement of goods and people do so in a safe fashion for all users of the highways. Public safety must take precedence over the

business operations of any one particular carrier. In this case, the Tribunal is of the opinion that the safety of the public has been seriously compromised by the number of safety infractions of the Applicant. Although the Applicant's safety record has shown improvement in the year 2000, there was no evidence that any new safety procedures had been implemented which would account for this improvement. The time frame has not been long enough to establish that there is a continuing trend of the Company to improve its safety record. The Tribunal is not convinced that the Applicant has improved its safety operations in any permanent fashion.

DECISION AND REASONS:

This Tribunal is of the opinion that the sanction as stated in the original Notice of Suspension, that pursuant to sections 47, 47(10) and 47.1 of the *Highway Traffic Act*, that the CVOR Certificate # 113-874-580 issued to Aman Enterprises 1989 Ltd. and plate portions of permits for all commercial motor vehicles and trailers registered in the name of Aman Enterprises 1989 Ltd. be suspended for a period of thirty days, is the appropriate sanction.

Pursuant to the authority vested in it under subsection 50(2) of the *Highway Traffic Act*, the Tribunal confirms the Registrar's Order of Suspension and Seizure, dated July 10, 2000, provided that to accommodate the Applicant's vehicles currently in transit in Ontario, such Order of Suspension and Seizure shall take effect at 8:00 a.m. Eastern Daylight Savings time on 16th day of November, 2000 to 7:59 a.m. Eastern Daylight Savings time on the 16th day of December, 2000.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta, Presiding Member

Charles Sandiford, Member

Malcolm Fealing, Member

RELEASED: *November 9, 2000*

DARLENE McKENZIE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: MALCOLM FEALING
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

DARLENE McKENZIE, Applicant
unrepresented

DATE OF HEARING: November 7, 2000

DECISION RELEASED: November 9, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 7, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Darlene McKenzie (the "Applicant")
Motor Vehicle: 1998 Ford Taurus, plate AFNM 979 (the "vehicle")
Date of Appeal: October 17, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 7, 2000 and proceeded as an electronic hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

- an appeal is being asked of this Tribunal on the grounds that
- "a threat to the health or safety of any person ordinarily transported by the motor vehicle." applies. I have given birth to my first child Oct. 5, 2000. Because we live in the country my vehicle is the only quick access I have to not only getting necessities but in the event of an emergency, the only quick resolution to providing medical attention for my baby.

The Applicant, Mrs. McKenzie advised that she was expecting a baby when the car was impounded. She said she was feeling ill, and her husband used the car to take her to her parents' house, a fifty-minute drive away. He was stopped by the police on his way back home and the car was impounded.

Mrs. McKenzie appealed because of her concern for her new-born child. She said that while all her basic needs were being met, she was worried about the safety of the baby in case of a medical emergency. The nearest doctor is in Cornwall, a fifteen-minute drive from her home.

In response to the Respondent's questions, Mrs. McKenzie admitted that thus far she had not experienced any problems with respect to the care of her baby. She had taken the child to the Doctor once. Her parents had been quite willing to help at the time. She also readily admitted that although she lived in the country, she had many neighbours, who would gladly assist her if her baby fell ill and had to be taken either to the Doctor or to the nearest Hospital in Cornwall.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Roderick B. McKenzie;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 25, 2003.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,

- (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant appealed under section 50.2(3)(d) of the *Highway Traffic Act* alleging that the impoundment results in exceptional hardship.

Section 22 of Regulation 574 R.R.O 1990, as amended by Ontario Regulation 632/98 provides the criteria to be considered and the criteria that is not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound a motor vehicle under section 55.1 of the Act.

The Applicant confined her appeal specifically to section 22(1)(a) of the Act, which states:

“(a) a threat to the health or safety of any person ordinarily transported by the motor vehicle.”

Her main concern was for her new-born baby. The child is only five weeks old and any illness or hint of same must not be trivialized.

In giving evidence, Mrs. McKenzie advised that her child was slightly congested and that she was planning another visit to the Doctor. Her parents would take her. She did not seem to feel that her baby was in imminent danger. In any event, she could depend on her neighbours in an emergency.

As far as the Tribunal is concerned, Mrs. McKenzie has not demonstrated that, as set out in section 22(3):

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting; or
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle.

While the Tribunal is very much aware that the health and care of a new-born infant is of paramount importance, we are satisfied that the child is presumably in good health, and that assistance is immediately available in the event of an emergency.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Malcolm Fealing, Presiding Member

RELEASED: *November 9, 2000*

ADLS/00/0297

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant
unrepresented

DATE OF HEARING: November 10, 2000 Toronto

DECISION

A hearing was held on November 10, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: November 14, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: Jeffrey M. Lee D.C.
Presiding Member

APPEARANCES: Kyle Biel
Representative for the Registrar of Motor Vehicles

Applicant
Unrepresented

DATE OF
HEARING: November 10, 2000

DECISION
RELEASED: November 14, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 10, 2000 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 14, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway*

Traffic Act was dated 18 October 2000, and was received by the Tribunal on October 18, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

AI was unable to provide the required breath sample because of a medical reason.®

Preliminary Matters

The Respondent presented to the Tribunal, the stamped certified copies of Notice to Registrar, Driving Record of the Applicant and the Vehicle Record as of Occurrence date. The Applicant presented copies of a Government Pardon for a 1990 drinking and driving conviction, an ETR bill as well as a statement of account from William Osler Health Centre. The Respondent had no objection to these late filings and the documents with consent of both parties were entered into evidence and the hearing proceeded.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal Form received October 18, 2000
- b) Exhibit # 2 Medical Information dated October 18, 2000
- c) Exhibit # 4 Government of Canada Pardon received November 10, 2000
- d) Exhibit # 5 ETR statement
- e) Exhibit # 6 Statement from William Osler Health Centre

By the Respondent:

- a) Exhibit # 3 Ministry of Transportation Submissions, 21 pages.

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason.

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) A report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of specialty.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.

Finally, section 13 of Regulation 574 (amended) provides:

AA person appealing a suspension has the onus of establishing the merit of the appeal@.

FACTS:

The Applicant was sworn and took the stand. He read into evidence his typed submission. He stated:

AO On the 30th of September 2000 at about 7:00 p.m., I got a call from a very good friend of mine, B.M., requesting to be picked up from Scarborough as he had too much to drink and was unable to drive home. So I picked him up at about 9:00 p.m. B. sat on the passenger side of my car. As soon as I took Hwy 407 from Hwy 404, B. dozed off. While I was driving, he kept leaning on my shoulder. This was interfering with my driving. I took the Goreway EXIT, and then took William's Pkwy on Airport Rd. As soon as I took this turn, about 4 or 5 police cars stopped me. A police officer came to my window and asked me to lower down my window. It was cold that night and I had all my car windows shut. As soon as I lowered down my windows, the police officer must have smelled the booze from B.'s heavy breathing in the car. No questions were asked, I was immediately searched, arrested and handcuffed and taken to the police station. There I was met with a police officer from East Indian Origin. He started questioning me in Punjabi. I indicated to him that I do not speak Punjabi fluently and that I prefer a Malay interpreter, as I come from Malaysia and not India. The police officer got very angry and warned me that they will beat me up if I refuse to speak Punjabi. But I kept insisting that I prefer Malay rather than Punjabi. He and another police officer took me into an empty room, where I was punched in the chest. I cried in pain and indicated to them that I have had a 5 By-Pass open-Heart surgery. Soon afterwards I had tremendous pain in the chest and difficulty breathing and collapsed on the floor. Ambulance was called and I was rushed to the hospital. The next day, I was discharged and taken back to the police station where I was shocked to find that I was charged for impaired driving and refusal to give a breath sample. I would like to state here very clearly that not once was I asked to blow into any Breathalyzer or asked to give a blood samples. So how could I be charged for refusal when I was not even approached?"

The Applicant had no further testimony to present and was cross-examined by the representative for the Respondent, Mr. Kyle Biel. The Applicant was asked if he had anything to drink that evening, to which he replied, "yes one beer only, at about 9 p.m." At this point in time, the Applicant had a video tape which he requested to play for the Tribunal. Mr. Biel had no objection and the tape was viewed.

The tape was a video from 22 Division showing the breath taking room with Officer #1 alone in the room. He was reading for the record the fact that the accused, would not provide a sample of his breath for testing and that he was clearly given his rights to counsel, was cautioned, and the demand for breath was read to him. The breath

machine runs out of time, as no sample was obtained, and we see nothing else on this video. According to the Applicant, he does not understand why the police did not even take him into the room? Was it not their duty to take him into the room?@

The Applicant at this point in time, stated that AI was feeling fine and had no problem to provide a breath sample, if they asked me to.@ The Applicant then stated that he was removed to a Aroom@ by two officers, whom he did not know their names or badge numbers, and was hit by both of them. He alleges that one officer hit him with his elbow in the side of his chest and the other officer punched him in the front of his chest. The Applicant stated that after he was struck, he had severe pain and told the officers that he was a heart patient. According to the Applicant, they took him out of the room and sat him on the bench. He states he collapsed, an ambulance was called and he was transported to hospital where he stated that blood was taken twice. Upon his release, he stated that he was told that Athe pain was not coming from his heart and if the pain persisted, he should follow up with his family physician. He was released and returned by Officer #2 to 21 Division. He was released on a promise to appear. The Applicant had nothing further to add and was excused from the stand.

No other witnesses were called to testify on his behalf. The Applicant relies on the medical report of Physician #1, his family physician. That report is filed as Exhibit # 2.

The representative for the Respondent, Mr. Kyle Biel, called Officer #2 Badge number 1674 to the stand. The officer was sworn and testified that the Applicant, the driver of a 1986 Oldsmobile, came to the attention of Peel Regional Police because a concerned citizen believed that the driver of the vehicle may have been under the influence of alcohol because of the erratic driving. The subject vehicle was stopped by Peel Regional Police on Airport Road. He was taken from the vehicle, searched, placed in handcuffs and taken to the police cruiser. The arresting officer was identified as Officer #3 Badge # 1720. Officer #2 Badge # 1674 also attended the scene and took charge of the driver. The handcuffs were exchanged and the driver was placed in Officer #2's vehicle. Officer #2 again stated to the accused that he was under arrest for impaired driving and that he was being transported to the police station for the purpose of providing a breath sample. The accused was informed of his rights as well as the demand for breath was made. The driver responded with Athat's your opinion, not mine. I don't speak English@. The accused was transported to 22 Division at approximately 10:23 p.m. for the purpose of obtaining a breath sample. At 22 Division, Officer #2 was met by Officer #4, who speaks Punjabi as well as Officer #1 Badge # 1799. According to the sworn affidavit of Officer #1, he was present with Officer #2 in the cell area when Officer #4 spoke with the driver in Punjabi. Officer #2 asked the questions to Officer #4 in English which Officer #4 then asked the driver in Punjabi. The driver was given his rights to counsel, was cautioned and the breath demand was made. According to Officer #1, the accused informed Officer #4 that he did not wish a lawyer and that he was refusing to blow. The driver indicated that he would not provide a breath sample and would not enter the breath testing room. Officer #4 informed the driver that he was being charged with refusal. In the sworn affidavit, it is clearly stated "I never took over custody of the driver, the driver never gave a reason why he outright refused to give a breath sample.@

Officer #2 testified that she left the accused for about 2 minutes to help move another person to another area. When she returned, she stated that the Applicant, was holding his chest. According to Officer #2, he would neither respond to her questions in English

nor indicate to her that he understood her. Officer #2 took the precaution of calling an ambulance for the Applicant. At this time the Applicant said "You hit, I die". He was attended at the station by paramedics and was then transported to the William Osler Health Centre. He was examined and then released. While at the hospital, the emergency room physician asked Officer #2 if the patient had been beaten by police, to which Officer #2 replied "No".

According to Officer #2, the accused had bloodshot eyes, had a strong odour of an alcoholic beverage on his breath, and was unsteady on his feet. The officer had no other testimony to provide. The Applicant asked the officer why he was not taken into the breath room? The officer responded that "You refused". The officer was excused from the stand.

The Board accepts the evidence of Officer #2.

APPLICATION OF LAW TO FACTS:

In an appeal of this nature, the onus is on the Applicant to substantiate his position. The evidence submitted by the Applicant does not substantiate his claim to the effect that he had a present medical condition which precluded him from providing a breath or blood sample.

The report from Physician #1 family physician, fails to meet the specific requirements of section 15(1) of Regulation 574 of the *Highway Traffic Act* in the following respects:

Physician #1 does not provide the details of any present condition, diagnosis and history of the condition that precludes the Applicant from providing a breath sample, including the results of any related tests to substantiate the Applicant's assertion that due to his medical condition he was unable to provide a proper breath sample. The "history" of the condition is a re-iteration of the events and symptoms allegedly experienced by the Applicant. There is nothing in the report to indicate that the history of the condition would in anyway interfere with the ability to provide a breath or blood sample. Physician #1 clearly states "that this patient's condition prior to this incident does not preclude him to provide a breath or blood sample." Physician #1 recommends that the Applicant be investigated with a stress test and follow-up with his cardiologist, however, no report or findings have been included with this appeal. Physician #1 does not indicate that he has knowledge of what is actually required to perform the Breathalyzer tests nor does he indicate how the Applicant's present medical condition would affect his ability to provide that sample of breath. The only possible corroboration from a medical standpoint would have been the emergency room report; however, this was not provided to the Tribunal and the Tribunal can not speculate as to its contents.

The Tribunal after very careful review of the medical information presented by Physician #1 is of the opinion that this report is speculative in nature as to the condition of the Applicant at the time that the demand for breath was made and does not provide sufficient medical evidence to support the position of the Applicant. The Tribunal attaches very little weight to this report.

The Applicant as well did not submit an emergency room report or a report from the Paramedics who attended to him at the police station and transported him to the hospital.

Reviewing the foregoing facts, the Tribunal finds that the Applicant did not relate his medical condition to Regulation 574 and Section 50(1)(2) (b).

The evidence does not support the Applicant's position that he refused to provide an adequate sample of breath for a medical reason. The evidence submitted suggests to the Tribunal that the actions of the Applicant were more indicative of the Applicant having no intention of providing a proper breath sample. The evidence presented clearly shows that the Applicant flatly refused to provide a sample when requested. The Applicant would not converse with the police officers in English, claiming that he did not understand the language. However, the Applicant has clearly demonstrated to this Tribunal his good command of the English language.

DECISION:

The Applicant has not discharged the onus of establishing a valid medical reason for his failure to provide a breath sample when demanded under section 254 of the Criminal Code (Canada).

Upon the application by the Applicant to appeal the suspension order dated October 6, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* (HTA) and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant.

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee D.C.
Presiding Member

RELEASED: November 22, 2000

REID

PREHEARING

LORI ANNE REID

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *REAL ESTATE AND BUSINESS BROKERS ACT* R.S.O.
1990, Chapter R. 4 as amended

TO REVOKE REGISTRATION

TRIBUNAL: KENT McCCLURE, Chair, Presiding

APPEARANCES:

LORI ANNE REID, the Applicant
GEORGE P. DRAMETU, Counsel, representing the Registrar, *Real
Estate and Business Brokers Act*

DATE OF

PRE-HEARING: November 9, 2000

By teleconference

ORDER

FOLLOWING attendances on November 9, 2000 at a prehearing *by teleconference* before this Tribunal of Lori Anne Reid (the "Applicant"), and George P. Drametu, Counsel on behalf of the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

The Tribunal makes the following Order:

1. The hearing shall be scheduled to commence at 9:30 a.m. on January 22, 2001, and thereafter, if necessary, to continue at 9:30 a.m. on January 23, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario;
2. The parties to the hearing are the Applicant and the Registrar.

3. The issues to be dealt with at the hearing are contained in the Proposal of the Registrar and arise under subsections 6(1)(a) and (b) of the *Real Estate and Business Brokers Act*; that is:
-
- 6.(1)(a) having regard to the applicant's financial position, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or
- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or
-
4. The Applicant admits that she declared bankruptcy on September 14, 1997.
5. Prior to the hearing, the parties may agree to other facts. In such case, the parties may submit an agreed statement of facts to the Tribunal prior to the commencement of the hearing.
6. The Applicant intends to call two (2) witnesses to testify at the hearing and the Registrar intends to call two (2) witnesses to testify on his behalf. Both parties reserve their right to call additional witnesses.
7. Disclosure of documentation has been made by both the Applicant and the Registrar and any further disclosure by the parties will be made no later than twenty (20) days before the commencement of the hearing on January 22, 2001.

LICENCE APPEAL TRIBUNAL

Kent McClure, Q.C.
Chair

RELEASED: November 9, 2000

EDITH NORAH HART

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the “Act”), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

EDITH NORAH HART, Applicant
unrepresented

DATE OF HEARING: November 6, 2000

DECISION RELEASED: November 10, 2000 Orillia

REASONS FOR DECISION

A hearing was held on November 6, 2000, at Orillia, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended (“HTA” or the “Act”).

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Edith Norah Hart (the "Applicant")
Motor Vehicle: 1981 Pontiac Parisienne, Plate # ADNN 798 (the "vehicle")
Date of Appeal: October 19, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 6, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Applicant and the Respondent agreed that the above-noted documents filed by the Applicant in support of her appeal at the hearing as evidence.

There being no other preliminary matters and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I, Edith Norah Hart, am the owner of the impounded vehicle. The loss of the vehicle for my use has resulted and will continue to result in exceptional hardship.

On the day that the vehicle was impounded, I was driving the car in the country (Medonte-Oro Twp.) for the purpose of a Thanksgiving outing. I experienced intense pain as a result of a medical condition I am suffering from, and for which my body involuntarily responds through incontinence and loss of control of certain bodily functions. I am scheduled for surgery in order to correct this condition. The loss of these bodily functions complicates further my existing medical conditions. I have never experienced the loss of bodily function in my vehicle before, but the chances of the condition recurring increases each day unless I receive regular medical treatment and until the surgical

procedures to correct it are performed. In any event, at that time, I was very surprised to experience the loss of control of my bladder and bowels. I became very upset, naturally.

I needed to return to either home or the hospital immediately, (the location depending on whether my condition worsened during the drive back) but I could not drive. So I asked the person with me to drive, and he did so as an act of courtesy and out of extreme concern for me. During the drive back home, we were stopped by the Barrie O.P.P. and the driver was charged with driving while suspended as he was not supposed to be driving. We tried to explain the situation, but the police officer ignored my explanation, and advised me that my vehicle would be impounded right away. The officer took the driver in the cruiser to the Barrie detachment and made me drive my vehicle, in my upset, painful and unclean condition to the detachment. I had asked to be driven to the hospital, but the officer did not heed my request.

My vehicle has been impounded for 4 days already and it is causing me extreme hardship to be without it. In addition, I and my partner are on disability benefits and cannot afford the impoundment fee. My vehicle is utilized for driving my disabled husband Paul to his regular physician's and therapist's appointments in Newmarket, in Orillia. I also need to drive to Aurora and Newmarket regularly, and to Toronto on occasion for medical intervention. I am concerned that we will not be able to continue with these necessary medical appointments while the vehicle remains impounded, as I am unable, in my unpredictable condition, to take public transit. I also feel that is extreme hardship to permit my vehicle to be impounded under the unusual circumstances involving my medical crisis. Since, the incident, I have made arrangements to be able to contact emergency numbers should such an incident occur again prior to the condition being corrected.

I have not made a claim of exceptional hardship before the Licence Suspension Appeal Board before.

I respectfully ask that the Board order the release of my vehicle and further, hope that the Board will consider waiving the impoundment and appeal filing fee under the circumstances.

Sincerely,

Edith Norah Hart

Please note that this submissions was made in consultation with Ms. Ellie Venhola, LL.B. who is a staff lawyer with the Simcoe Legal Services Clinic, but who is not mandated to act as my agent or legal representative in this matter.

The Applicant claims that the impoundment will result in exceptional hardship as the Applicant *"...cannot afford the impoundment fee ...vehicle utilized for driving disabled husband ...to his regular physician's and therapist appointments ...need to drive to Aurora and Newmarket regularly and to Toronto on occasion for medical intervention ...unable in unpredictable condition, to take public transportation ...made arrangements to be able to contact emergency numbers should such an incident occur again..."*

In a handwritten note, Dr. L.B. Wilkes confirms that the Applicant is *"...disabled by severe stress incontinence..."*

Dr. Stephen B. Will, Obstetrician and Gynecologist, states in a letter dated October 16, 2000 that the Applicant *"...has a medical condition that is significantly affecting her day-to-day living ...disabling. activity function at work and at home ...testing in near future ...will require further investigation and treatment..."*

At the hearing, the Applicant read into evidence a prepared statement which detailed the events that led up to and surrounding the impoundment.

In viva voce and cross-examination, the Applicant testifies that she asked her common-law husband to drive, as a *'favour'* to her. She had an accident and soiled herself which made her feel extremely uncomfortable.

The Applicant complained that she felt as if she was *"...treated like a criminal..."* and wanted to register a complaint as she *"expected more compassionate and civilized treatment from ...police force."*

Copies of bills for car rental and cabs were provided to the Tribunal. These expenses were incurred as the Applicant went about her daily activities, which included volunteer work.

An opportunity to obtain work as a personal care giver was lost, as the cost of transportation to and from work, i.e. cabs, would override any income earned. The Applicant testified that she is unable to use public transportation as she suffers from a *"...social dysfunction ...gets paranoid..."*

When asked about her health the Applicant remarked that she has *"...a variety of conditions ...did not want to disclose ...just what caused the problem..."*.

The Applicant attested that due to the fact that she and her spouse come from *"dysfunctional families"*, they have no family or friends on whom they can count on to drive them from place to place.

Both the Applicant and her spouse are required to see their physicians on a regular basis.

The Applicant has been scheduled for surgery in December but is on a waiting list for an earlier date.

With respect to her financial situation, the Applicant testified that both she and her spouse are on disability benefits. They each require medication which are not always covered by Family Benefits.

When asked directly how the impoundment of the vehicle directly affected her health and/or her husband's health, the Applicant replied that they had several appointments with their physicians.

During her cross-examination of Constable Dore, the Applicant chastized him for putting her in a situation of *"reckless endangerment"*, as she was forced to follow him to the detachment as he drove at an excessive speed and failed to signal turns.

In closing, the Applicant suggested that her car was in perfect condition when it was impounded and requested the Tribunal to consider compensation in the event of damages while the vehicle was impounded.

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Paul B. Essery;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence failing to remain at accident under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension for life.

The Respondent called upon Police Constable Dore, Badge number 0333 as a witness. Constable Dore's evidence pertained solely to the events surrounding the suspension.

In closing, the Respondent asked that the Tribunal confirm the decision of the Registrar as the Applicant's testimony amounted to proof of inconvenience which did not constitute hardship.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was

being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
 - (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Before rendering a decision in this matter the Tribunal will address the complaints raised by the Applicant with respect to her treatment by Constable Dore. As stated at the hearing, this is an issue which may be raised at other proceedings but in which this Tribunal has no jurisdiction.

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

The Tribunal will proceed to review the criteria required to meet the onus for consideration of financial loss.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that she is able to get about by taking cabs or renting a car. Receipts were shown to support this statement.

As the Applicant has alternate methods of transportation available to her, the Tribunal may not consider the provisions of section 22(1) of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting.

Both the Applicant and her spouse are on disability benefits and have not suffered loss of income due to the impoundment. It must be contemplated that the Applicant is spending extra money on cabs and car rental, however, as she stated, she is "...saving on gas..."

The Applicant has not satisfied the Tribunal that she has in fact incurred any loss of income or extra expenses which could be considered hardship.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence indicates that the impact of the loss will be borne by the owner of the vehicle who is a person ordinarily transported in the motor vehicle. Therefore, the requirements under O. Reg. 632/98, subsection 22(3)(c) are met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The Applicant meets the requirements of subsection 22(3)(d)(i) as the loss of the impounded vehicle is upon a person other than the suspended driver. Subsection 22(3) requires the Applicant to establish all of clauses 22(3)(a)(b)(c) and (d). That is, the requirements of subsection 22(3)(a)(b)(c) and (d) are cumulative.

As stated above, the Applicant has not established clauses 22(3)(a) or (b). Therefore, the ground of exceptional hardship has not been established on the evidence.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal **confirms** the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: November 10, 2000

**R & S TRANSPORTATION INC., and
HARJ-MIN EXPRESS CARRIERS INC.**

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, c. H.8 as amended (the "Act"), from a Decision of the Registrar of Motor Vehicles pursuant to s.s. 47, 47(10) and 47.1 of the Act.

TRIBUNAL: E. Alan Garbe, Presiding Member
Norman Mealing, Member
Clarke Wallace, Member

APPEARANCES: Art Wong, Agent for the Applicants
Murray G. Forbes, Counsel for the Registrar of Motor Vehicles

DATE OF
HEARING: November 6, 2000 Toronto

ADJOURNMENT ORDER

WHEREAS a hearing was scheduled to be held on November 6, 7 and 8, 2000 in Toronto in the above matter;

AND WHEREAS at the opening of the hearing, the Applicant moved for an adjournment of the hearing due to the medical incapacitation of Shelly Troupe who had been acting as agent for the Applicant;

AND WHEREAS counsel for the Registrar of Motor Vehicles strongly opposed such adjournment on the basis that the Applicant had shown a consistent course of conduct of delay as exemplified by (a) ignoring the limit set forth in the notice of suspension and seizure, dated May 15, 2000, which required a response from the Applicant prior to June 5, 2000 but none was received until June 6, 2000; (b) waiting until the day before to request an adjournment as happened with the prehearing scheduled for August 29, 2000 which was adjourned at the request of the Applicant made by letter, dated August 28, 2000; (c) ignoring the instructions given at the time of the granting of the adjournment order that the Applicant file with the Tribunal a letter detailing the nature of the reason for requesting the adjournment which has still not been done; and (d) failing to file in a timely manner the documentation which was to be filed, in accordance with the pretrial conference order, dated September 20, 2000, with the Tribunal on or before September 29, 2000;

AND WHEREAS the Applicant has tendered a letter from Patrick Di Monte advising that he had been retained by the Applicant but could not attend on November 6, 7 and 8, 2000 but was available for a hearing on December 6, 7 and 8, 2000;

The Tribunal makes the following orders respecting the motion for an adjournment:

1. the matter is adjourned peremptorily against the Applicant to 9:30 a.m. on December 6, 2000 at the Licence Appeal Tribunal, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario M4V 1K6, to continue on December 7 and 8, 2000 if required;
2. before 11:00 a.m., November 7, 2000, the Applicant shall file with the Tribunal the letter requested in the adjournment order dated August 29, 2000 detailing the nature of the reason for requesting the said adjournment from August 29, 2000; and a letter from a medical practitioner confirming the current medical incapacitation of Shelly Trope; and
4. all documentation to be tendered by the Applicant at the hearing to commence on December 6, 2000 is to be delivered to counsel for the Registrar of Motor Vehicles and to the Tribunal at least ten days prior to the commencement of the hearing.

LICENCE APPEAL TRIBUNAL

E. Alan Garbe, Presiding Member

Norman Mealing, Member

Clarke Wallace, Member

RELEASED: *November 10, 2000*

SKOWRON, MIROSLAW o/a SCORPIO AUTO BODY & USED CARS SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
MIROSLAW SKOWRON O/A SCORPIO AUTO BODY &
USED CARS SALES

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 2nd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

MIROSLAW SKOWRON O/A SCORPIO AUTO BODY
& USED CARS SALES

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Miroslaw Skowron o/a Scorpio Auto Body & Used Cars Sales, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 15, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: Miroslaw Skowron o/a Scorpio Auto Body & Used Cars
617 Clarke Road Unit 4
London, ON N5V 3R5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Miroslaw Skowron o/a Scorpio Auto Body & Used Cars, (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to its registration as a motor vehicle dealer:

- a) The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
- b) The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
- c) The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Dealer further agrees to store its books and records at the location approved by the Registrar.
- d) The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify their registered name and the address of the location approved by the Registrar.
- e) The Dealer agrees not to invite the public to deal at a place other than their approved location.

- f) The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in business location in the form required by the Registrar. The Dealer further agrees to store all books and records at the registered premises and to display a sign that is visible to the public, stating the dealership name.
- g) The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
- h) The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
- i) The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- j) The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
- k) The Dealer agrees that it is under a positive obligation to disclose in writing, all material facts about the vehicles it sells to its customers. Material facts such as; but not limited to, salvage, previous salvage, accidented and repaired, theft recovery, previous taxi cab, previous police car, unibody damage, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
- l) The dealer agrees that where the odometer of a vehicle has been repaired or exchanged, full disclosure of such will be written on the bill of sale. Disclosure shall be in accordance with Section 2.2 of OMVIC's Standards Of Business Practice.
- m) The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
- n) The Dealer understands that their registration will be conditional for 60 days and may be cancelled by the Registrar, in accordance with Section 13(3) of Regulation 801. For the purpose of Section 13(3) of Regulation 801, these Terms and Conditions are part of the Dealer's application.

- o) The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
- p) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- q) The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked.
- r) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- s) The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this 8th day of November, 2000.

(Signature) Miroslaw Skowron o/a Scorpio Auto Body & Used Cars

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

MORINET, TODD JAMES o/a KTS AUTO BODY

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
TODD JAMES MORINET O/A KTS AUTO BODY

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATION
- Proposal dated: August 22nd, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TODD JAMES MORINET O/A KTS AUTO BODY

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Todd James Morinet o/a KTS Auto Body, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 6th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

From: Todd James Morinet
O/a KTS Auto Body
1 - 549 Massey Rd
Guelph ON N1K 1B3

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Todd James Morinet O/a KTS Auto Body (hereafter the "Registrant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Dealer will successfully complete the certification course within 60 days of the date of this Order.
2. The Dealer agrees to comply with the Code of Ethics and the Standards of Business Practice, and in particular the dealer will follow the standards of Business Practices as in Section 2.2 as they relate to disclosure of distance travelled.
3. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
4. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.

5. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to store his books and records at the location approved by the Registrar.
6. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify its registered name and the address.
7. The Dealer agrees not to invite the public to deal at a place other than its approved location.
8. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location of the Registered premise in the form required by the Registrar.
9. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
10. The Dealer will ensure that all vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
11. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
12. The Dealer agrees to register in its name, all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
13. The Dealer agrees that he is under a positive obligation to make full and honest disclose all material facts, in writing, about the vehicles he sells to customers. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
14. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.

15. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
16. The Dealer acknowledges that should he breach any of these terms and conditions, in whole or in part, that the Registrar is directed to, and shall carry out the proposal to revoke his registration, and that revocation will be final.
17. The Dealer acknowledges that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.

Signed in the City of Toronto, this day of 2000.

(Signature of Dealer) Todd James Morinet O/a KTS Auto Body

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

UR AUTO SALES and MANJIT RANA and AMARJIT UPPAL

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
UR AUTO SALES AND MANJIT RANA AND AMARJIT UPPAL

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*

TO REFUSE REGISTRATION OF UR AUTO SALES AND MANJIT RANA
TO REVOKE REGISTRATION OF AMARJIT UPPAL

- Proposal dated: October 9th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

UR AUTO SALES AND MANJIT RANA AND AMARJIT UPPAL

- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by UR Auto Sales and Manjit Rana and Amarjit Uppal, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 1, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: UR Auto Sales
1 - 20 Melanie Drive
Brampton ON L6T 4K2

And From: Manjit Rana
7 Sugarpine Court
Brampton ON L6R 1X6

And From: Amarjit Uppal
7 Sugarpine Court
Brampton ON L6R 1X6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, UR Auto Sales (hereafter the "Dealer") and Manjit Rana (hereafter "Rana") and Amarjit Uppal (hereafter "Uppal") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Dealer and Rana and Uppal acknowledge and understand that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
2. The Dealer and Rana and Uppal further acknowledge that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
3. The Dealer and Rana and Uppal agree to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records, and bank statements as required by the Motor Vehicle Dealers Act. The Dealer agrees to store its books and records at the registered premise of the Dealer approved by the Registrar, MVDA.
4. The Dealer and Rana and Uppal agree to operate exclusively from the location approved by the Registrar, MVDA. The Dealer agrees to apply for the Registrar, MVDA approval, by way of prior written notice, of any change in location in the form required by the Registrar, MVDA.

5. The Dealer and Rana and Uppal understand it will not store any motor vehicles at any other location than the registered location.
6. The Dealer and Rana and Uppal will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
7. The Dealer and Rana and Uppal will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
8. The Dealer and Rana and Uppal will not purchase vehicles without ensuring that the vehicle is registered to the seller.
9. The Dealer and Rana and Uppal agree to register, in its name, all vehicles purchased, within 6 days in accordance with the Highway Traffic Act.
10. The Dealer and Rana and Uppal understand that they will not allow anyone, other than persons registered to the Dealer, to use their Dealer number for any purpose at all, including but not limited to, attendance at the auctions.
11. The Rana and Uppal understand that they will only attend the auction on behalf of the Dealer. Further, attendance at the auction on behalf of anyone else is grounds for the revocation of the Dealer and salesperson's licence.
12. The Dealer and Rana and Uppal understand that all Bills of Sale will include the odometer reading and the true distance travelled if true distance travelled is different from the actual odometer reading. The Dealer and Rana and Uppal understand that failure to so, will result in the automatic revocation of the registrations.
13. The Dealer and Rana and Uppal agree that it is under a positive obligation to disclose all material facts about the vehicles that he sells to purchasers. The Dealer and Rana and Uppal understand that all material facts shall be noted on the bill of sale and initialled by the purchaser. The Dealer and Rana and Uppal agree to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer and Rana and Uppal agree that should any information come to light, which the Registrar, MVDA deems to be a material fact concerning a vehicle the Dealer or Rana or Uppal has sold, the Dealer and Rana and Uppal will comply with all reasonable requests made by the Registrar, MVDA to provide compensation to the purchaser. Material facts include, but are not limited to, accident repair, salvage, theft recovery, and previous rental.
14. The Dealer and Rana and Uppal acknowledge and understand that its registration will not be used to buy or sell motor vehicles where the Dealer and Rana and Uppal know or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
15. The Dealer and Rana and Uppal understand that their registration will be conditional for 60 days and may be cancelled by the Registrar, MVDA in accordance with the Motor Vehicle Dealers Act.

16. The Dealer and Uppal and Rana acknowledge that the Registrar, MVDA may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
17. The Dealer and Rana and Uppal acknowledge that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out herein.
18. The Dealer and Rana and Uppal hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
19. The Rana and Uppal agree to take the Ontario Motor Vehicle Dealers Act certification course and agree to have successfully completed the course within 60 days of the issuance of this Order.
20. The Dealer and Rana and Uppal agree and acknowledge that should the Dealer or Rana or Uppal breach any of the terms and conditions set out herein, in whole or in part, the Registrar, MVDA is directed to and shall carry out the proposal and the registrations shall automatically be revoked
21. The Dealer and Rana and Uppal hereby withdraw the appeals to the Licence Appeal Tribunal.

Signed in the City of _____, this _____ day of _____ 2000.

(Signature) UR Auto Sales
I have authority to bind the corporation

(signature) Manjit Rana

(signature) Amarjit Uppal

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

ROB PIROLI CONSTRUCTION INC.

ROB PIROLI CONSTRUCTION INC.

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: BRIAN K. MAROTTA, Vice-Chair

APPEARANCES: BRIAN CAMPBELL, Counsel, representing the Applicant
MICHAEL W. BADER, Counsel, representing the
Registrar of the Ontario New Home Warranty Program

DATE OF
HEARING: November 6, 2000 Windsor

ORDER

WHEREAS by a written Notice of Proposal dated March 17, 2000 and Supplementary Notice of Proposal dated June 26, 2000, the Registrar, Ontario New Home Warranty Program (the "Program") proposed to refuse to renew the registration of Rob Piroli Construction Inc. (the Applicant)

AND WHEREAS the Applicant appealed the Notice of Proposal to the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) which appeal was heard in Windsor July 24 and July 25, 2000 and was to continue in Windsor, November 6, 7, and 8, 2000,

AND WHEREAS, part-way through the hearing on November 6, 2000, Counsel for the Registrar informed the Tribunal that he wished to withdraw the Proposal and Supplementary Proposal of the Registrar of the Ontario New Home Warranty Program;

NOW THEREFORE this Tribunal orders on the consent of both parties that the hearing in this matter before the Tribunal is hereby terminated and this matter is concluded.

LICENCE APPEAL TRIBUNAL

Brian K. Marotta
Vice-Chair

Released: November 15, 2000

CORVETTEMASTERS LTD.

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

JOSEPH ULMAN, Agent for the Applicant
unrepresented

DATE OF HEARING: November 9, 2000

DECISION RELEASED: November 15, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 9, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: CorvetteMasters Ltd. (the "Applicant")
Motor Vehicle: 1990 Chev Corsica, plate # AEFH 511 (the "vehicle")
Date of Appeal: October 24, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on November 9, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"Vehicle was leased to Gaetan Sequin on May 14/99 and we were not aware that his license had been suspended."

The Applicant is owned and operated by Joseph Ulman and his wife. They are the only two employees. The Applicant was incorporated in 1981 and is operating as *Lease to Own Unlimited*. The Applicant currently has approximately 90 to 100 vehicles out on lease. On average the Applicant leases 10 vehicles per month.

On February 2, 1999, G. Seguin, the driver of the impounded vehicle, signed a lease for a 1988 Pontiac Grand Am. On or about April 5 1999, Mr. Seguin had a minor accident with the 1988 Grand Am and Mr. Seguin's insurance company wrote off the vehicle since the value of the vehicle itself was less than the damage incurred. On April 22, 1999, Mr. Seguin's insurance company paid out the cost of the vehicle to the Applicant.

On May 14, 1999, Mr. Seguin obtained a replacement vehicle from the Applicant, a 1990 Corsica (the now impounded vehicle). When Mr. Seguin initially entered into the lease with the Applicant (Exhibit 5) on January 2, 1999, various particulars were provided including viewing and providing a driver's licence number. When Mr. Seguin obtain the replacement vehicle in May, 1999, the original lease was reviewed for any address and phone number changes as well as viewing and confirming the driver's licence number. This revised leased was entered into for two and half years and the last payment will be on October 15, 2001.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Gaetan Seguin;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 5, 2001.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, “due diligence” in Black’s Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that the Lessee’s driver’s licence at the time in respect of which the order was made was not then under suspension.

Mr. Ulman testified that the Applicant is the owner of the vehicle that has been impounded and at the time of impoundment the Lessee was driving the vehicle.

The onus of proof is on the Applicant or its agent to establish that due diligence was performed which is required under section 50.2(3)(c) of the Act.

Mr. Ulman did make the argument and referred to page 3, item #4 (Exhibit 6) and page 7, item #28 (Exhibit 7) of a lease agreement, which states:

- “4(a) The vehicle leased hereunder shall be lawfully operated in accordance with the laws of any jurisdiction to which the use and operation thereof may at any time be subject.
 - (v) operated or driven by a driver without a valid driver's licence issued by the appropriate governmental authority, or by a driver whose driver's license has at any time been suspended or cancelled;
 - (vi) operated contrary to the provisions of any policy of insurance covering the vehicle or in violation of provisions of any statute, law or ordinance, rule or regulation of any governmental or municipal authority having jurisdiction.
- 28. Lessee must have a valid Province of Ontario Drivers Licence at all times during the duration of this lease. In the event of cancellation of the above Drivers Licence by the Ministry of Transport the Lessor must be immediately notified by the Lessee.”

In his testimony, Mr. Ulman indicated that he relies on the honesty and integrity of the Lessee in providing a valid driver’s licence as well as relying on the Lessee’s insurance company to verify that the Lessee has coverage. The insurance company then mails

the particulars of the policy to the Applicant within a specific timeframe, but there is no reference or confirmation as to whether a driver's abstract was ever done.

In further testimony, Mr. Ulman advises that his wife routinely, every three to six months, telephones Lessees' insurance companies to obtain verbal confirmations on insurance coverages.

Mr. Seguin's current insurance coverage is effective from February 13, 2000 to February 13, 2001. Mr. Seguin was convicted of drinking and driving on September 5, 2000. If his insurance company obtains an abstract on his customer pending the renewal of his policy, the Applicant would not have known about the suspension until January or February 2001. Mr. Ulman testified that he did not know that Mr. Seguin had a suspended driver's licence until he was made aware of it on or about November 5, 2000.

Unfortunately, neither the Applicant nor Mr. Ulman or his wife took any measures at any time after the execution of the above-mentioned lease agreement to ensure that the Lessee had a valid driver's licence. Viewing a driver's licence on two occasions, does not in itself ensure its validity, particularly when there was a lengthy period between the viewing and the impoundment. Furthermore, here the evidence indicates that the Applicant's actions were passive in nature. The Applicant relied upon others rather than actively make inquiries about the current status of the driver's licence.

The evidence before the Tribunal is that the Applicant has not demonstrated that it made any attempts to satisfy the requirements of section 50.2(3)(c) the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

Nives Montano, Presiding Member

RELEASED: November 15, 2000

OHRSTROM-COELHO

LINDA OHRSTROM-COELHO

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *REAL ESTATE AND BUSINESS BROKERS ACT*

TO REFUSE TO GRANT REGISTRATION

TRIBUNAL: BRUCE FITZPATRICK, Vice-Chair

APPEARANCES:

MUNYONZWE HAMALENGWA, Agent for Counsel representing
the Applicant
GEORGE DRAMETU, Counsel representing the Registrar,
Real Estate and Business Brokers Act

DATE OF
HEARING: November 14, 2000 Toronto

ORDER

FOLLOWING attendances on November 14, 2000 before the Licence Appeal Tribunal of Munyonzwe Hamalengwa, Agent for Counsel for Linda Ohrstrom-Coelho (the "Applicant") and George Drametu, Counsel for the Registrar, *Real Estate and Business Brokers Act* (the "Registrar");

WHEREAS, at the commencement of the hearing on November 14, 2000 before this Tribunal, Agent for Counsel for the Applicant requested an adjournment of this matter as the Applicant's Counsel was ill;

TAKE NOTICE, upon consent of the parties, the Tribunal *peremptorily* adjourns the hearing *against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 9:30 a.m. on Thursday, January 25, 2001, and to continue January 26, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Bruce Fitzpatrick
Vice-Chair

Released: November 15, 2000

DARLING, BUDDY and 1199813 ONTARIO LIMITED o/a B & J AUTO SALES

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
1199813 ONTARIO LIMITED O/A B & J AUTO SALES AND
BUDDY DARLING

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*

TO REVOKE REGISTRATION of 1199813 Ontario Limited o/a B & J
Auto Sales and

TO REFUSE REGISTRATION of Buddy Darling
- Proposal dated: July 7th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1199813 Ontario Limited o/a B & J Auto Sales and
Buddy Darling

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by 1199813 Ontario Limited o/a B & J Auto Sales and Buddy Darling, Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

William McIntosh

Released: November 15th, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: 1199813 Ontario Limited o/a B&J Auto Sales
And Buddy Darling

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act, 1199813 Ontario Limited o/a B&J Auto Sales and Buddy Darling hereby consent to the following terms and conditions to their registration as a motor vehicle dealer and salesperson, respectively:

In accordance with section 4.1 of the Statutory Powers Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions;

1. The Dealer and Salesperson hereby agree to forthwith advise the Registrar in writing if any charges are laid against them further agree to advise the Registrar, in writing, of the disposition of the charges. The Dealer and salesperson further agree that should either the Dealer or the Salesperson be convicted of any industry specific offence or should either the dealer or salesperson be convicted of any offence under the Criminal Code the salesperson and the dealer shall have their registrations revoked.
2. The Dealer agrees to obtain a Letter of Credit in the amount of \$7500.00 in favour of the Motor Vehicle Dealers Compensation Fund. Said Letter of Credit shall be in place for a period of at least 2 years from the date of execution by the dealer of these Terms and Conditions. The Registrar has the right to require that the Letter of Credit be extended beyond 2 years. The Dealer shall provide the Registrar with the Letter of Credit within 60 days from the date of execution by the dealer of these Terms and Conditions.
3. The Dealer shall forthwith enter into a repayment plan with the Ministry of Finance for the repayment of all monies currently outstanding, and the dealer shall provide proof to the registrar that a repayment plan has been entered into between the Dealer and the Ministry of Finance. The Dealer shall provide the Registrar with proof of a repayment agreement on or before December 1, 2000.
4. The Dealer agrees to comply with all of its obligation pursuant to the Retail Sales Tax Act and shall ensure that all monies collected and all remittances and returns are remitted/filed with the Ministry of Finance when due.
5. The dealer acknowledges that these Terms and Conditions do not prevent the Registrar from taking any legal action against it, which may include, but is not limited to a provincial offences prosecution, administrative action or proposal.

6. The Salesperson will successfully complete the certification course within 60 days of the date of this Order.
7. The Dealer and Salesperson agree to comply with the Code of Ethics and the Standards of Business Practice.
8. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
9. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
10. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required by the Motor Vehicle Dealers Act. The Dealer further agrees to store his books and records at the location approved by the Registrar.
11. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify its registered name and the address.
12. The Dealer agrees not to invite the public to deal at a place other than its approved location.
13. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in location of the Registered premise in the form required by the Registrar. The Dealer shall maintain a sign and office as required by the Motor Vehicle Dealers Act.
14. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
15. The Dealer will ensure that all vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
16. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
17. The Dealer agrees to register in its name, all vehicles purchased within 6 days in accordance with the Highway Traffic Act.

18. The Dealer agrees that he is under a positive obligation to make full and honest disclose all material facts, in writing, about the vehicles he sells to customers. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
19. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
20. The Dealer and salesperson acknowledge that if they breach any of the Terms and Conditions herein the Registrar is directed to and shall carry out the Proposal, and the Dealer's and salesperson's registration shall be revoked.
21. The Dealer and salesperson hereby consent to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
22. The Dealer and salesperson hereby withdraw their appeals to the Licence Appeal Tribunal.
23. The Dealer and Salesperson hereby acknowledge that they have obtained or have had the opportunity to obtain independent legal advice with respect to their consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this 14th day of November, 2000.

1199813 Ontario Limited o/a B&J Auto Sales.
I have authority to bind the dealer.

Buddy Darling

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar MVDA

MEHTA

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
GULSHAN AND SUKHDEV MEHTA

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

GULSHAN AND SUKHDEV MEHTA

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

TOWN WOOD HOMES LIMITED

Added Party

ADJOURNMENT

WHEREAS the Commercial Registration Appeal Tribunal (which as of April 1st, 2000 is known as the Licence Appeal Tribunal) appointed a time and place for a hearing in the above matter on November 20-24, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m., on Monday, March 5, 2001 and to continue on March 6-9, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.

Released: November 16, 2000

JOHNSTON

WILLIAM JOHNSTON

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: SHEENA MACASKILL, Vice-Chair

APPEARANCES:

BRIAN M. CAMPBELL, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program

DATE OF
HEARING:

November 20, 2000

Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31 as amended, William Johnston, (the "Applicant") appealed a decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated June 27, 2000;

WHEREAS, the hearing was to be heard on November 20, 2000 at the Tribunal;

AND WHEREAS, upon motion made by counsel for Applicant at the onset of the hearing on November 20, 2000, that the Tribunal allow the matter to be adjourned and upon hearing the submissions of counsel for the parties;

This Tribunal Orders that:

- 1) The hearing in this matter is adjourned *peremptory against the Applicant* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, March 19, 2001 and to continue March 20-23, 2001 and March 26-28, 2001, inclusive.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice-Chair

Released: November 21, 2000

PRESCOD, WINSTON ROSS and 1006525 ONTARIO LTD. d/b/a/ FLAMBOROUGH
AUTO WRECKERS

**1006525 ONTARIO LTD. d/b/a/ FLAMBOROUGH AUTO WRECKERS AND
WINSTON ROSS PRESCOD**

APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE INSPECTION
STANDARDS ISSUED PURSUANT TO CLAUSES 91(a) AND (e) AND
CLAUSES 93(a) AND (c) OF THE *HIGHWAY TRAFFIC ACT* R.S.O. 1990,
CHAPTER H.8 AS AMENDED

To revoke 1006525 Ontario Ltd. d/b/a/ Flamborough Auto Wreckers registration
as a Motor Vehicle Inspection Station and Winston Ross Prescod registration as
a Motor Vehicle Inspection Mechanic

TRIBUNAL: STUART CORK, Presiding Member

APPEARANCES:

Winston Ross Prescod, Agent for Applicants

Patrick Moore, Counsel, representing the Director of Vehicle
Inspection Standards

DATE OF
HEARING:

November 17, 2000

Toronto

ORDER

Following attendances on November 17, 2000 at a hearing before this Tribunal of
Winston Ross Prescod, Agent, on behalf of 1006525 Ontario Ltd. d/b/a/ Flamborough
Auto Wreckers and Winston Ross Prescod (the "Applicants") and Patrick Moore,
Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

WHEREAS, at the commencement of the hearing on November 17, 2000, the Agent for
the Applicants requested an adjournment of the matter in order to retain counsel;

The Tribunal makes the following Order:

1. The hearing of this matter is adjourned on consent of the parties to commence at
the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario,
at 9:30 a.m. on Wednesday, December 13, 2000.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Released: November 21, 2000

SARKADI and SARAMO

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
KAROLY SARKADI AND KAMILLA SARAMO

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

KAROLY SARKADI AND KAMILLA SARAMO

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1220608 ONTARIO LTD.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter
on September 6 and 7, 2000;

AND WHEREAS, upon consent of the parties the hearing was adjourned to November
23 and 24, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal further adjourns the hearing
peremptory against the Added Party to commence at the Tribunal's Chambers, 1 St.
Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Thursday, March 8,
2001 and to continue March 9, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 22, 2000

CORNALE

PREHEARING

FRANCES CORNALE

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

FRANCES CORNALE, representing himself
MARK ROCCATAGLIATA, Agent, representing the Ontario New
Home Warranty Program
STAN FERKUL, Agent, representing Kaneff Homes Corporation,
Added Party

DATE OF

PREHEARING: November 20, 2000

Toronto

ORDER

Following attendances on November 20, 2000 at a pre-hearing before the Licence Appeal Tribunal of Frances Cornale, representing himself (the "Applicant") and Mark Roccatagliata, Agent, for the Ontario New Home Warranty Program (the "Program"), and Stan Ferkul, Agent, for Kaneff Homes Corporation (the "Added Party");

The Tribunal makes the following Order:

- 1) The parties to the hearing will be the Applicant, the Program and the Added Party.
- 2) The hearing on this matter shall commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on December 4, 2000, and to continue on December 5, 2000, if necessary.
- 3) The Parties remain in disagreement on all 8 items listed in the Program's Decision Letter of August 21, 2000.

- 4) All material to be relied upon in evidence shall be exchanged between the parties prior to the commencement of the hearing within the time prescribed by the Tribunal's Rules of Practice.
- 5) The qualifications of any expert witness shall be disclosed to all parties prior to the commencement of the hearing as prescribed in the Tribunal's Rules of Practice.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: November 23, 2000

WENDY A. STRYCKER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

WENDY A. STRYCKER, Applicant
unrepresented

DATE OF HEARING: November 16, 2000 *By teleconference*

DECISION RELEASED: November 22, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 16, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the “Act”).

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Wendy A. Strycker (the “Applicant”)
Motor Vehicle:	Chevrolet Cel, plate # AEVT230 (the “vehicle”)
Date of Appeal:	October 27, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 16, 2000 and proceeded as teleconference hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

"The owner's position is that she does not have sufficient income to cover the cost of releasing the vehicle in 45 days & is unable to find full-time work at present due to loss of vehicle & is involved in another legal matter. The hardship being that she is under extreme stress financially & emotionally & has lost quite a lot. She will not be able to pay release costs & does need this vehicle for future living needs."

The following is a summary of the Applicant's affirmed testimony.

The essence of this hearing is based on the Applicant, who is a 36 year old waitress, claiming financial hardship and how she cannot afford the impoundment charges once her vehicle is releasable.

She has been a waitress for the past 2 years at a location on Highway 6, approximately 17 kilometers from her home in Dundas, Ontario. She usually worked a 35 to 40 hour week. On September 29, 2000 a domestic dispute took place wherein her live-in boyfriend was incarcerated for 1 year. She finds it difficult to pay the bills and rent on only one income. She has indicated that she must borrow money for her everyday living expenses.

It must be noted that this Applicant was quite evasive and clearly did not want to answer any questions when asked about her place of employment as well as her health in relation to the domestic dispute.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibits 3 & 4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Wendy A. Strycker, the Applicant;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 19, 2000.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has requested an appeal on the grounds of "exceptional hardship" under section 50.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the criteria the Applicant must meet to determine if in fact "exceptional hardship" will result from the impoundment. The Applicant in this case has argued that the impoundment will result in financial hardship. In order for her claim to be considered under section 22(2), the Applicant must have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every reasonable option has been considered for an alternative to the impounded vehicle.

The Tribunal would like to examine the *Owner's Position* in the Applicant's Notice of Appeal (Exhibit 2):

"The owner's position is that she does not have sufficient income to cover the cost of releasing the vehicle in 45 days ..."

Under section 22(2) of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, the Tribunal shall **not**, consider whether the impoundment will result in

- (a) inconvenience to any person;
- (b) **financial or economic loss to any person;**
- (c) **loss of employment or employment opportunity to any person;** or
- (d) loss of education or training or of an educational or training opportunity to any person.

The evidence does not establish this, and unless the Applicant demonstrates all four elements of subsection (3) which include demonstrating that no alternative to the vehicle is available and that the loss will be immediate, significant and lasting, the Applicant's above-referenced sentence is precluded from being considered.

“...& is unable to find full-time work at present due to loss of vehicle & is involved in another legal matter.”

At the onset of this hearing, the Applicant testified that she has quit her highly stressful job as a waitress due to the impoundment and was trying to find another job. When cross-examined by the Representative for the Registrar of Motor Vehicles regarding her last day of employment, the Applicant tried to evade the question but finally indicated that she had gone to work to “give them a hand” on Saturday (November 11, 2000) and Monday (November 13, 2000) (respectively 6 and 4 days prior to this hearing). Therefore, the Tribunal's finds that the Applicant has not ceased her employment all together. In all likelihood, to ease her financial difficulties, the Applicant could remain at this place of employment on a full-time or part-time basis until she was able to find comparable employment elsewhere.

When asked how she had managed to get to work after the vehicle was impounded, the Applicant indicated that a friend and a co-worker drove her to work. If the Applicant is determined in finding a new place of employment, there are alternatives available to her. The Applicant has also testified that her mother owns a vehicle as well.

“The hardship being that she is under extreme stress financially & emotionally & has lost quite a lot.”

It is unfortunate that the Applicant was involved in a domestic dispute, but the fact remains that the majority of what the Tribunal has heard regarding the Applicant's hardship relates to this serious incident which pre-existed the impoundment. For example, there is now only one income in the household to pay for rent, utility bills, and even the impoundment charges. But the Applicant did testify that she is managing to carry on in her day-to-day life by borrowing money. She also indicated that if necessary, she could borrow money from her mother.

The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and

With regard to clause 2(a), the Applicant has testified that a friend and a co-worker have driven her to work.

With regard to clause 2(b), since she has been a suspended driver for the past year, the impoundment does not qualify as immediate or significant. The loss will not be lasting since (i) the release of the vehicle is scheduled for November 21, 2000; and (ii) the Applicant has the ability to remove the remedial suspension on her driver's licence pending her enrollment and completion of the course schedule for sometime in December.

Last and most importantly, under clause 22(3)(d) of Regulation 340/94, as amended, the exceptional hardship identified in the Applicant's appeal is not available to the driver of the vehicle who was driving while her driver's licence was under suspension. Here,

the driver is the Applicant who has been a suspended driver since October 19, 1999. Her suspension with regard to a conviction of the offence of driving with more than 80 mgs alcohol in her blood under the *Criminal Code of Canada* would have been reinstated on October 19, 2000 pursuant to the completion of a remedial program which the Applicant has indicated will not take place until some time in mid December. On the date of impoundment (October 7, 2000), the Applicant was driving the impounded vehicle to work. It is against the law to have care and control of a vehicle knowing full well that your licence is under suspension.

The Applicant has testified that she has not been charged with *driving while disqualified* possibly due to the fact that her reinstatement was only a few days away from the date of impoundment. The police officer could have given her some leniency due to the recent domestic dispute. There is no evidence before this Tribunal to substantiate any of the foregoing possibilities.

The Tribunal is of the opinion that the Applicant does have alternatives to the impounded vehicle, and under section 22 of Regulation 632/98 cannot establish exceptional hardship under section 50.2(3)(d) of the Act.

Claims presented by the Applicant have been substantiated by evidence as being financial hardships not exceptional hardships. None of the losses presented in the Applicant's submissions have been proven to be immediate, significant and lasting.

Also, as the driver, the Applicant can not rely on financial or economic loss or loss of employment or employment opportunity under section 22(3)(d) of Regulation 340/94, as amended.

The Tribunal accordingly finds the Applicant has not established that she has or will suffer exceptional hardship as defined by section 22 of Ontario Regulation 340/94 as amended by 632/98.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: November 22, 2000

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED;**

IN THE MATTER of an application by Merle's Auto Repairs and Merrill Thomas Gordon to appeal the Notice of the Director of Vehicle Inspection Standards dated July 7th, 2000 to revoke the Motor Vehicle Inspection Station Licence and to revoke the registration as a Motor Vehicle Inspection Mechanic pursuant to section 91(8)(e) and section 93(a) and (c) of the *Highway Traffic Act*;

MERLE'S AUTO REPAIRS AND MERRILL THOMAS GORDON

APPLICANTS

and

THE DIRECTOR OF VEHICLE INSPECTION STANDARDS

RESPONDENT

ADJOURNMENT

WHEREAS a hearing was scheduled to be held on November 22, 2000 in Toronto in the above matter;

AND WHEREAS a letter was filed dated November 15, 2000 from Counsel on behalf of the Director, requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned; and
- (2) the appeal is scheduled to be heard on **January 10, 2001 at 9:30 a.m.** at the **Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.**

AND TAKE FURTHER NOTICE that upon failure to attend at the aforesaid time and place, the Tribunal may make a Decision in your absence and without further notice to you.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: November 22, 2000

KHAROUBA

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NADER KHAROUBA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 9th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NADER KHAROUBA

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Nader Kharouba, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 22, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: Nader Kharouba
1107-2101 Islington Ave.
Etobicoke On M9P 3R2

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Nader Kharouba (herein after referred to as "the Applicant") hereby consents to the following terms and conditions to his registration as a motor vehicle salesperson.

In accordance with section 4.1 of the Statutory Power Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law, his registration shall be automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without prior written consent from the Registrar.
4. The applicant shall not be an officer, director, owner or partner in a dealership.
5. The Applicant will not be the final signatory on any bills of sale.
6. The Applicant agrees to provide full and complete disclosure on all future applications submitted to the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant agrees that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke the registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of

motor vehicles that may have occurred in the past or that may occur in the future.

10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked.
11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Salesperson hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

BEER-EXHP

ANGELA J. E. BEER

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

ANGELA J. E. BEER, Applicant
unrepresented

DATE OF HEARING: November 15, 2000

DECISION RELEASED: November 23, 2000 Kingston

REASONS FOR DECISION

A hearing was held on November 15, 2000, at Kingston, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Angela J. E. Beer (the “Applicant”)
Motor Vehicle: 1990 Chevrolet GM4, plate # 278 3ES (the “vehicle”)
Date of Appeal: October 26, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 15, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant’s request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant’s appeal.

Should the Tribunal set aside the Registrar’s order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant’s evidence follows.

Applicant’s written submission filed with the Tribunal in support of appeal states:

Owner’s Position

I (Angela Beer) am the owner of the impounded vehicle. I was, in no way involved in the incident which resulted in the impoundment of my truck. (I was unaware, and not even near the area in which the incident took place). The truck was left with Jason Dobb (the person who incurred the offense) in order for him to make repairs to it (this was the only

way, financially, for me to have it fixed). I did not give him permission to drive the vehicle - nor did I, however, specifically state that he was not to drive the vehicle (as I was completely unaware that his licence was not in good standing).

I am filing an appeal under section 50.2(d) of the Highway Traffic Act - the grounds that the order will result in exceptional hardship.

I have no alternative to the impounded motor vehicle, and there are many repercussions for me in not having my truck. I use the vehicle in almost all that I do... Getting to and from classes, going home (to Madoc, ON) to be with my parents, getting to my volunteer position at the hospital, etc.

Having the truck (and one of my reasons for having a vehicle, is that it) definitely decreases the threat that exists to my safety by ensuring that I never need to walk anywhere at night in the city - it allows me freedom, without fear.

I am a 4th year student at Queen's University, finishing my honours degree in life sciences this year. As a student, it is imperative that I regain the use of my truck immediately. And, as I am not the person who committed the offense, I am being unreasonably punished.

If I do not regain the use of my truck, I will be unable to reliably attend my classes, and hence my education is in immediate, severe jeopardy... This will be an immediate, significant and lasting loss, as I will then not be able to attend medical school as planned, and essentially will alter the entire course of my life, and career.

As a student, money is very tight. As an innocent bystander to this offense, I feel that the great financial burdens resulting are unreasonable. I barely have the extra 100\$ to file this appeal, let alone face the possibility of paying out approximately \$1200 dollars when the vehicle is released. I do not even have this much money...in fact, I have barely enough to see myself through the school year. I do not currently have a job outside of school, as I am trying to focus entirely on my studies to ensure that my dream of becoming a doctor becomes reality. The financial repercussions of this impoundment may force me to curtail my schooling, which I feel is unfair, considering I was not involved in the incident.

Thank you for hearing my appeal. I hope you will find everything in order and I will hear from you soon regarding the Tribunal hearing.

Sincerely,

Angela Beer

I am requesting a written hearing, as it will be the most feasible way for me to proceed. I do not have the means to ensure that I can attend an oral hearing, as I am unsure as to where it will be....and I do not have the resources to hire a legal representative.

Angela Beer

The only witness for the Applicant was Ms. Angela Beer she testified on her own behalf. Ms. Beer reviewed, for the Tribunal, her written submission filed at the time she submitted her Notice of Appeal. Ms. Beer testified arrangements had been made with Mr. Jason Dobbs, of Tweed Ontario, to make repairs to the exhaust system on her truck. She was unaware his Ontario Drivers Licence was under suspension. He did not have permission to drive the vehicle but had taken it and was subsequently stopped by police and the vehicle impounded.

She uses the truck to get to classes and the hospital for her volunteer activities. Ms. Beer also uses it to drive home to Madoc, Ontario to visit her parents. Ms. Beer also feels the vehicle increases her personal safety in that she can drive rather than walk or ride the bus in the city at night.

Ms. Beer stated that her education was in jeopardy because she has trouble getting to University classes without the truck. The associated costs of the impoundment also were cause for concern to her in that she is not working in order to concentrate on her studies. Ms. Beer stated she feels she was an innocent bystander and had not committed the offence and thus was being punished unfairly.

Under cross-examination, Ms. Beer stated she had not checked into alternatives to the vehicle such as a rental car stating she knew they were too expensive. Taxis would also be expensive to use on a regular basis. She does however live on a bus route and is within walking distance of some of her classes and the hospital where she volunteers. She stated she is aware there is a student escort program in place to accompany students walking alone although she has not used its services. Night classes and classes at the West Campus are further from her home. She had not attempted to get a ride with other students or check into other possible alternatives.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Jason R. Dobb;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until February 23, 2003.

The respondent called no witnesses, relying only upon their written submissions and cross-examination of Ms. Beer.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- 3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;

- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to whether the evidence established "exceptional hardship" The Tribunal finds Ms. Beer failed to satisfy the conditions as set out in section 22.(1), (2), (3), and (4) of Regulation 340/94, as amended, under the Act.

Alternative means of transportation were not fully explored by her.

Ms. Beer's personal safety is of concern to the Tribunal, but the Tribunal finds that the use of Taxis, student escorts and ride sharing can address those concerns.

The cost of the impoundment will no doubt be expensive to Ms. Beer on her limited student budget; however, the Applicant failed to demonstrate that the loss will be immediate, significant and lasting.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: November 23, 2000

LYSANDRA WENONA CARD

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK,
Presiding member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

LYSANDRA WENONA CARD, Applicant
unrepresented

DATE OF
HEARING: November 16, 2000

DECISION RELEASED: November 23, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 16, 2000 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Lysandra Wenona Card (the "Applicant")
Motor Vehicle:	Chevrolet Astro, plate # AHSY356 (the "vehicle")
Date of Appeal:	October 31, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 16, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals.

All documents were submitted into evidence with the consent of both parties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

HUSBAND WILL LOOSE EMPLOYMENT - 11/4 HR DRIVE
HAVE 3 CHILDREN
LIVE 10 MIN'S FROM TOWN
PARENT'S 75-76 YEAR'S OLD
DEPENT ON ME FOR
TRANSPORTATION.

The Applicant testified that she and her family reside in Shelburne Ontario, and that she usually drives her husband to work each day in Maple. On the day of the impoundment, the Applicant was ill, and could not drive her husband to work, so he drove the vehicle himself. The Applicant's husband was subsequently stopped by police, and it was found that his driver's licence was under suspension, and the vehicle was impounded.

The Applicant further testified that she is the only driver in her family. Since the loss of her vehicle, her husband has managed to arrange transportation to his job with a neighbour, and has missed one day of work thus far, with zero loss of income. The Applicant also testified that her children are taken to school by school bus, and that her parents have managed to use taxi's to maintain their medical appointments in Orangeville. The Applicant also has a friend that can drive her to Orangeville for her shopping needs.

The Applicant also owns a 1991 Chevrolet that is need of transmission repairs to make it road worthy, yet has not attempted to pursue this as an alternative to the impounded vehicle. Due to the Applicant's financial situation, she has made no further inquiries into other possible alternatives to the impounded vehicle.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Paul James Card;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 2, 2004.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at

- the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines “exceptional hardship” as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
- (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
- (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The Applicant has appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself. In the matter before this Tribunal, there was no evidence before the Tribunal that the impoundment had contributed to the pre-existing financial hardships or uncertainty that the Applicant and her family may have had to endure.

The Applicant has claimed that the impoundment has jeopardized her husband's employment situation. However, section 22(3)(d) of Regulation 632/98 precludes the Tribunal from considering the impact of any loss as a result of the impoundment that may be upon the person who was driving the vehicle at the time of the impoundment while their driver's licence was then under suspension. Here, the Applicant's husband was the driver of the vehicle at the time of the impoundment. Therefore, the Tribunal may not consider the impacts of the loss that may be experienced by the Applicant's husband.

Furthermore, in the forthright testimony of the Applicant, it was adduced that the Applicant's husband has in fact managed to secure alternative transportation to work with a neighbour, and that it would appear to the Tribunal that the Applicant's husband's employment situation is not actually at risk.

In order for the Applicant's claims to be considered under section 22(2)(a), (b), and (c), she must also have demonstrated that all of section 22(3) has been met. Furthermore, section 22(4) of the Regulation provides the criteria for demonstrating that every

reasonable option has been considered for an alternative vehicle. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Applicant has not presented the Tribunal with any evidence that would demonstrate that every reasonable alternative option has been considered and inquired into as required under section 22(4) of the Regulation. The Tribunal finds that the Applicant's statement that an alternative is simply not possible due to her financial limitations, and therefore was not inquired into, is insufficient in meeting the onus under this section of the Regulation. In fact, the Applicant has testified that she and her family have in fact managed to mitigate the loss of the impounded vehicle through a variety of alternative sources, including friends, neighbours, and taxi cab rides.

The Tribunal finds that the Applicant has failed to meet the onus under section 22(4) of the Regulation and is therefore precluded from considering the Applicant's claim of exceptional hardship under section 22(2) of the Regulation.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

RELEASED: November 23, 2000

McWHIRTER

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JASON McWHIRTER

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 2, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JASON McWHIRTER

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Jason McWhirter, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 20, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

From: Jason Mcwhirter
53 Barnes Street
St. Thomas, ON
N5R 2V6

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Jason Mcwhirter, (hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees, if he is criminally charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law, his registration shall be automatically revoked.
3. The Applicant agrees that his explanation of the circumstances of the convictions is accurate and if the Registrar discovers that the particulars of the convictions is substantially different from what the Applicant disclosed, his registration shall be automatically revoked.
4. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without prior written consent from the Registrar.
5. The Applicant agrees to provide full and complete disclosure on all future applications submitted to the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
6. The Applicant shall not handle any monies or banking on behalf of the dealer, including the handling of deposits.
7. The Applicant shall not be the final signatory on any Bills of Sale.
8. The Applicant shall provide a copy of this order to his employer.
9. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke the registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial

circumstances and his honesty and integrity.

10. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked
13. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Applicant will provide a copy of this order to his employer forthwith.
15. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____ 2000.

(Signature Jason Mcwhirter

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

BISH-EXHP

TREVOR BISH

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ALAN HOLBROOK
Presiding member

APPEARANCES: CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

MICHELLE KEHOE AND ROBERT THAIN
Representatives for the Applicant

TREVOR BISH, Applicant

DATE OF HEARING: November 15, 2000 Kingston

DECISION RELEASED: November 23, 2000

REASONS FOR DECISION

A hearing was held on November 15, 2000, at Kingston, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Trevor Bish (the "Applicant")
Motor Vehicle:	1990 Ford Aerostar, plate ADTK 925 (the "vehicle")
Date of Appeal:	November 2, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 15, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

Docket Information

A request was made by the Respondent's representative for a ruling as to whether or not the Tribunal would allow into evidence (Exhibit 5) three letters from Ms. Kehoe's Doctors, in regard to her medical condition (Exhibit 5). Also, the Applicant asked that a witness (Ms. MacLean) be heard by the Tribunal.

The Respondent's representative was concerned by the lack of notice, regarding Ms. MacLean's appearance but did not object to her testifying. She did object to the three letters (Exhibit 5) feeling they may be prejudicial. She stated the Applicant had indicated that all submissions had been sent to the Board.

The Applicant believed all submissions had been made at the time she filed the Notice of Appeal. After receiving the Respondent's submissions, the previous Wednesday, November 8, 2000, the Applicant's representative, Ms. Kehoe, felt more information regarding the Applicant's health was important for the Tribunal to hear. Time restraints, difficulties in obtaining this information and lack of familiarity with the appeal process were stated as the cause for the Applicant's late submissions.

The Tribunal reserved its decision on the three letters until after Ms. Kehoe's and Ms. MacLean's testimony and after cross-examination by the Respondent. At that time the Tribunal read the letters and ruled that the three letters did not prejudice the Respondent in the appeal although they added credence to the testimony already heard.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #2) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

As the Registered owner Trevor was out of province so I as the common law wife will have to file this appeal with his support letter.

In addition, the Applicant filed the following letter of support dated October 31, 2000:

October 31, 2000

To whom it may concern;

I Michelle Kehoe having the authorization and control from Trevor Bish regarding a black 1990 Ford Aerostar 1fmda31u41za47058 do state, on October 28, 2000. I was delivering Royal Canadian Legion poppies. Upon completing this task I returned to the branch. I was relaxing having a couple of drinks. I felt I should not drive my vehicle. As I had to be a designated driver the following day for a 4 man sports team. Someone else offered to drive my vehicle home and me. The person who offered to take me home showed me an Ontario driver's license, which leads me to believe he was a valid driver. As I did not see this person drinking I thought it would be all right for him to drive. It was not until we were pulled over by the Kingston Police did I realize differently. I was not aware of the new law regarding suspended drivers or their consequences. The vehicle was not involved in any accident or any other serious incident. The registered owner or myself was not driving and I take full responsibility for this error in judgment, as I did not think I was being misled regarding the driver's license. I am forty-six years of age and have the responsibly of four children ages four, six, eight and fifteen. I have been diagnosed with Multiple Sclerosis and I am the sole care provider for these children. The vehicle is the only means of transportation I have for my family. My only financial means of support is my disability pension. I have not the financial means to make other arrangements regarding my family's lively hood. Your consideration in this matter would be greatly appreciated.

Sincerely Yours,
Michelle Kehoe

Ms. Kehoe, is identified as the person who will suffer exceptional hardship as a result of the impoundment. Ms. Kehoe is the common law wife of the Applicant. Ms. Kehoe suffers from Multiple Sclerosis ("M.S.") and asked that Robert Thain be allowed to assist her to present her evidence and testimony. The Tribunal agreed and Mr. Thain was sworn in.

Mr. Thain, assisted by Ms. Kehoe, explained the events that led to the impoundment. The vehicle was registered to Mr. Trevor Bish, Ms. Kehoe's common law husband. Mr Bish is in British Columbia in a training program and was unable to attend.

On October 28, 2000 Ms. Kehoe was doing volunteer work for the Legion and had a few drinks upon her return to the Legion Hall. She decided to call a taxi to take her home and at that time Mr. Harold Marshall insisted he would drive her home in her vehicle (the "van") as that would save her having to return to retrieve the van the next day. Mr. Marshall showed her his drivers licence and told her it was valid. On the way home they were stopped by police and an impoundment order was issued for the van, after police determined the licence was under suspension.

Mr. Thain explained that Ms. Kehoe and he were unaware of the legislation regarding impoundments.

Ms. Kehoe at this point is a single mother, with three children at home ages 5, 6 and 9 years old. She is on a disability pension of some \$1777.00 per month. Ms. Kehoe would get her children ready and then drive them to school. She can no longer do this without her van and she cannot walk the distance with them due to her illness. They are too close for the school bus to take them, under school board policy. She feels they must be escorted as the school notified her that her 9 year old cannot properly supervise the other two children and there had been an "incident" with traffic.

In addition Ms. Kehoe uses the van for grocery shopping, taking the children to appointments and activities and it affords her the freedom to get around at her own pace, when she is physically capable of doing so, rather than when someone is available to assist her. Taxis are too expensive to use on a regular basis, on her limited income and public transit is very difficult for her with her limitations.

In cross-examination it was determined, that her husband is not employed and contributes nothing to the family in the way of income. When he left for British Columbia an arrangement was made respecting the ownership of the van. The van was being purchased on a lease to own basis and Ms. Kehoe was to make the balance of the payments in his absence with the understanding that ownership will be transferred to her name. Although the van is not modified in any way for her handicap, she is dependent on it because of the limited distance she can walk, and to permit her to the part in activities when she is feeling well enough to tend to them.

Her 15 year old nephew has since moved out of the house and is unavailable to assist her.

Family and friends work throughout the day and are not readily available to assist or drive her or her children.

She has limited interaction with her neighbours and is hesitant about asking for their help.

She has run into problems with people avoiding her, for fear of her asking for more favours.

A rental car would cost in excess of \$400 per month, which she can not afford.

She does not live on a bus route and special bus service is limited.

The additional stress is aggravating her M.S.

Ms. Jan MacLean is an Occupational Therapist and has treated Ms. Kehoe since December 1997. She provided oral and written evidence as to Ms. Kehoe's physical limitations, stating that walking is not an option for her. She fatigues very quickly. Public transit is not safe for her to use, due to balance problems at times. She testified stress further aggravates Ms. Kehoe's MS.

Under cross-examination, Ms. MacLean indicated that the Handicapped bus service is over extended and thus unreliable.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Harold Marshall;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until September 3, 2001.

The Ministry relied only on their written submissions and cross-examinations. No additional evidence was presented.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

- (3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

As to whether an alternative vehicle is available, the evidence heard by the Tribunal would indicate that every reasonable option has been considered and that on the particular evidence presented in this case, no alternative is available to the Applicant. A rental car or regular use of taxis would be too expensive for Ms. Kehoe's fixed monthly income, public transit is unsafe for her to use and public Handicap Transit too unreliable.

The loss of the vehicle appears to be causing additional stress and thus further aggravating her physical disorder. The Applicant's demeanor during the hearing indicated that the effects are significant and will have lasting impact on Ms. Kehoe and her family.

As stated the van was used on a daily basis to transport Ms. Kehoe and her children.

The Tribunal finds that, Ms. Kehoe's health must be considered in determining the degree of hardship she faces as a result of the impoundment of her only vehicle. Her health is affected by the impoundment as well as her ability to function as a mother and care for, and ensure the safety of her children.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal sets aside the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Alan Holbrook, Presiding Member

RELEASED: November 23, 2000

MED/00/281

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT, M.D., Presiding Member

APPEARANCES: CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

THE APPLICANT

APPLICANT'S COUNSEL

DATE OF
HEARING: November 15, 2000

KINGSTON

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

#1 - Notice of Appeal, filed by Applicant

2 - Notice of Suspension

3 - Letter from Richard Manning, District Attorney, St. Lawrence County, New York, dated August 7, 1995, with abstract of driving record

4 - Photostat of 2 pages from a Medical Text introduced by Counsel

5 - Medical Report from Physician # 1, Applicant's family physician, introduced by Counsel, dated November 13, 2000-11-21

6 - Letter from Physician # 2 dated February 25, 2000, to the Ministry, but introduced by Counsel

PRELIMINARY MATTERS:

The Applicant was quite disturbed by what he considered to be a "run around" by the Ministry since his two convictions for impaired driving in 1996. He stated he was first informed his licence would be suspended until October 3, 1998. At the end of this period, he was told he would have to arrange a driving test. When he applied, he was told his licence was still under suspension for medical reasons. He was confused and angered by this because he had undergone a recent physical by his family doctor and was told everything was normal, including his blood work.

Following complaints to the Ministry, the Applicant received the standard letter from the Deputy Registrar outlining what he had to do in order to have his licence re-instated. He had another physical on November 13, 2000; an appointment with Physician #2, an addiction specialist, who filed a very negative report (Exhibit # 6); and assessment at the TriCounty Addiction Services Unit and an Administrative Review with a Driver Improvement Counsellor. The Applicant had also attended the TriCounty Addiction Services following his convictions.

The Applicant was very confused over the differences in the responses received from the doctors and agencies. The Applicant's counsel wrote to the Ministry (Exhibit # 7) complaining about Physician # 2's report and thought the doctor should have been summoned to the Hearing. The counsel was especially concerned about Physician # 2's reference to three impaired charges instead of two. The Applicant had been charged in New York State for reckless driving in July 1995, with some connotation to driving while intoxicated, but this had been rectified on August 7, 1995.

FACTS:

The Applicant, appears to be a responsible businessman. He is 60 years of age, divorced and has four boys. He owns two G.M. car dealerships with retail sales of \$25,000,000. Three of his sons work for him.

In 1996, the Applicant and his wife divorced. He testified that this caused him much distress and financial problems in his business. He began to drink more than usual and was charged twice in a 2-month period for impaired driving. He was also charged for reckless driving in New York State. He pleaded guilty to the charges and said it was because of his marriage breakdown and being under considerable stress.

Following his convictions he went to the TriCounty Addiction Services for sixteen days and received a good report. He was apparently never told that he had to remain alcohol free for one year until the letter from the Deputy Registrar in November 1999. He stated that he likely would have stopped drinking, if he had known, but he now felt it was now, too late. He considers himself a social drinker and is drinking a minimum of alcohol.

The Applicant states his health is good and he is not on any medication for his blood pressure. His liver is not palpable according to his family doctor.

The Medical Advisory Committee recommended his driving privileges remain under suspension based on Physician # 2's report. The Applicant felt his interview with the doctor had gone downhill when he mentioned he had two glasses of wine with dinner the night before, when asked when he had his last drink.

In reviewing Physician # 2's letter and considering the evidence heard, the Tribunal is not convinced it is truly objective. The Applicant stated he had not seen the report after it had been completed and denied giving several of the answers contained in the finished document.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to ".....suspend or cancel" a driver's licence for "any sufficient reason...". The Registrar originally suspended the Applicant's licence following two (2) convictions for impaired driving in 1996. The suspension was for a period of 3 years (October 3, 1999), but not re-instated at that time because of medical reasons.

The Applicant admitted his guilt, sought help at an addiction centre and completed his probation period without incident and has had no problems of any kind associated with alcohol consumption. He received a clean bill of health from his family doctor, runs a multi-million dollar business and appears on the evidence not to be addicted to alcohol to an extent likely to significantly interfere with his ability to drive a motor vehicle, as contemplated in section 14(a) of Regulation 340/94 under the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated October 10, 1996 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D., Presiding Member

RELEASED: November 22, 2000

MED/00/0286

**Appeal under section 50(1) of the *Highway Traffic Act*,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to section 47(1)
of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT. M.D., Presiding Member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles, Respondent

The Applicant
Counsel for Applicant

DATE OF HEARING: November 10, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit # 1 Decision to suspend dated April 18, 2000 issued by the Registrar of Motor Vehicles
- Exhibit # 2 Notice of Appeal received at the Tribunal October 12, 2000 filed by the Applicant
- Exhibit # 3 Letter from St. Joseph's Health Centre, dated October 25, 2000 with attached Laboratory results.
- Exhibit # 4 Ministry documents of Applicant's driving record
- Exhibit # 5 Letter from Physician # 1, dated July 7, 2000, with diabetic assessment

PRELIMINARY MATTERS:

When the inquiry was opened the Applicant's lawyer immediately introduced himself and advised the Tribunal that he had two witnesses and would like to introduce a copy of a letter from St. Joseph's Health Centre as an exhibit. He added that he had sent a copy to the Tribunal Office on November 1, 2000.

Ms. Grosskurth objected to the introduction of this letter because neither the Registrar nor the Medical Advisory Committee had an opportunity to examine this information before making their decisions.

Counsel for the Applicant countered that their decisions were based on criteria in the National Driver's Safety Code which recommended a 12 month period of abstinence from alcohol before a suspension is lifted, so the information in the letters would have been no value. Ms. Grosskurth stated that she simply wanted the objection on the record.

FACTS:

The Applicant is appealing the suspension of his driver's licence under section 47(1) of the *Highway Traffic Act*.

The suspension was made after receipt of an unsolicited letter from Physician # 2, the Applicant's family physician, dated February 10, 2000. The letter stated in his opinion, the Applicant was not fit to drive a motor vehicle at that time because he is suffering from uncontrolled Diabetes, Alcoholic Liver Disease and Anaemia.

The Respondent stated the Ministry's only concern is the Alcoholism.

The Applicant is a fifty five (55) year old male employed by the TTC for the past thirty one (31) years as a bus driver and cleaner. He had worked regularly, never lost time because of his drinking and had never been disciplined. His drinking occurred on weekends and some nights. His only driving infraction has been a speeding ticket.

Following his physician's warning and the licence suspension, the Applicant realized he had to stop drinking. His last drink of alcohol was March 28, 2000. He was admitted to the alcoholic ward at St. Joseph's Health Centre for a 10-day treatment program and then enrolled in a 21-day program at the Centre for Addiction and Mental Health Therapy (Donwood). He also had a diabetic assessment at St. Joseph's by Physician # 1, an Endocrinologist.

The Applicant's two witnesses, his wife and Witness # 1, his addiction therapist from the Centre, verified his evidence and supported his efforts to overcome his alcohol problems. Witness # 1 stated he attended group therapy with her once a week and AA every weeknight.

The Ministry's Medical Advisory Committee did a case study on August 11, 2000. From a Diabetic point of view his licence could be reinstated, but he should complete a 12 month period of abstinence from alcohol, continue with AA and obtain an up-to-date

report from Physician # 2 before this licence is reinstated. The Deputy Registrar of Motor Vehicles concurred with the committee's recommendation.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "any...sufficient reason...". The Registrar originally suspended the Applicant's driver's licence, upon receipt of an unsolicited letter from the Applicant's family physician. Physician # 2 informed the Ministry that the Applicant was suffering from uncontrolled diabetes, alcoholic liver disease and anaemia and was not fit to drive. The Tribunal finds that the Ministry acted properly and in accordance with the Regulation, at the time of suspension.

The Applicant, realized he was in serious trouble, quit drinking, sought help at St. Joseph's and the Donwood Addiction Centre, got his diabetes under control, joined AA and began attending group therapy.

After evaluation of all the evidence in its entirety the Tribunal accepts the Applicant's positive actions and his desire to change his way of life. There is no history of any problems with drinking and driving and the only driving infraction was a speeding offence. The fact he has been a bus driver for 31 years substantiates the evidence.

The Tribunal finds the Respondent has not proven the Applicant is currently suffering from a medical condition, which is likely to significantly interfere with his ability to drive a motor vehicle as described by section 14(a) of Regulation 340/94 under the *Highway Traffic Act*.

DECISION:

Upon the application by the Applicant to appeal the decision dated April 18, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett, M.D.
Presiding Member

RELEASED: November 22, 2000

ADLS/00/285

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: JEFFREY LEE, D.C.
Presiding Member

APPEARANCES: K.M. BIEL
Representative for the Registrar of Motor Vehicles

The Applicant
unrepresented and by written submission only

DATE OF
HEARING: November 10, 2000 Thornhill

DECISION

A hearing was held on November 10, 2000, at Thornhill, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Jeffrey Lee, D.C.
Presiding Member

RELEASED: November 14, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

**TO APPEAL A 90-DAY ADMINISTRATIVE
DRIVER'S LICENCE SUSPENSION**

TRIBUNAL: Jeffrey M. Lee D.C.
Presiding Member

APPEARANCES: Kyle Biel
Representative for the Registrar of Motor Vehicles

The Applicant
By written submissions only

DATE OF
HEARING: November 10, 2000

DECISION
RELEASED: November 14, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 10, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 14, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended,

chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 6, 2000 and was received by the Tribunal on October 12, 2000, together with the prescribed fee of \$100.00, paid by money order.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

AI was unable to provide the required breath sample because of a medical reason.®

Preliminary Matters

There were no preliminary matters, and the documents submitted were entered into evidence.

Submissions of Written Material

By the Applicant:

- a) Exhibit # 1 Notice of Appeal dated October 6, 2000 received October 12, 2000
- b) Exhibit # 2 Medical Letter from Physician # 1 MD dated October 4, 2000

By the Respondent:

- a) Exhibit # 3 MTO Submissions, 27 pages received October 31, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he or she was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* (HTA®) states:

- 50.1 (1) AA person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.
- (2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason@.

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) Aa report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;

- (b) the name, date of birth and address of the person who is the subject of the report;

- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a drivers licence under section 50.1 of the Act;

- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

- (f) whether the medical practitioner is a specialist and, if so, the field of specialty.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.@

Finally, section 13 of Regulation 574 (amended) provides:

AA person appealing a suspension has the onus of establishing the merit of the appeal@.

FACTS:

On September 26, 2000 at approximately 11:30 p.m. the Applicant was stopped by Officer #1 for speeding. Officer #1 formed the opinion from his observations of the Applicant that he was driving a motor vehicle after having consumed an alcoholic beverage. Officer #1 asked the driver, identified as the Applicant to come back to his cruiser and provide a road side breath test. The Applicant co-operated. The Applicant

was read the demand for breath and a demonstration of how the device was to be used was shown to the Applicant by Officer #1. The Applicant was given six opportunities to provide a suitable sample. According to the affidavit of Officer #1, the Applicant was able to activate the tone indicating sufficient air was entering the machine. However, according to the testimony of Officer #1, the Applicant stopped blowing or simply removed his lips from the device. The Applicant indicated at no time during the testing or while in the presence of the officer that he had a medical condition, congenital or otherwise which was preventing him from providing an adequate sample of his breath. The Applicant was subsequently charged with failure to provide a breath sample and released.

In the Affidavit submitted by Officer #1, the Applicant indicated the reason why he could not blow as being Aa Body Shop worker.® There is no mention of any present medical condition which would have precluded the Applicant from providing an adequate sample of breath.

The Applicant has provided the Tribunal with a medical report from Physician #1 M.D. The report does not indicate how the Applicant's congenital cleft palate would have affected his ability to provide an adequate sample of breath. The report, however, does indicate that there is no lip. The report does not indicate the extent of the cleft palate i.e. size of the defect. Physician #1's report also states that the Applicant would have a difficult time form a seal and that this would present as though there was no expiratory effort. This position may have been advanced had the Applicant or the Applicant's physician provided this Tribunal with medical test result from a respirologist, but none has been provided. Physician #1 also indicated that the defect is congenital and unrepaired. The Tribunal accepts the submission by the Respondent that the condition poses no risk to the Applicant's health and that he is able to compensate for this problem and function quite adequately in his daily activities.

The evidence is quite clear that the Applicant refused to provide an adequate sample of breath for no stated medical reason. The evidence submitted suggests the actions of the Applicant were such as to lead this Tribunal to believe that he had no intention of providing a proper breath sample in fact the evidence presented clearly shows that the Applicant on each attempt stopped blowing when he heard the tone activated on the device.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is upon the Applicant to substantiate his position.

Reviewing the foregoing facts, the Tribunal finds that the Applicant did not relate his medical condition to Regulation 574 and Section 50(1)(2)(b) of the *Highway Traffic Act*.

The Applicant has failed to show to this Tribunal a causal link between his congenital anomaly and his failure to provide an adequate sample of his breath.

The Applicant has not discharged the onus of establishing a valid medical reason for his failure to provide a breath sample when demanded under section 254 of the Criminal Code (Canada), as required by section 13 of Regulation 574.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated September 27, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* (HTA) and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee D.C.
Presiding Member

RELEASED: November 21, 2000

RUBIN, LARRY o/a AFFORDABLE AUTO SALES

LARRY RUBIN O/A AFFORDABLE AUTO SALES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: BEVERLEY READE, Vice-Chair

APPEARANCES:

Richard Culpeper, Counsel representing the Applicant
Mary Jane South, Agent representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

November 8, 2000

Thunder Bay

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Applicant appeals a Notice of Proposal dated August 18, 2000 issued by the Registrar of the *Motor Vehicle Dealers Act* ("the Act") to refuse to grant the registration of Larry Rubin, operating as Affordable Auto Sales (the "Applicant") as a motor vehicle dealer under the provisions of the Act.

The Registrar's proposal is based on the provisions of section 6(2) of the Act as read with section 5(1)(b) thereof, on the grounds that the past conduct of the Applicant affords reasonable grounds for belief that the Applicant will not carry on business in accordance with law and with integrity and honesty.

FACTS:

The Tribunal heard evidence from Ms. South, the Deputy Registrar under the Act. No other evidence was presented on behalf of the Registrar. Mr. Rubin testified, and the Tribunal heard from Sharon Low, his former parole officer, Antonio Stranges, a friend, Timothy Slongo, a former business associate, and Officer Popowich, a member of the Thunder Bay Police department. Based on this evidence, the Tribunal makes the following findings of fact:

Larry Rubin is 40 years old. On June 28, 2000, he applied for registration as a motor vehicle dealer. At the time that he applied, he was on parole. He had been convicted on September 4, 1998 of four counts of trafficking in narcotics, possession of a prohibited weapon and possession of property obtained by crime. He was sentenced to two years in federal custody, concurrent on all the convictions. He was released on

May 5, 1999, and remained on parole until September 3, 2000. Mr. Rubin made full disclosure of his parole status and criminal record at the time of the application.

Mr. Rubin's criminal record includes a 1982 impaired driving conviction, a 1988 attempted fraud conviction, and a 1993 conviction for trafficking in a narcotic. The Registrar places no reliance on the 1982 conviction.

The Registrar reviewed the application and proposed to refuse registration on the grounds that the intention and objective of the Act is to protect the public interest and that the Applicant's past conduct is inconsistent with that intention. The Registrar is concerned that the past conduct of the applicant as exhibited by his criminal record, affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty.

Ms. South noted that the Registrar is concerned with different risks when an Applicant is applying for registration as a dealer, rather than as a salesperson, because there is no supervisory control on a day to day basis for a dealer. Because a fraud conviction involves deliberate deception, and because the applicant was recently involved in the illegal business of drug trafficking, the Registrar proposes to refuse registration.

Mr. Rubin pleaded guilty to all of the convictions on his record, but gave evidence admitting responsibility for none of them.

He said that the conviction for attempted fraud resulted from the theft of his car. He said that he lived in Thunder Bay and went to Winnipeg for a holiday, where his car was stolen. The car was recovered in Thunder Bay and a registered auto salesperson tried to frame him. He pleaded guilty because it was cheaper than having a trial. The 1993 conspiracy conviction was simply a matter of being in the wrong place, with the wrong people. He said that he was not guilty, but pleaded guilty because the trial would have been lengthy. He was incarcerated for 90 days as a result on that conviction.

The 1998 convictions, according the Applicant, resulted from entrapment and harassment by a police informant. He claims that his life was threatened, his family's safety was in peril and that he was afraid to go to the police. He claims that the cash which formed the basis of the possession of proceeds of crime conviction belonged to his girlfriend and that the prohibited weapons belonged to the police informant. He pleaded guilty because his father was sick and he wanted to get it over with. He did not file a complaint about the police conduct although his lawyer advised him to. He wanted to leave the past where it belonged.

Mr. Rubin noted that the incidents giving rise to his latest convictions took place in 1996, although the convictions were not registered until 1998. He has not engaged in any criminal activity since he was charged. He believes that he has served his debt to society. When incarcerated, he was exposed to a cognitive skills course, as a result of which he now feels comfortable in contacting the police if he were to be threatened in the future.

Mr. Rubin has no experience as a motor vehicle salesperson but has retail experience in other areas. He is not interested in registration as a motor vehicle salesperson, where he would report to a dealer, because he is used to his independence. He wants registration as a motor vehicle dealer.

Various upstanding citizens provided character references for Mr. Rubin. His former parole officer has seen no indication that he will involve himself in criminal activities in the future. He is not known to be associating with drug users in Thunder Bay, according to Officer Popowich. He was trusted with cash by a former employer and is considered honest by his friends.

ISSUE:

The sole issue in this proceeding is whether the Registrar has sufficient grounds for refusing to grant the registration of the Applicant.

THE LAW:

The relevant portions of the Act that are applicable to these proceedings are subsections 5(1) and 6(1), which set out the circumstances under which the Registrar may refuse to register an applicant. The powers of the Tribunal are set out in section 7(4).

The Divisional Court has clearly outlined the proper test to be applied by the Tribunal in Re Brenner, 19 CRAT 58 as follows:

The effect of section 7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The Board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead, the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed and appears to have decided that it ought to give him a second chance because there was a possibility that he, indeed, might have reformed himself.

In that case, the Divisional Court sent the matter back for a rehearing by the Tribunal, adding:

The proper question at the rehearing remains, however, whether the past conduct of the Applicant affords reasonable grounds for belief that he will not carry on business in accordance with law and with integrity and honesty. Unless the Tribunal can find that it does not, the Tribunal should not order the Registrar to refrain from carrying out his proposal.

The Tribunal notes that it has only been a matter of weeks since Mr. Rubin has not been on parole. He acknowledged a great incentive to stay within the law during the time that he could have been returned to jail. In Ripani, 18 CRAT 356, the Commercial

Registration Appeal Tribunal discussed a number of cases dealing with this issue, and stated:

What all these cases indicate is that where past conduct includes criminal convictions, generally, unless exceptional circumstances exist, no registration will be permitted until some time after the sentence has been served and parole or probation have been completed; then a period of reformation has been exhibited; and even then, certain terms and conditions will be imposed.

Counsel for the Applicant argues that the Registrar erred in failing to investigate the Applicant's circumstances more fully prior to arriving at the conclusion that registration should be refused. The Tribunal cannot agree. There was ample evidence upon which the Registrar could make the finding, which he did. The evidence submitted at the hearing shows that the Applicant is unwilling to accept responsibility for his criminal activities. His explanations for his involvement leading to various guilty pleas before various courts are not credible.

The Tribunal is unable to find that the Registrar erred in his decision. Rather, the Tribunal agrees that the past conduct of the applicant gives reasonable grounds for belief that Mr. Rubin will not carry on business with integrity, honesty and in accordance with law.

DECISION:

By virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his proposal to refuse the registration of the Applicant.

LICENCE APPEAL TRIBUNAL

Beverley Reade
Vice-Chair

Released: November 27, 2000

FREEMAN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
DOUGLAS AND MARIE FREEMAN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DOUGLAS AND MARIE FREEMAN

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing of a motion by teleconference in the above matter on November 27, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing of the motion *peremptory against the Respondent* to commence by teleconference at 9:30 a.m., on Friday, December 8, 2000, at the telephone numbers specified in the Appointment for and Notice of Hearing of Motion.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 28, 2000

CANADIAN WILDERNESS PROGRAM

PREHEARING

CANADIAN WILDERNESS PROGRAM

APPEAL FROM A PROPOSAL OF THE DIRECTOR,
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TRIBUNAL : ROBERT ADAMS, Presiding member

APPEARANCES:

GREG DUCHARME, Counsel, representing, Canadian Wilderness
Program and Robert Fairbridge
KATHARINE RENISAN, Counsel, representing the Ministry of
Community and Social Services

DATE OF THE

PRE-HEARING: November 20, 2000

Toronto

ORDER

WHEREAS, Mr. Robert Fairbridge representing Canadian Wilderness Program requested a hearing before the Licence Appeal Tribunal pursuant to the provisions of Section 197, the *Child and Family Services Act*, (the Act), R.S.O. 190 Chapter 11 as amended. The Applicant appealed the proposal of the Director, under the *Child and Family Services Act*, dated September 22, 2000 to Refuse to Renew the licence of the Canadian Wilderness Program under Section 196 of the *Child and Family Services Act*.

AND WHEREAS, a pre-hearing was held between the parties on November 20, 2000 at the Tribunal's Chambers, 1 St. Clair Avenue West, Toronto, Ontario, as set forth in the Tribunal's Notice of Pre-hearing Conference dated September 18, 2000.

AND WHEREAS, the parties on consent agreed to adjourn the matter until December 18, 19 and 20, 2000, based on the terms set out in Schedule 1 attached here to.

The Tribunal on consent of the parties orders that:

1. The parties agree to the dates for a hearing in this matter to commence at 9:30 a.m., on December 18, 19 and 20, 2000 set by the Tribunal to be held in North Bay, Ontario;

2. During this period of adjournment, the parties will comply with the attached terms set out in Schedule 1 dated November 20, 2000.

LICENCE APPEAL TRIBUNAL

Robert Adams,
Presiding Member

RELEASED: November 28, 2000

Schedule 1(A)

I, Greg DuCharme undertake on behalf my client Bob Fairbridge to use the best efforts to provide Katherine Renison, counsel for Ministry of Community and Social Services on or before Friday, November 24th, 2000 with a text setting out proposed conditions to be attached to the licence of Canadian Wilderness Program in an attempt to reflect the discussions at Prehearing by the parties on Nov 20/2000.

As counsel for the Director I undertake to provide a reply to the applicants proposal by November 29, 2000.

"Greg DuCharme"

"Robert Adams"
Nov. 25/00

CLUNIE TRANSPORT LTD.

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)**

IN THE MATTER OF an Application by Clunie Transport Ltd.
dated October 13, 2000, for a hearing before the Licence
Appeal Tribunal pursuant to Section 50(1) of the *Highway
Traffic Act* appealing the Notice of Refusal to Issue an
Operating Licence of the Registrar dated September 14,
2000, and the Notice of Refusal to Issue a Commercial
Vehicle Operator's Registration Certificate dated September
14, 2000.

AND IN THE MATTER of

CLUNIE TRANSPORT LTD.

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS a prehearing in the above matter was scheduled to be held on Tuesday,
November 28, 2000 at the Tribunal;

AND WHEREAS a letter dated November 27, 2000 was filed by the Applicant's Counsel
requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned peremptorily against the Applicant; and
- (2) the prehearing shall be heard at 9:30 a.m., on Monday, January 15, 2001 at the
Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.,
Chair

RELEASED: November 29, 2000

PREHEARING

CPG AUTOMOTIVE AND LEONARD SHERWOOD

APPEAL FROM A PROPOSAL OF THE DIRECTOR OF VEHICLE INSPECTION STANDARDS ISSUED PURSUANT TO CLAUSES 91(8)(e) AND CLAUSES 93(c) OF THE *HIGHWAY TRAFFIC ACT* R.S.O. 1990, CHAPTER H.8 AS AMENDED

To revoke CPG Automotive's registration as a Motor Vehicle Inspection Station and Leonard Sherwood's registration as a Motor Vehicle Inspection Mechanic

TRIBUNAL: Stuart Cork, Member

APPEARANCES: Leonard Sherwood, Applicant

Patrick Moore, Counsel, representing the Director of Vehicle Inspection Standards

DATE OF
PRE-HEARING: November 30, 2000 ***(By teleconference)***

ORDER

Following attendances on November 30, 2000 at a pre-hearing by teleconference before this Tribunal of Leonard Sherwood proprietor of CPG Automotive (the "Applicants") and Patrick Moore, Counsel, on behalf of the Director of Vehicle Inspection Standards ("the Director");

The Tribunal makes the following Order respecting the hearing scheduled to commence at 9:30 a.m., on Wednesday, January 3, 2001, and to proceed if necessary, on January 5, 2001 at Tribunal's Chambers, 1 St. Clair, Avenue West, 12th Floor, Toronto, Ontario;

1. The Parties to the hearing are
 - (a) CPG Automotive;
 - (b) Leonard Sherwood; and
 - (c) The Director

2. The parties shall make disclosure as required by Rule 6 of the Rules of Practice of the Tribunal by no later than December 22, 2000. The Tribunal notes that the Applicants address has been changed to:

CPG Automotive and Leonard Sherwood
9842 Lakeshore Drive
Kettlepoint ON N0N 1J0

3. (a) The Applicant intends, at this time, to call one expert witness, Mr. Mark Wilson, who will give testimony pertaining to the infractions, and to the character and his relationship with the Applicant.
- (b) The Applicant, Leonard Sherwood intends at this time to testify at the hearing to the circumstances surrounding the time period of the infractions and to the appropriateness of the sanction.
- (c) The Director intends, at this time, to call the following two MTO Inspection Officers to testify as witnesses at the hearing:
- Gordon Waldron
 - Gerald Dienesch

They will give evidence to a number of Safety Standard Certificates issued by the Applicant in violation of the *Highway Traffic Act*. The Director will request that they be qualified by the Tribunal as expert witnesses in the field of Auto mechanics, and they will give mechanical evidence with respect to those vehicles inspected.

LICENCE APPEAL TRIBUNAL

Stuart Cork
Member

Released: November 30, 2000

McFADDEN

REAL ESTATE AND BUSINESS BROKERS ACT
Revised Statutes of Ontario 1990, Chapter R. 4

IN THE MATTER OF
TERRY McFADDEN

AND IN THE MATTER of the PROPOSAL by
the Registrar, *REAL ESTATE AND BUSINESS BROKERS ACT*
TO REVOKE REGISTRATION
- Proposal dated: June 13th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

TERRY McFADDEN

Applicant

- and -

REGISTRAR, *REAL ESTATE AND BUSINESS BROKERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on November 1-3, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Monday, February 5, 2001, and to continue February 6, and 7, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: November 1st, 2000

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)**

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to section
47(1) of the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Friday,
December 15, 2000 at the Tribunal;

AND WHEREAS a letter dated November 15, 2000 was filed by the Applicant
requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 9:30 a.m. on Wednesday, December 20, 2000 at the
Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: November 16, 2000

MED/00/253

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ROSS C. BENNETT M.D., Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant,
unrepresented

DATE OF
HEARING: October 30,2000 Bracebridge

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the "Applicant" respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit #1 Decision, dated March 20, 2000, issued by the Registrar of Motor Vehicles
- Exhibit # 2 Notice of Appeal received at the Tribunal September 18, 2000. Filed by the Applicant
- Exhibit # 3 a) & b) Ministry of Transportation ("MTO") documents regarding driving experience
- Exhibit # 4 Physician # 1's letter to the MTO, February 24, 2000
- Exhibit # 5 Physician #2's letter to Physician #1, March 20, 2000
- Exhibit # 6 EEG Report, March 6, 2000

Exhibit # 7 Fax to MTO, dated March 21, 2000, from Physician #2's office

Exhibit # 8 Physician #1's letter to MTO, March 22, 2000

PRELIMINARY MATTERS:

The Respondent objected to Applicant's physician, Physician #2, giving evidence since notice had not been given to the Registrar of the content of the evidence. Applicant stated he was unaware that this was a necessity. Physician #2 said it was his understanding his presence was required simply to answer questions.

The Tribunal noted the objection for the record and the hearing continued.

The Respondent then requested Physician #2 be excluded until his evidence was required. The Tribunal granted that request.

The Applicant was very upset about the way this whole issue had been handled by the Ministry of Transportation (the "Ministry" or "MTO") and his family doctor. He was not advised that the Ministry was to be informed of his seizure. The Internist, Physician #2 had told him he had to wait for the results of a CT scan and an EEG before he could determine what exactly happened. Physician #2 finally advised him the results were normal except for a minor abnormality on his EEG which did not require the Dilantin Physician #1 had ordered, and that he could drive in one week. Two days later he received a notice from the Registrar informing him of his licence suspension. He later learned Physician #1 had notified the Ministry before the test results were back and without telling him. He was unaware that reporting seizures to the Ministry was mandatory until he was so informed at this hearing.

He went to Huntsville for a Medical Review hearing and the reviewer was a "no show". One of the clerks at the Ministry Office learned the reviewer was on sick leave. An attempt was made to make another appointment, but apparently head office refused. This incensed the Applicant. It required several calls, letters and pleas before a file review was obtained on April 25, 2000. This did not satisfy the Applicant because he did not have an opportunity to state his case. As a result of what he felt was unfair and unjust treatment, he filed a complaint to the College of Physicians and Surgeons against Physician #1 and an appeal to the Tribunal.

FACTS:

The Applicant suffered an apparent generalized seizure on February 20, 2000 just after waking up in his home in Gravenhurst. He was unconscious for a few minutes and was confused until he reached the South Muskoka Hospital in Bracebridge. He was examined by his family physician, Physician #1, and an internist, Physician #2. His physical and neurological examinations were normal, and appointments were made for an EEG, CT Scan and a MRI. Physician #1 notified the Ministry on February 24 that the Applicant had two grand mal seizures and was on medication. On March 16, 2000, the Ministry notified the Applicant his driver's licence was under suspension for medical reasons. Physician #2 had just informed the Applicant his tests were normal and that he

could stop his Dilantin and resume driving in a month. The CT Scan on March 2 was reported as normal.

An EEG performed February 23 found characteristics of Petite mal epilepsy with left lateralization indicating a propensity to Grand mal seizures stemming from the left central focus.

Physician #2 originally stated he would take this finding with a "grain of salt"; however, when he gave evidence, he had changed his mind after reviewing the whole case. He felt the findings were significant and could not be ignored. He stated the Applicant had a seizure at the age of nine and had bitten his tongue on several occasions during the night. The Applicant stated it was a febrile convulsion when he was nine and he often bit his tongue when reading and concentrating. The Tribunal did not have before it a neurologist's interpretation of this information.

The Applicant testified that he had been working normally since the day after the seizure without any problems and had only taken the Dilantin 100 mg from February 25th until March 19th. He felt that the seizure was a stress-related seizure and a solitary event. The Applicant testified that two days after the seizure he had an abscessed tooth, he was asked to leave his church for some reason and his 20-year-old cat had just died.

The Ministry's Medical Advisory Committee had confirmed the suspension and recommended reconsideration in February 2001 after receiving a neurologist's report confirming no seizures had occurred in a year.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or

- (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (g) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) of the *Highway Traffic Act* unquestionably empowers the Registrar to "suspend or cancel" a driver's licence for "any sufficient reason". Regulation 340/94 lists a number of grounds that must not be present in the holder of a driver's licence. Section 14(a) of that Regulation states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and

The Applicant, a 40-year-old man, suffered a Grand mal seizure on the morning of February 20, 2000 and was transferred to a hospital in a confused state. There was a history of another seizure at the age of nine. An EEG on February 23rd revealed abnormalities suggesting a propensity to Grand mal seizures.

The suspension was originally based on an unsolicited letter from the Applicant's family physician, Physician #1, dated February 24th. Subsequently Physician #2, an Internist, wrote to Physician #1 on March 20, 2000, presented his findings and stated the Applicant had been advised to stop his medication and could resume driving in a week's time. On March 22nd, Physician #1 wrote the Ministry and advised them of Physician #2's findings and decision and stated he concurred with Physician #2.

At the hearing before this Tribunal, Physician #2 testified that after a review of the case, he had changed his mind and felt that the evidence indicating that the Applicant had a

propensity to Grand mal seizures stemming from the left central focus was significant and could not be ignored.

Based on the evidence before the Tribunal it appears the weight of evidence is in favour of the Ministry's decision that the medical condition of the Applicant is likely to significantly interfere with the Applicant's ability to drive a motor vehicle.

The Tribunal is satisfied that the criteria in Regulation 340/94 section 14 (a) of the HTA applies to the Applicant. Thus, the Tribunal concurs that the Applicant's driver's licence remains under suspension at the present time.

The Tribunal draws to the Applicant's attention that he may at any time provide new neurological evidence to the Ministry.

DECISION:

Upon the application by the Applicant to appeal the decision dated, March 25,2000, the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the Highway Traffic Act ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: November 10, 2000

ADLS/00/268

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
by written submission

DATE OF
HEARING: November 3, 2000 Toronto

DECISION

A hearing was held on November 3, 2000, at Toronto, Ontario, by way of a written hearing to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.
Presiding Member

RELEASED: November 7, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M. D.,
Presiding Member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

Applicant
by written submissions only

DATE OF
HEARING: November 3, 2000

DECISION
RELEASED: November 7, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 3, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on November 7, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of

a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated September 25, 2000, and was received by the Tribunal on October 2, 2000, together with the prescribed fee of \$100.00, paid by cash.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice to Registrar, dated August 29, 2000
- b) Exhibit #2 Notice of Appeal Form - received October 2, 2000
- c) Exhibit #4 Doctors Reports, Pharmacy Receipts and Medication Information - 9 pages – received October 24, 2000

By the Respondent:

- a) Exhibit #3 Ministry of Transportation submissions – 32 pages - received October 17, 2000
- b) Exhibit #5 Ministry of Transportation's Reply to Appellant's Supplementary Materials and Submissions – 7 pages – received November 2, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath or blood because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or
- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason”.

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) “a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver’s licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner.”

Finally, section 13 of Regulation 574 (amended) provides:

“A person appealing a suspension has the onus of establishing the merit of the appeal”.

FACTS:

The Applicant’s Driver’s Licence was suspended “29 August 2000” as indicated in his Notice of Appeal (Exhibit # 1)

The Notice of Appeal prepared by Physician #1, GP, the Applicant's family physician for "6 years", details and diagnosis the Applicant's present condition as "*Periodic dyspnea ...asthma ...COLD ...smoking for 25 years ...PFT ...(illegible) allergy/exercise testing will be done...*" (Exhibit # 1)

The Applicant's last visit to Physician #1, was on "2.10.2000". (Exhibit # 1)

The Applicant provided the Tribunal with pharmacy receipts as well as "*Patient/Medication Information*" sheet. (Exhibit # 3)

Physician #2, MD. FRCP(C), in an undated report, pertaining to an assessment of the Applicant on "29/09/2000" describes the "*Problem: Chronic back pain secondary work accident; Depression; Hernia repair; Appendectomy; Allergies - bees*" (Exhibit # 3)

The Applicant has been prescribed the following medication: "*Naprosyn 375 mg; Tylenol # 3; Lorazepam 1 mg; temazepam 15 mg Effexor 75 mg,*" (Exhibit # 3)

A "*Progress History*" of the Applicant, reported by Physician #2 reveals "*Vague historian.... construction worker (dry wall), 25 pack year smoker ...developed periodic SOB, chest heaviness and wheeze ...triggers ...dust cold air and exertion at 3/4 mile ...no trouble with ASA ...chronic morning cough productive of yellowish sputum ...occasional nighttime awakenings ...no SOA, orthopnea or PND ...likely exposure to asbestos ...no recent change in home environment ...currently not working ...dog at home ...does not know cholesterol status ...no Hx of DM or PH or FHx of CAD/Asthma. HIV risk - various heterosexual relationships. ROS - chronically tired.*" (Exhibit # 3)

The "Physical" portion of Physician #2's report notes "*Looks well; BP 130/70; HR 72 RR 12; H&N no nodes, oropharynx cobblestone appearance to posterior aspect, trachea midline, no sinus tenderness; Chest normal breath sounds, no adventitious sounds, no clubbing, CVS JVP normal, HS normal, no murmurs, PPP, no SOA; Abd soft, non-tender, no HSM*" (Exhibit # 3)

Physician #2 provides the results of "*Chest X-ray - Thickened bronchi in the perihilar region bilaterally otherwise unremarkable*" (Exhibit # 3)

In a second undated report, pertaining to an assessment of the Applicant on "23/10/2000", Physician #2, MD. FRCP(C), describes the "*Problem: Chronic back pain secondary work accident; Depression; Hernia repair; Appendectomy; Allergies - bees*" (Exhibit # 3)

The Applicant has been prescribed the following medication: "*Naprosyn 375 mg; Lorazepam 1 mg; Effexor 75 mg; Tylenol # 3; temazepam 15 mg*" (Exhibit # 3)

A "*Progress History*" of the Applicant, reported by Physician #2 reveals "*Vague historian ...periodic SOB, chest heaviness and wheeze ...chronic morning cough productive of yellowish sputum ...occasional nighttime awakenings ...unclear if ...significant postnasal drip or GERD ...dog at home.*" (Exhibit # 3)

The "Physical" portion of Physician #2's report notes "*Looks well; HR 72 RR 12; Chest normal breath sounds, no adventitious sounds, no clubbing, CVS JVP normal, HS normal, no murmurs, PPP, no SOA*" (Exhibit # 3)

Physician #2 provides the results of *"Pulmonary Function"* as follows: *"FEV/FVC=2.5/5.1 with a 28% increase in FEV, post bronchodilator. Flow volume loop not reproducible; TLC 106%, RV 114%. FRC 146%, VC 102%, DLCO 106% Raw 92%"* (Exhibit # 3)

The Respondent provided the following Documents for the hearing:

- a) Part I -The Facts: points 1-24
- b) Part II - The Law: points 25 - 27
- c) Part III - Argument of the Registrar: points 28 - 48
- d) Part IV - Order Requested
- e) Certified Copy of the Notice to the Registrar dated August 29th, 2000, sealed October 5th, 2000
- f) Certified Copy of the Applicant's Driving Record, sealed October 4th, 2000
- g) Certified Copy of the Vehicle Search on Occurrence date, sealed October 5th, 2000.
- h) Sworn Affidavit of Officer # 1, Arresting Officer, Ontario Provincial Police, Badge #xxxx, sworn October 12, 2000
- i) Sworn Affidavit of Officer # 2, Qualified Breathalyzer Technician, Ontario Provincial Police, Badge #xxxx, sworn October 12, 2000.
- j) Medical Report of Dr. Eva S. Mate, MD. FRCP(C), dated October 12, 2000.

A summary of the facts as presented by the Respondent, indicate the Applicant was stopped by an Ontario Provincial Police Constable, on August 29, 2000, at which time he was demanded to give and failed to provide a breath sample. (Exhibit # 2)

In its Argument, the Respondents contends that *"...the appellant did not have a health problem at the time the breath demand was made ...Physician # 1's and Physician #2's reports do not serve to substantiate the appellant was suffering from a medical condition which prevented him from providing a breath sample..."* (Exhibit # 2)

The Applicant's driver's record since 1983, shows several infractions (Exhibit # 2)
Officer # 1, a member of Ontario Provincial Police for *"...17 years..."* deposes in an Affidavit dated 12 October 2000, as follows:

1. *"...approximately 9 p.m. ...approached the vehicle..."*
2. *...read ...Rights, Breath Demand and Caution...he spoke to me in English and understood..."*
3. *...approximately 9:12 p.m....arrived at detachment"*
4. *...approximately 9:43 left The Applicant with Officer # 2 to complete breath testing session..."*
5. *...approximately 10:06 The Applicant was returned to my custody. I was advised by Officer # 2 that he failed to provided a breath sample..."* (Exhibit # 2)

Officer # 2, a member of the Ontario Provincial Police for "...6 years... qualified to operate the Intoxilyzer Model 5000 C... Breath Technician since January 1997, in an Affidavit dated October 12, 2000 attests that:

1. "...I am a Paramedic ...for 13 years...
2. ...set up the Intoxilyzer 5000 C, serial 64-003643...performed diagnostic check and calibration check...passed...
3. ...On his first attempt...observed cheeks sunk in ...I kept telling him to blow out, he continued to suck in ...observed his cheeks ...sunk in...
4. ...on the next attempt ...started to blow ...stopped blowing after 1-2 seconds...again...sucking in his cheeks...
5. ...continued to do this ...advised ...he was being charged..
6. ... at no time during the breath testing session did The Applicant appear to be in any physical or medical distress...not having difficulty breathing or talking ...not coughing, wheezing or gasping for air...
7. ...at no time during the breath testing session did The Applicant make a request ...for medical assistance or medication..." (Exhibit #2)

Dr. Eva S. Mate, FRCP (C) a consultant in respiratory medicine with The Wellesley Hospital, in a letter dated October 12, 2000, qualifies that she has been in "...practice since 1982...", and that she has "...extensive experience in the management of chronic respiratory illness such as obstructive lung disease and asthma." Dr. Mate goes on to describe her qualifications: "...lengthy experience with performance and interpretation of pulmonary function tests... Assistant Professor at the University of Toronto...know the background evaluation of instrumentation such as Intoxilyzer 5000 cc and also Alcotest ...aware of breath sampling criteria required to provide acceptable information using the above instrumentation."

After reviewing the information provided, Dr. Mate comments and concludes that "...on physical examination... no features of advanced disease ...failure to provide a breath sample was ...voluntary ...due to lack of cooperation and unrelated to the existence of underlying COPD..." (Exhibit # 2)

APPLICATION OF THE LAW TO FACTS:

At issue is, how does the medical condition of the Applicant relate to section 50.1 (2) (b) of the *Highway Traffic Act*, and did this medical reason cause him to fail or not comply with the breath demand.

The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed all evidence submitted by both parties. The Applicant proffers no explanation as to why he failed to provide a breath sample when demanded to do so.

The Notice of Appeal prepared by Physician #1, reports the Applicant's present condition as: "*Periodic dyspnea ...asthma ...COLD...*" (Exhibit # 1)

The only evidence tendered by the Applicant, other than the information contained in the Notice of Appeal, are two undated reports from Physician #2, pertaining to visits on "29/10/2000" and "23/10/2000". The Tribunal notes that both of these assessments occurred well after the Applicant's driver's licence was suspended for failure to provide a breath sample.

In reviewing all the medical reports provided for the hearing by the Applicant, the Tribunal finds that neither of the reports complies with the requirements of sections 15(1) and (2) of Regulation 574 which provides:

15 (1) (c) " that the medical practitioner had prepared the report or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's licence under section 50.1 of the Act."

15 (2) "The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests."

Physician #2's and Physician # 1's reports simply state the Applicant's present condition, and they offer no reason as to why the Applicant could not provide a breath sample.

There is no indication as to whether the Applicant sought medical assistance at the time of the incident. Physician #1, states that the Applicant's last visit was on "2.10.2000" but does not render a record of previous visits, which might be related to the incident that led to the suspension of the Applicant's driver's licence... (Exhibit # 1).

The Tribunal must rely on the eyewitness testimony offered by the Breathalyzer Technician, who attests that "*...at no time ...did The Applicant appear to be in any physical or medical distress ...not having difficulty breathing or talking ...not coughing, wheezing or gasping for air...make a request ...for medical assistance or medication...*" (Exhibit #2)

The Tribunal finds that there is insufficient medical reasons as to why the Applicant was unable to comply with the request to provide a breath sample. The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample when requested.

DECISION:

Upon the application by The Applicant to appeal the suspension order dated August 29, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal **confirms** the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: November 8, 2000

HESPELER TRAVEL LTD. O/A HESPELER TRAVEL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
HESPELER TRAVEL LTD. O/A HESPELER TRAVEL
as a travel agent and as a travel wholesaler

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: January 17, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

HESPELER TRAVEL LTD. O/A HESPELER TRAVEL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

ORDER

PURSUANT to the provisions of the Travel Industry Act R.S.O. 1990, Chapter T. 19 (the "Act") Hespeler Travel Ltd. o/a Hespeler Travel (the "Applicant") initiated an appeal of the proposal of the Registrar under the Act dated January 17, 2000 in terms of which the Registrar proposed to revoke the registration of the Applicant as a travel agent and travel wholesaler;

AND WHEREAS, the Applicant has failed to pay the filing fee for these proceedings before the Tribunal, required pursuant to section 7 of the *Licence Appeal Tribunal Act*, 1999;

AND WHEREAS, the Applicant has not responded to a Notice of Intent to Dismiss Proceedings sent to the Applicant pursuant to section 4.6 of the *Statutory Powers Procedures Act*, R.S.O. 1990, Chapter S.22 as amended, and Rule 2.10 of the Rules of Practice of the Licence Appeal Tribunal whereby a proceeding before this Tribunal may be dismissed without a hearing for failure to pay the required filing fee;

NOW THEREFORE, this Tribunal orders that:

1. Pursuant to the authority vested in it under section 4.6 of the *Statutory Powers Procedures Act*, as amended, these proceedings, initiated by the Applicant's request for a hearing before this Tribunal, are dismissed;
2. Pursuant to the authority vested in it under section 6(4) of the *Travel Industry Act*, this Tribunal directs the Registrar, *Travel Industry Act* to carry out his proposal dated January 17, 2000 to revoke the registration of Hespeler Travel Ltd. o/a Hespeler Travel.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 1, 2000

SORELY

KIRK SORLEY

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TO REVOKE REGISTRATION

TRIBUNAL: DAVID J. HUNT, Vice-Chair

APPEARANCES:

ANTHONY BAK, Counsel representing the Applicant
MITCHELL GOLDBLOOM, Counsel representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING:

October 27, 2000

Toronto

REASONS FOR DECISION AND ORDER

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar", and the "Act" respectively). The Notice of Proposal dated June 19, 2000 proposed to revoke the registration of Kirk Sorley ("Sorley"), as a salesperson under the Act. No Notice of Appeal was filed on behalf of 1174793 Ontario Inc. or Jacques Poulin also named in the Notice of Proposal.

BACKGROUND:

The Registrar under the Act proposed to revoke the registration of Kirk Sorley. The grounds relied upon by the Registrar for the Proposal are set out below:

1. Pursuant to the provisions of section 6 (1) of the Act, the Registrar, having regard to the registrant's financial position, finds that the registrant cannot reasonably be expected to be financially responsible in the conduct of its undertakings as required by the provisions of section 5(1)(a) of the Act, TO WIT;
 - (a) The registrant is an officer of 1174793 Ontario Inc. o/a "The Car Lot" which has failed to comply with the requirements of the Retail Sales Tax Act as to filing of returns and remitting of tax due, and paying assessments when due.
2. The past conduct of the Applicant affords reasonable grounds for belief that the Applicant's undertakings will not be carried out in accordance with law, and with integrity and honesty, TO WIT;
 - a) The Applicant is an officer of 1174793 Ontario Ltd. o/a "The Car Lot" which has failed to comply with the requirements of the Retail Sales tax

Act as to filing of returns and remitting tax due, and paying assessments when due.

THE LAW:

Section 3 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows,

(1) No person shall,

(a) carry on business as a motor vehicle dealer unless the person is registered under this Act; or

(b) act as a salesperson of or on behalf of a motor vehicle dealer unless the person is registered as a salesperson of such dealer and such dealer is registered as a motor vehicle dealer under this Act.

.....

Section 5 of the *Motor Vehicle Dealers Act* (the "Act"), states as follows;

5(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(a) having regard to the financial position of the applicant, the applicant cannot reasonably be expected to be financially responsible in the conduct of business; or

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law, and with integrity and honesty; or

(c) the applicant is a corporation and,

(i) having regard to its financial position, it cannot reasonably be expected to be financially responsible in the conduct of business, or

(ii) the past conduct of its officers or directors affords reasonable grounds for belief that its business will not be carried on in accordance with law and with integrity and honesty; or

(d) the applicant is carrying on activities that are, or will be, if the applicant is registered, in contravention of this Act or the regulations.

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 6 of the Act states as follows;

(1) Subject to section 7, the Registrar may refuse to register an applicant where in the Registrar's opinion the applicant is disentitled to registration under section 5.

(2) Subject to section 7, the Registrar may refuse to renew or may suspend or revoke a registration for any reason that would disentitle the registrant to registration under section 5 if the registrant were an applicant, or where the registrant is in breach of a term or condition of the registration.

Section 43 of the *Retail Sales Tax Act* (the "Act") states as follows:

(1) Where a corporation has failed to collect tax or has collected tax and failed to remit the tax or has failed to pay any interest or penalty related thereto, the directors of the corporation at the time the corporation was required to collect or remit the taxes or to pay the interest or penalty relating thereto, are jointly and severally liable, together with the corporation to pay such amounts.

(3) A director of a corporation is not liable for a failure described under subsection

(1) if the director exercised the degree of care, diligence and skill to prevent the failure that a reasonably prudent person would have exercised in comparable circumstances.

CASELAW:

Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesman) 1983 O. J. No. 1017 Ontario Supreme Court-High Court of Justice Divisional Court

This was an appeal by the Registrar of Motor Vehicle Dealers and Salesmen from a decision of the Commercial Registration Appeal Tribunal in which the Tribunal directed the Registrar to grant a conditional registration to the Respondent. The Applicant had a very serious criminal record which he had disclosed in his application, but he had not disclosed three further convictions which were considered by the Registrar to be minor offences. The Applicant heard evidence from a potential employer and a criminal lawyer who testified that the Applicant was rehabilitated himself. The Court found that the Tribunal had not applied the proper test, and set out this test in paragraph nine of the judgment as follows:

"the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty. The board does not appear to have directed itself to this question and makes no finding that, in its view, the past conduct of Brenner did not afford reasonable grounds for the belief that Brenner would not carry on business in accordance with law and with integrity and honesty. Instead

the Board appears to have been preoccupied with sympathetic concern as to whether or not Brenner had genuinely reformed, and appears to have decided that it ought to give him a second chance because there was the possibility that he, indeed, might have reformed himself."

669607 Ontario Ltd. (c.o.b. Carrerra Fine Cars) 1998 O.C.R.A.T.D. No. 45

In this matter, the Registrar based a proposal for the revocation of the dealer's registration on the grounds of the lack of financial responsibility where there was a failure by the Applicant to comply with the requirements of the Retail Sales Act. The Applicant owed an estimated \$109,743.60 and had not filed Retail Sales Act returns for "a couple of years". The Ministry of Finance had made an estimate of the tax owing, and although the Registrant admitted he owed money, he disputed the amount although no objection was ever registered. He testified that he had a partner who did the books for the company during the period in question, but the Tribunal rejected this evidence. The Tribunal found that although the company was now operating as wholesaler, this did not eliminate the responsibilities of the Registrant as its sole officer to make payment arrangements. Further, the Tribunal found that the Registrant ignored its obligations to meet these debts, and was obliged to deal with the financial liabilities even when they considered it inconvenient or unfair. On pages 6 and 7 of the decision the Tribunal stated:

"There is no evidence before the Tribunal that the Registrant made any serious attempts to discuss repayment of the debt"

and "The Tribunal is more troubled by the fact that for all these years the Registrant has ignored its obligations that it is with the fact that there are debts. Sometimes business practices are not perfect and mistakes can be made, but for the Registrant some five years later to state that it cannot at this time make any repayment arrangements but wants to at some point in time is completely unacceptable. If the Registrant had shown any attempts to make repayment arrangements, the Tribunal would have been inclined to look at strict terms and conditions to allow the wholesale registration to continue."

This inaction was found to go directly to the issue of honesty, integrity, and carrying on business in accordance with law. The explanation given by the Applicant was found to cast doubt on his ability to conduct business with honesty and integrity. The Registrar was ordered to carry out the proposal.

787498 Ontario Inc. o/a Lakeview Motor Sales and Service and Christopher Richard Hiles, July 10, 2000, Licence Appeal Tribunal

In this matter the Registrar based the Proposal for the revocation of the registration as a dealer and a salesman on the failure to remit Retail Sales Tax. Hiles was the sole officer of the company as well as a registered salesperson. He admitted that there was at least \$100,000.00 owing by the company and had filed 47 returns which were all in default. By 1999, the Ministry estimated that the debt had grown to approximately \$171,000.00. Eight post-dated cheques had been provided but were returned N.S.F. During an audit, the Applicant admitted that trust money was collected but used to pay the expenses of the business. By the time of the hearing the Applicant was making payments of \$200.00 per week towards and estimated debt of over \$300,000.00. The

Applicant had also transferred three properties into his wife's name on the advice of his lawyer as a method of "securing his family position". There were also 14 vehicles registered to him personally. The Tribunal found that the use of trust funds to run the business was a "completely unsatisfactory and irresponsible approach to the conduct of business". Due to the amount owing and the length of time it was owed, the Tribunal found on page 5 that:

"Hiles and Lakeview cannot be reasonably expected to be financially responsible in the conduct of their business on an ongoing basis."

The Tribunal also found Hiles explanation to be unsatisfactory as he knew that the monies were owed and chose not to remit them, and use them for his own purposes. The fact that Hiles transferred properties out of his own name 12 days after the additional visit from the representative of the Ministry caused the Tribunal to doubt whether he was genuinely interested in making arrangements to pay his outstanding debt. In the circumstances, the Tribunal directed the Registrar to carry out the proposal to revoke the registration of Lakeview Motor Sales and Christopher Richard Hiles.

Pilling v M.N.R. 89 DTC 327

In this matter the taxpayers Dale and Heather Pilling were the directors of a contracting business under the name Gilmour Construction & Engineering Co. Ltd. ("Gilmour") Dale was an engineer, and was responsible for the day to day operation of the business. Heather prepared the payroll and tax remittances for the company at the direction of Dale. The cash flow of the company deteriorated in 1982 and no remittances were paid during March and April 1992 and from June to October 1982. The withholding of remittances was at the direction of Dale Pilling and both parties were personally assessed for tax arrears in the amount of \$27,170.68 including penalties and interest. In October 1982 the collections officer had discussions with Mr. Pilling and was told that the company had \$30,000.00 "on hand" and no payments were made toward the arrears. The Court found that both parties demonstrated the attitude that the Receiver General could wait while available funds were used for the operating expenses of the business. After the closure of Gilmour the parties opened a new company and the pattern of not remitting the statutory deductions continued. At page 7 of the judgment to court stated:

"There is absolutely no evidence that the Pillings gave any consideration to the corporation's obligations under the Act or of their personal liability. Mr. Pilling ran the corporation and Mrs. Pilling followed his instructions without reserve. Payment to the respondent appears never to have been consideration of the part of the Pillings; the attitude of Mr. Pilling to the statutory obligation of the corporation and his and Mrs. Pilling's own personal liability was demonstrated in both the corporation and the company incorporated in 1982: payments to the respondent could wait, money was necessary for the operation of the corporation's business."

In the circumstances, the Court found that neither party fell within the exemption of s. 227.1 (3) of the Act, and neither exercise the degree of skill care, and diligence that he reasonably prudent person would have exercised in comparable circumstances.

Barnett v M.N.R. 85 DTC 619

In this case the Appellant was a minority shareholder, a director and the vice president of the company. He was responsible for the production side of the business and although he was authorized to sign cheques, he did so only once. When he became aware that the company had an income tax problem, the directors who were responsible for financial matters assured him that it was being dealt with and that he did not need to worry. The Court held that he failed to exercise the degree of care, diligence and skill that a reasonable prudent person would exercise in comparable circumstances as he did nothing to prevent the failure to remit the tax, however the Court did not find it necessary to set out what must be done to meet the standard of care required.

Lloyd Youngman & Company Inc. Trustee of the Estate of Harold Fraser in Bankruptcy v The Ministry of National Revenue 87 DTC 250

In this case the Court found that the Appellant did nothing to prevent the failure, and did not even urge the other directors to comply with the requirements. He was not aware of the statutory requirements but that was no excuse. The company did not keep the funds separate from their own operating revenue, and the Court found that he did nothing to ensure that this was done in compliance with the regulations. Internal arrangements within the company may be taken into account in an appropriate case, but it is not a defence for an Appellant to argue that someone else had a better opportunity to prevent the failure. At page 4 of the decision, the Court stated:

“ This is not a case in which a director is forced to rely on other directors or officers or subordinate employees because those others possess skills which he does not. Mr. Fraser did not make an unsuccessful attempt to prevent default. He simply did not try.”

The appeal was dismissed.

Edmondson v M.N.R. 88 DTC 1542

In this case the Appellant had no previous business experience and in 1983 invested money in a company in which he became a director. He was not a signing officer and did not go to the company offices or attend directors' meetings. In 1984, the Appellant became aware that payments had not been made to Revenue Canada. He mortgaged his home and put further money into the company so that Revenue Canada was paid and insisted on cosigning all cheques and having his daughter do the books as she was an experienced bookkeeper. Later Revenue Canada examined the company books as there were still arrears, and it was found that the cheques had not been forwarded to Revenue Canada.

The Court examined the requirements for due diligence and found that the high degree of vigilance is required for a director to rely on the 'due diligence' defence. The Revenue Canada Taxation directive of October 6, 1987 was referred to by the Court on page 3 where it was stated:

"directors must take positive action to prevent the failure of the corporation to deduct, withhold and remit if they wish to rely on the defence provided in subsection 227.1(3)."

The Court found that the Appellant although unsophisticated in corporate management arranged to pay the arrears, and insisted on being a co-signer on cheques, and had his daughter as the bookkeeper. Unfortunately, the cheques were not mailed and his efforts were frustrated. Counsel for the Receiver General argued that in the Appellant was not familiar with the director's duties and personal liability but this was no defence. Dealing with this proposition, the Court cited the case of *Cybulski v M.N.R.* 88 DTC 1531 in which Christie A.C.J. stated that:

"In my opinion the principle that ignorance of the law is no excuse [FOOTNOTE 1: it is not correct to say that everyone is presumed to do the law. The true proposition is that no man can excuse himself from doing his duty by saying that he did not know the law of the matter. Ignorantia juris neminem excusat, *Kiriri Cotton Co. Ltd. v Ranchhoddas Keshavji Dewani*, [1960] A.C. 193, Lord Denning at 204] can have no application here. In enacting subsection 227.1(3) Parliament established an exonerating standard of conduct the presence of which is to be determined in particular cases by the actual relevant facts and not by fixing to a taxpayer knowledge of a somewhat esoteric point of corporation law that in reality is probably not within the actual knowledge of the good number of legal practitioners."

The Court found that although the Appellant was completely unaware of his director's duties, he took protective action when he was almost forced to do so. In the circumstances the Court found that he did bring himself within the exempting provisions of the Act and allowed the appeal.

ISSUES:

The legal issue in this case is whether the Registrar erred in his decision to revoke the Applicant's registration under the Act on the basis of a lack of financial responsibility or that the Applicant would not act with integrity, honesty, and carry on business in accordance with the law.

EVIDENCE:

Witness for the Registrar

Deborah Price testified that she is a senior collections officer for the Ministry of Finance of Ontario and has been employed there since 1998. She dealt with the Ontario Retail Sales Tax arrears for "The Car Lot" and explained that as of May 11, 2000 the sum of \$84,981.70 had not been remitted and that with penalty and interest the balance was \$106,194.82. On May 11, 2000 a letter (Exhibit 4, Tab 6) was sent to O.M.V.I.C. requesting that they issue a Proposal to revoke the registration of the motor vehicle dealer. She explained that this is a standard procedure when an account is in arrears. Ms. Price had made arrangements with Sorley for monthly payments of \$1000.00 from November 8, 1999 to April 8, 2000 together with the current filings and payments being kept up to date. The monthly payments were made, but the arrangement had gone into arrears as the current filings and payments were not made. From March 31, 2000 until September 13, 2000 no returns had been filed and no payments made. A Writ of

Seizure was issued and she was advised by the Sheriff that the company was operating under another name. In August, 2000 a letter was sent to Sorley and the other three directors of "The Car Lot" advising them that they would be held personally responsible for the debt, and in September 2000 they all declared personal bankruptcy.

Ms. Price testified that when she had originally called the dealership, she spoke with Sorley and had no reason to speak to Mr. Poulin as Sorley had authority to deal with her. She did not know that Mr. Poulin was a Director until the corporate search was done, then learned from Sorley that Mr. Poulin was no longer on the premises, and was not taking part in the business. The Applicant advised her that he had reduced the expenses for the business, and was paying \$2,500.00 per month for nine months for G.S.T. arrears. Ms. Price did not remember asking the Applicant for payments of \$5,000.00 per month, and denied that she told him to ignore his G.S.T. obligations.

During cross-examination, Ms. Price confirmed that there was no evidence of dishonesty by the Applicant in dealing with members of the public, or any conduct such as tampering with odometers; however, the Ontario Retail Sales Tax money was to be held in trust, and there was an obligation by the company to remit these trust funds. The Applicant did not contest his liability as a Director, so the issue was never adjudicated and. Mr. Sorley did not raise the defence of "due diligence". The witness also confirmed that she had no knowledge of any Retail Sales Tax problems with the new company operating as "The Car Lot 2000".

Mary Jane South testified that she is the Deputy Registrar of O.M.V.I.C. which is the administrative authority for the Ontario Motor Vehicle Dealers Act. She stated that a person is entitled to registration as a motor vehicle salesperson unless they do not meet the requirements of financial responsibility or their conduct demonstrates that they would not carry on business with honesty, integrity, and in accordance with the law. In the case of this particular Applicant, she was concerned that trust funds had been collected by the dealer, and they had not been kept separate and remitted to the Ministry as required. On this basis, she decided to revoke the registration of the dealer and the salespersons as they were directors of the company. She was given no information to lead her to conclude that Sorley should not be responsible as a director. Ms. South testified that she had concerns about the present situation as the Applicant was working in what appeared to be a very small dealership where he would have a great deal of responsibility rather than a large dealership where there would be checks and balances in place. When a corporate search was done, it was also discovered that the Applicant was a director of the new company. Although Sorley made arrangements for payment of arrears, it was only a token amount, and the default in filings and payments for current months breached the arrangement with the Ministry. Therefore in making her decision to issue the Proposal, she considered that there was a lack of financial responsibility due to the failure to maintain the agreement with the Ministry, and a failure to act in accordance with the law as the trust funds were not kept separate as required.

In cross-examination Ms. Price said that she did not consider the Applicant as dishonest and agreed that she had not discussed the issue of due diligence with him. Her knowledge came from the forms sent to her from the Ministry of Finance, and there has been no communication with anyone involved in the new company. She agreed that she received the letter of May 11, 2000 from Ms. Price requesting that there be a Proposal to revoke the motor vehicle dealer registration, but she stated that the decision was made by her.

Witness for the Applicant

Mr. Kirk Sorley testified that he is 48 years of age, is married, and has two children. One child is still living at home in Niagara Falls and the other is in Alberta. After graduating from High School, the Applicant was a member of the R.C.M.P. in Alberta from 1972 until 1980 when he left the force with an honourable discharge. He moved to Ontario, and operated an automobile rust proofing business from 1980 until 1988. In 1988 he opened a small motor vehicle dealership with a partner which operated until 1990 when he moved to Niagara Falls so that he could be closer to his parents who were not good health and needed his assistance.

For two years he worked as a salesman at a dealership in St. Catherines, then moved to a Honda dealership in Niagara Falls. Jack Poulin was the manager of the dealership, and they developed a good working relationship. In January 1993, they formed a partnership and opened The Car Lot. Sorley was the main buyer and seller of vehicles, and Poulin carried out the administrative duties as well as a few sales. Poulin was computer literate and did the day-to-day record keeping. They hired an accountant who they later found was only a bookkeeper, but he was replaced by the time they incorporated the company. The Applicant was the president of the company as he had invested the majority of the money, but Poulin made most of the financial decisions. Sorley, his wife, and Poulin all had signing authority for the company.

After a couple of years, Sorley discovered that there was a problem with cash flow, the payment of bills and the timely payment of taxes. By 1998, the Applicant had problems getting Poulin to do things and by the middle of the year he began to get involved. He made an arrangement with the Receiver General of Canada to pay G.S.T. arrears at \$2500.00 per month and in 1999 was contacted by Ms. Price from the Ministry of Revenue regarding the problem with the Ontario Retail Sales Tax. The first written notification he received was the final notice dated October 20, 1999 (Exhibit 5, Tab 1), and he immediately telephoned Ms. Price to make arrangements for sending the necessary returns and arranging monthly payments. He stated that she told him that she did not care about his G.S.T. payments, but he said he could pay \$1000.00 per month. In January or February, 2000 an auditor came from the Ministry of Finance and Mr. Sorley testified that he tried to be as helpful as possible. After the audit was completed, Sorley, sent a letter to Ms. Price on Feb. 25, 2000 (Exhibit 5, Tab 3) showing his financial plan to reduce the expenses for his business and asking her to work with him to keep the business running and reduce his debt. He testified that Ms. Price advised him that his efforts were not enough and she wanted \$5000.00 per month. Unfortunately, Poulin could not put any money into the business, and the witness could not afford the payment requested. Sorley testified that he was never told by Ms. Price that forms had to be submitted and, in any event, after March 1, 2000 no Provincial Sales Tax was collected. He testified that to meet the filing requirements Ms. Price sent him some blank forms a month ago and he submitted them showing that there was nothing owing.

Mr. Sorley testified that the accountant for the new company had included him as a first director so that he could make deposits, but really he was just a salesperson. He would be willing to abide by terms and conditions that he act only as a salesperson and take no part in the administration of the business. In his capacity as a salesperson, he has never had any complaints about dishonesty, and the present company has had the O.M.V.I.C. inspector come in without any difficulties being found. The Applicant testified

that this situation has resulted in problems with his marriage and his family, his health has suffered, and his self respect has been seriously reduced. To try to keep the business going and pay the debts, he has mortgaged his home to the extent of his equity, has no money in the bank and has borrowed from his parents as an advance on his inheritance. He testified that he has no other work that he can do.

In cross-examination, he confirmed that Poulin did not steal money from the business or do anything dishonest with the corporate records, and he does not challenge the tax liability calculated by the Ministry of Finance. Mr. Sorley agreed that the trust money was simply used by the company to keep the business going. Sorley testified that he is not an owner of the new business, which is owned by his sister and brother-in-law. He was unclear on how he is being paid, and testified that he is receiving a wage but that it is somehow based on the profitability of the company. He could not describe how it was calculated. When he was questioned about whether Retail Sales Tax remittances should have been made on January 4, 2000 or March 6, 2000, he had no knowledge of any such payments being due, and stated that the accountant would have filled out the form.

FACTS FOUND PROVEN:

The facts found by the Tribunal are that Sorley was an officer of 1174793 Ontario Inc. operating as "The Car Lot", and invested the majority of the money. His primary responsibility was buying and selling cars, and his partner Poulin carried out the administrative duties together with the book keeper or accountant. Poulin decreased his participation in the business, and Sorley became aware of a cash flow problem. This situation was clarified when he was contacted concerning G.S.T. arrears and Retail Sales Tax arrears. Sorley made arrangements for payments to be made on the tax arrears, and he issued company cheques which were honoured.

Sorley did not file further Retail Sales Tax returns until after he was contacted. There is no reliable evidence of further sums of Retail Sales Tax owed. Sorley tried to re-organize the business to reduce expenses so that he could keep the business going, and contributed most of his personal assets to the business. The Retail Sales Tax had been collected but was used as general company revenues leading to the accumulation of the debt. The company ceased operation, and a new company was formed, and is operating at the same location with Sorley as a founding director as well as his sister and brother in law. In May 2000, Sorley applied to transfer his registration as a salesperson from 1174793 Ontario Inc. o/a The Car Lot to 1302766 Ontario Inc. o/a The Car Lot 2000. There is no evidence of any irregularities with filings or remittances from that company. Sorley is a salesman with the company and is paid according to the profitability of the company. The Tribunal accepts the evidence of Sorley that he does not intend to act in an administrative capacity with the new company, and intends to be removed as a director and officer if this has not already been done.

APPLICATION OF LAW TO FACTS:

The Act provides that the Registrar may revoke the registration of the Applicant where the Applicant's past conduct affords reasonable grounds for belief that the Applicant will not carry on business in accordance with the law, and with integrity and honesty.

The Tribunal finds it significant that there is no evidence that the Applicant took an active role in the administration of the business as Poulin acted in an administrative role due to his experience and skill. In the "Carrera" decision, the Tribunal specifically rejected the Applicant's evidence that someone else did the books. Mr. Sorley finally became involved in the administration once Poulin had effectively withdrawn, and arrangements had to be made to begin to pay tax arrears. Although the payments made were small amounts compared to the arrears, Sorley did try to deal with the situation when he had the opportunity, unlike the "Carrera" case where the Applicant was found to be ignoring his responsibility to make arrangements for payment. In this case, Sorley also used his own resources unlike the "Hiles" case where the Applicant transferred properties out of his name to protect the financial position of himself and his family. There was no indication in the case now before this Tribunal that the Applicant was hiding assets to evade payment of tax, and there was no reliable evidence that any new tax was owing after the audit.

This Tribunal's jurisdiction is set out in the provisions of the *Ontario Motor Vehicle Dealers Act* and does not extend to a determination of whether the Applicant has an exemption for liability for unremitted Ontario Retail Sales Tax in his capacity as a director on the basis of due diligence. The Tribunal will, however, be guided by the principles set out in the above cases as they relate to standards of conduct since the matter of due diligence has not been determined by the courts. In this case, the Applicant contributed his own money to the business and took control of the financial matters once he was aware of the problems in the business. Unlike the cases of "Pilling" and "Barnet" he tried to take positive steps to deal with the arrears, and did not ignore the problem.

The legal test to be used by the Tribunal is whether the Registrar was in error in deciding that the past conduct of the Applicant provided reasonable grounds to believe that the Applicant would not carry on business in accordance with integrity honesty and with the law. On the basis of the facts as found, and the application of the law to those facts, the Tribunal finds that the decision by the Registrar was in error, and the Applicant is entitled to registration as a salesperson only.

DECISION:

Therefore, by virtue of the authority vested in it under section 7(4) of the *Motor Vehicle Dealers Act*, the Licence Appeal Tribunal directs the Registrar not to carry out his proposal to revoke the registration of the Applicant, but to permit him registration as a salesperson only on the conditions that he is neither an officer nor a director of any motor vehicle dealership, and that he takes no part in the administration or the financial affairs of any motor vehicle dealership.

LICENCE APPEAL TRIBUNAL

David J. Hunt,
Vice Chair, Presiding.

JOHNSTONE

MARY B. JOHNSTONE

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

MARY B. JOHNSTONE, Applicant
unrepresented

DATE OF HEARING: November 29, 2000 *by teleconference*

DECISION RELEASED: December 4, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 29, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Mary B. Johnstone (the "Applicant")
Motor Vehicle: 1986 Pontiac Grand Prix, plate # AHRP 059 (the "vehicle")
Date of Appeal: November 10, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 29, 2000 and proceeded as a teleconference hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Respondent filed certified copies of documents on file.

The Applicant and the Respondent agreed that the hereinto before mentioned documents be filed at the hearing as evidence.

There being no other preliminary matters and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I AM THE OWNER OF THE IMPOUNDED CAR. MY CAR ('86 PONTIAC) WAS LEFT AT MY SON'S (MICHAEL BRENNAN) RESIDENCE (219 BOULLEE ST LONDON) WHILE I WAS IN FLORIDA FOR THE MONTH OF OCT/2000, AS I LIVE IN AN APARTMENT COMPLEX AND DID NOT WANT TO LEAVE IT THERE. I NEED THE

CAR TO GET BACK AND FORTH TO DOCTOR'S APPTS., AND TO GET MY GROCERIES.

The Applicant claims impoundment will result in extreme hardship as the vehicle is needed "...to get back and forth to the doctor's appts., and to get. groceries."

At the hearing the Applicant gave evidence as to the events that led up to and surrounding the impoundment.

In viva voce and cross-examination the Applicant testified that she owns another vehicle, but that she does not like to drive it in the winter.

When asked directly how the impoundment of the vehicle directly affected her health, the Applicant replied that she has several appointments with her physicians, but confirmed that her daughters would be driving her to the appointments.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael L. Brennan;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving While Disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until October 16, 2001.

The Respondent offered no evidence other than the documentation offered prior to the hearing. At the hearing the Respondent introduced a certified copy of proof of ownership of the Applicant's second vehicle.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under

- suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the exceptional hardship ground of appeal as provided in subsection 50.2(3)(d) of the Act.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified that she is able to get about by with the assistance of her daughters. Further the Applicant admitted to owning another vehicle.

As the Applicant has alternate methods of transportation available to her, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Board may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting. The Applicant denied having incurred any financial burden.

The Applicant has not satisfied the Board that she has in fact incurred any loss of income or extra expenses which could be considered hardship.

Is the loss upon a person ordinarily transported in the motor vehicle?

The evidence establishes that the Applicant was being transported by the vehicle as required by O. Reg. 632/98, Subsection 22(3)(c).

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

The loss will be upon the Applicant who is a person other than the driver whose licence was under suspension as required by subsections 22(3)(d).

Although the Applicant meets two of the four criteria under subsection 22(3), two are not met. The subsection requires all four criteria to be met before considering financial or economic loss or loss of employment or employment opportunity or loss of education or training as exceptional hardship. Also subsection 22(2)(a) prevents inconvenience as being considered as exceptional hardship pursuant by this Tribunal. There is no evidence that the Applicant's health or safety is at risk due to this impoundment.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship under section 50.2 of the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: December 4, 2000

RAZACK

ALISCIA B. RAZACK

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: JOE HEWITT, Presiding member
FRANK WOLMAN, Member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

ALISCIA RAZACK, Applicant
unrepresented

DATE OF
HEARING: November 29, 2000

DECISION RELEASED: December 4, 2000 Toronto

REASONS FOR DECISION

A hearing was held on November 29, 2000 at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO SET ASIDE the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Aliscia B. Razack (the "Applicant")
Motor Vehicle: 1995 Toyota Camry, plate # 069 VPM (the "vehicle")
Date of Appeal: November 15, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3)(d) of the Act.

This matter came before this Tribunal on November 29, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

The hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Re: My car- I use the car to get my (2) kids 9mths & 3 1/2yrs old to & from the babysitter. My job is with an agency. I work from one end of the city to the other. My shifts are mostly (95%) 3-11pm. My babysitter lives at Birchmount & Finch. I lives at Lawrence/Morningside. It takes 40 mins to get to the sitter on my way then on to work. Considering the time of my shifts using the bus is not even an option. If I don't work my bills ie mortgage \$1025.00 Insurance 200.00 Loan \$195.00 Car Loan \$425.00 not forgetting my kids and the expense of everyday living. I'm really sorry that before lending

my car I didn't check to see if that person can drive. I hope on the day of my hearing I can explain better how much I need my car for survival.

Thank you.
Aliscia

Ms. Aliscia Razack gave evidence that she is the owner of the impounded motor vehicle. That the car is a necessity in order for her to transport her two children 9 months and 3 1/2 years old to her babysitter. Ms. Razack works as a health care worker in senior citizens homes. That is, she works for a temporary work agency that assigns her to fill in at a number of locations. She works a full week but not usually at one location in Toronto. Her work may be at Keele and Sheppard or Dufferin and Finch area. Her shifts are normally 3:00 p.m. to 11:00 p.m., and she testified that she has no person other than her friend, to be the babysitter to leave her children with. The babysitter's house is at Birchmount and Finch. She testified that it is impossible for her to use public transit to drop off her children at her babysitter's home and then get to work and later pick them up after work. That a taxi would be cost prohibitive because it would cost \$30.00 to \$35.00 each way. She testified that alternative childcare would be approximately \$300.00 per week for her infant child and her daughter.

Ms. Razack stated that since the impoundment of her vehicle, she has not been able to work at all. She has made inquiries of agencies that would transport her to work, but they would not provide transportation for her children. She has looked into car rentals which would cost \$25.00 per day.

Ms. Razack testified that she currently has \$200.00 dollars in her bank account which she will be using for food and formula for her children. Her mortgage, car payments, insurance, utility bills, food and living expenses do not leave much in the way of savings in a normal month, and now she does not know how she will meet her current financial obligations of mortgage and car payments. She stated that she is in no position to pay impoundment fees and without her car cannot earn a living.

Ms. Razack stated that Mr. St.-Kitt, the driver of the car at the time of its impoundment, pays half of the households bills. She was never told of his driving suspension.

Ms. Razack testified that Mr. St.-Kitt was an occasional driver of her car.

Ms. Razack submitted financial statements and loan documents to support her sworn testimony, and the Tribunal finds that Ms. Razack was a credible witness.

Evidence for the Registrar

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Mark A. St-Kitt;

3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Driving with more than 80 mgs alcohol in blood under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 5, 2001.

Ms. Kim Grosskurth tendered original documents for the record and stated that Mr. St.-Kitt had this vehicle impounded for one night on December 16, 1999 but provided no documents with respect to the one day impoundment. She tendered a ruling of September 14, 2000 by member Stuart Cork.

Ms. Razack was not aware of the one night impoundment or the suspension given to Mr. St.-Kitt on December 16, 1999.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or

- (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

In determining exceptional hardship under section 50.2 of the Act, the Tribunal is bound by the restrictions set out in section 22 of Regulation 574 as amended by Regulation 632/98. It is not disputed that:

1. The Applicant is the owner of the motor vehicle that was the subject of the impoundment order.
2. At the time of the impoundment order the Applicant's motor vehicle was driven by Mr. Mark St.-Kitt
3. At the time of the impoundment of the Applicant's motor vehicle Mr. Mark St.-Kitt driver's licence was under suspension due to a conviction under the Criminal Code of Canada for driving with more than 80mg. Of alcohol in blood.

Section 22 of Regulation 574, as amended, require that the Applicant establish that no alternative to the impounded vehicle is available, and to establish this subsection 22(4) requires that the owner has demonstrated that every reasonable option has been considered to replace the impounded vehicle. Here the unique combination of lack of resources, nature of Applicant's employment and childcare responsibilities establishes that there is no alternative for the Applicant.

The Tribunal has next considered the criteria contained in subsection 22(1) with respect to the health and safety of persons ordinarily transported in the vehicle. The young age of the Applicant's children, the distance to travel to their babysitter, the hours of work of the Applicant and the Applicant's lack of resources establishes that the impoundment will result in the health or safety of the Applicant's children.

The Tribunal also has considered the criteria under subsection 22(2) of Regulation 573 as amended by Regulation 632/98. The evidence establishes that the impoundment will result in economic loss to the Applicant which is immediate, significant and lasting. This impact will be upon the Applicant who is ordinarily transported in the vehicle and who is not the driver at the time of the impoundment.

In consideration of all the evidence presented, the Tribunal finds that the Applicant has demonstrated exceptional hardship as circumscribed by Section 22 of Ontario Regulation 632/98 amending Ontario Regulation 574 under the *Highway Traffic Act*.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal orders that the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle be set aside.

LICENCE APPEAL TRIBUNAL

Joe Hewitt, Presiding Member

Frank Wolman, Member

RELEASED: December 4, 2000

WILLMARC PROPERTIES LIMITED

WILLMARC PROPERTIES LIMITED

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: BRIAN MAROTTA, Vice-Chair

APPEARANCES:

BRIAN CAMPBELL, Counsel, representing the Applicant
ANDREA YORK, Counsel, representing Registrar, Ontario New
Home Warranty Program

DATE OF
HEARING:

December 4, 2000

Toronto

ORDER

WHEREAS a written Notice of Proposal dated July 24, 2000, to refuse to renew the registration of Willmarc Properties Limited (the AApplicant@) was issued by the Registrar of the Ontario New Home Warranty Program (the ARegistrarA) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS the Applicant appealed the proposal to the Licence Appeal Tribunal which appeal was to be heard in Toronto on December 4 and 5, 2000;

AND WHEREAS at the commencement of the hearing on December 4, 2000, the Tribunal was advised that the parties have come to an agreement to settle, with an order to issue on consent with terms and conditions agreed to in Schedule "A";

AND WHEREAS having reviewed the written settlement signed by the Applicant and the Registrar as to the disposition of further proceedings which is filed and attached hereto as Schedule "A";

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are concluded and disposed of on the basis of the terms set out in the said Schedule "A".

LICENCE APPEAL TRIBUNAL

Brian Marotta
Vice-Chair

Released: December 4, 2000

SCHEDULE 'A'

Willmarc Properties Limited

December 4, 2000

Consent Order

That the Applicant provide to the Registrar the Financial information requested in the Notice of Proposal including but not limited to an up to date Personal Net Worth Statement with back up documentation within 40 days of today's date. Failing which the registration of the Registrant/Applicant is revoked.

Dated December 4, 2000

"Brian Campbell"
Solicitor for the Applicant

"Andrea York"
Solicitor for the Registrar

BERENDSE

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
GEOFFREY SEAN BERENDSE

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 6th, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GEOFFREY SEAN BERENDSE

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Geoffrey Sean Berendse, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 1, 2000

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Geoffrey Sean Berendse
40 Bertram Rd.
Etobicoke, ON M6M 3S6

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Geoffrey Sean Berendse (hereinafter referred to as "the Applicant") hereby consents to the following terms and conditions to his registration as a motor vehicle salesperson.

In accordance with section 4.1 of the Statutory Power Procedures Act, the parties hereto hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he convicted under the Criminal Code, his registration is automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The applicant shall not be an officer, director, owner, or partner in a dealership.
5. The Applicant will not be the final signatory on any bills of sale.
6. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
7. The Applicant agrees that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
8. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.

9. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
10. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.
11. The Applicant will provide a copy of this order to his employer forthwith.
12. The Salesperson hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
13. The Salesperson hereby withdraws his appeal to the Licence Appeal Tribunal.
14. The Salesperson hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of this day of November, 2000.

Geoffrey Sean Berendse

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

AMIRI

JAFAR AMIRI

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER *THE MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATION

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES: No one appearing for the Applicant
AVIVA R. HARARI, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: November 21, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is a hearing before the Licence Appeal Tribunal (the "Tribunal") arising out of a Notice of Proposal issued by the Registrar under the *Motor Vehicle Dealers Act* (the "Registrar" and the "Act" respectively). The Notice of Proposal dated August 22, 2000 proposed to refuse the registration of Jafar Amiri as a motor vehicle salesperson on the basis that the Applicant responded "no" to Question 9 on the application but a criminal history check showed that the Applicant had been charged with assault with a weapon and weapons dangerous.

Question 9 asks, "Have you ever been found guilty or convicted of an offence under any law or are any charges pending? This includes those instances where a conditional or absolute discharge has been ordered. If yes, list all charges and or convictions and the circumstances surrounding each.

The Applicant by his Notice of Appeal dated September 5, 2000 requested a hearing before the Tribunal. He provided an explanation stating "No Assault; No Weapon; No Danger". He also stated that when he did the application he had not understood Question 9 but after making that mistake he explained everything to the Ontario Motor Vehicle Industry Council ("OMVIC").

The hearing date was scheduled for November 21, 2000. On November 20, 2000 a fax from the Applicant was received at the offices of the Tribunal. It stated: "To Whom It May Concern: The reason of this letter that I am not going to show up at court on November 21, 2000. Because I've already lost my job and I am not concern about this job any more." This fax was entered as an exhibit at the Hearing on November 21, 2000.

On the date of Hearing, that being November 21, 2000, Counsel for the Registrar and her witnesses appeared before the Tribunal. The hearing was convened at 9:30 am

and then adjourned for thirty minutes in case the Applicant did decide to attend. At 10:00 am the hearing recommenced and the Tribunal heard the evidence of the Registrar and the witnesses. The Applicant was not in attendance during the course of the hearing.

ISSUE:

Did the Registrar act on a reasonable basis in his refusal to grant registration to the Applicant?

EVIDENCE:

Opening statement by Counsel for the Registrar:

Counsel stated that the basis of the Proposal of the Registrar was two fold: 1. the non disclosure by the Applicant on his application of the two pending charges of assault with a weapon and weapon dangerous; 2. The conduct of the Applicant which resulted in those charges.

Testimony of Ralph Ashford:

Detective Ashford is with the major crime unit, 31 Division of the Metropolitan Toronto Police.

Detective Ashford testified that on May 8, 2000, Mr. Amiri was arrested and brought to 31 Division. Reading from his notes, Detective Ashford stated that on May 2, 2000 the victim had gone to National Best Auto Sales and test drove a vehicle. That vehicle had a sale price of \$10,000.00. The victim gave \$4,000.00 as a down payment and obtained a receipt. On May 8, 2000 the victim attended again at National Best Auto Sales. He approached Mr. Amiri and presented his receipt. An argument ensued. Mr. Amiri threw the receipt on the floor. The victim bent down to pick up the receipt and Mr. Amiri punched the victim in the face. A witness went to help the victim and Mr. Amiri pulled a knife.

Detective Ashford testified that he interviewed Mr. Amiri. Following that interview, he charged Mr. Amiri with assault with a weapon and weapon dangerous.

Testimony of Laura Gordon:

Ms. Gordon is the Director of Compliance at OMVIC. She has held that post for over three years.

Ms. Gordon testified that under section 5 of the Act there are requirements that the past conduct of registrant show that he will carry on business in accordance with law and with integrity and honesty. Ms. Gordon was of the opinion that the past conduct of the Applicant as it related to the pending charges and the non disclosure of those charges showed that the Applicant could not meet those requirements.

Ms. Gordon stated that the Applicant answered "no" to Question 9. There was no disclosure on the application form of the pending charges. When OMVIC did its CPIC check, it was determined that the Applicant had been charged on May 8, 2000 with

assault with a weapon and with weapons dangerous. The date of the application for registration by the Applicant was July 3, 2000, after the charges had been laid by the police. It was the understanding of Ms. Gordon that there had been no disposition of the charges at the date of the hearing before this Tribunal.

Ms. Gordon stated that she was concerned as the charges related to an incident at the very dealership, National Best Auto Sales, that the Applicant wished to be registered as a salesman. These charges occurred at a motor vehicle dealership, and Ms. Gordon was concerned for the safety of the public.

Submission of Counsel for the Registrar:

Counsel submitted that the Registrar had reasonable grounds for the Proposal to refuse to grant registration to the Applicant.

As well, Counsel requested costs under section 8 of the *Licence Appeal Tribunal Act*. Counsel stated that the Notice of Proposal contained the notice to the Applicant that the Registrar would be asking for such costs.

Counsel stated that the facts in this case are similar to the LAT case of 1384706 Ontario Inc. o/a Perfect Auto Sale and George Fiddaoui and Frank Menhem Faoual released August 2, 2000.

If the Tribunal were to grant costs, the Registrar was requesting the amount of \$1,200.00. That amount would cover the administration fee paid by OMVIC to have a case before the Tribunal, the witness fees for Detective Ashford and the lawyer's time at the hearing.

LEGISLATION:

The relevant legislation respecting registration of the Applicant is the *Motor Vehicle Dealers Act*, and the relevant legislation respecting the issue of costs is the *Licence Appeal Tribunal Act, 1999*.

Motor Vehicle Dealers Act:

Section 5

(1) An applicant is entitled to registration or renewal of registration by the Registrar except where,

(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty;

Section 7

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or

refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

Licence Appeal Tribunal Act, 1999

Section 8

If, on the application of a party to a hearing before the Tribunal with notice to the other parties, the Tribunal is satisfied that the application for the hearing is frivolous or vexatious, the Tribunal may refuse to grant the hearing or may terminate the hearing at any time and make an order of costs as it considers appropriate in the circumstances.

APPLICATION OF THE LAW TO THE FACTS:

At the conclusion of the oral hearing the Tribunal stated on the record that it was satisfied that the Registrar had acted on a reasonable basis in refusing to grant the registration of the Applicant. The act of non disclosure itself has been held to be sufficient to disqualify an Applicant from being registered under the Act. In this case, the non disclosure occurred within two months of the charges being laid against the Applicant. The Tribunal does not put any weight on the written statement of the Applicant that he failed to understand Question 9. The Question asks if there are any charges pending. The Applicant has not provided the Tribunal with any reasonable explanation for why he did not understand this statement.

Further, the Tribunal is disturbed by the fact that the charges were laid as the result of an incident at the dealership where the Applicant wishes to work as a registered salesperson. There exists a question of what the Applicant was doing at the dealership some two months prior to requesting registration as a salesperson. But putting that question aside, there is still the fact that the place of the incident was at a motor vehicle dealership. This raises questions as to judgment of the Applicant and to his honesty and integrity based on his past conduct. Again, the Applicant was not present to provide any explanations to the Tribunal concerning this incident.

Counsel for the Registrar requested costs under section 8 of the *Licence Appeal Tribunal Act 1999*. The Tribunal is satisfied that the paragraph included in the Notice of Proposal of the Registrar provides the notice requirement found in section 8 of the *Licence Appeal Tribunal Act 1999*.

This section contains the words “Frivolous” or “Vexatious”. An examination of these words in Black’s Law Dictionary 6th ed. Finds the following:

Frivolous: of little weight or importance. A pleading is “frivolous” when it is clearly insufficient on its face and does not controvert the material points of the opposite pleading, and is presumably interposed for mere purposes of delay or to embarrass the opponent. A claim or defense is frivolous if a proponent can present no rational argument based upon the evidence or law in support of that claim or defense...

Vexatious proceeding: proceeding instituted maliciously and without probable cause....Type of malicious prosecution.....when the party bringing proceeding is not acting bona fide, and merely wishes to annoy or embarrass his opponent, or when it is not calculated to lead to any practical result. Such a proceeding is often described as "frivolous and vexatious", and the court may dismiss it on that ground.

The section states that the application can be frivolous or vexatious. Using the above definitions it would be much easier to find under this section for a frivolous application.

The present case is not similar on its facts to the case of 1384706 Ontario Inc. o/a Perfect Auto Sale and George Fiddaoui and Frank Menhem Faoual supra. In that case, Mr. Fiddaoui had numerous prior convictions which he failed to disclose to the Registrar. As well the dealer was operating without benefit of registration. The case was held in Ottawa at the convenience of the Applicants, but they failed to attend and did not notify either the Registrar or the Tribunal. Most of the other participants in the hearing were not from the Ottawa area and were inconvenienced and put to the expense of having to travel to Ottawa. Though the Tribunal found that costs would be well deserved they were denied due to lack of prior notice to the Applicants of this matter.

Here the Registrar has provided prior notice to the Applicant in the Notice of Proposal. But the Applicant did provide some notice, if only to the offices of the Tribunal, that he was not attending at the hearing. Of course that was of no benefit to the Registrar whose Counsel and witnesses did attend on the date of the hearing. The Tribunal would be more inclined to have awarded costs under section 8 on the basis of a frivolous proceeding if the Applicant had convictions rather than charges. The Tribunal can take notice that in some instances charges do not lead to convictions under our criminal justice system. So the Applicant might have had some rational argument to make on this matter if he had attended and provided his explanations to the Tribunal. The matter is not as self evident as stated by Counsel for the Registrar on its merits and does not meet the standard of "no rational argument based upon the evidence or law in support of that claim or defense". On that basis the motion for costs is denied.

ORDER:

Accordingly, pursuant to the authority vested in it by section 7(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal dated August 22, 2000 to refuse the registration of Jafar Amiri as a motor vehicle salesperson.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice Chair

Released: December 4, 2000

SAFA, ALI REZA KATEB and NORTH YORK AUTO GALLERY LIMITED

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
NORTH YORK AUTO GALLERY LIMITED AND ALI REZA KATEB SAFA

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATIONS
- Proposal dated: August 1, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

NORTH YORK AUTO GALLERY LIMITED AND
ALI REZA KATEB SAFA

Applicants

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 6, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario at 1:30 p.m., on Monday, December 18, 2000 and to continue at 9:30 a.m., on Tuesday, December 19, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 5, 2000

FRANZE, VINCENT and FRANZE AUTOMOTIVE INC.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
VINCENT FRANZE AND FRANZE AUTOMOTIVE INC.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: August 23, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

VINCENT FRANZE AND FRANZE AUTOMOTIVE INC.

- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on December 5, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th floor, Toronto, Ontario, at 9:30 a.m., on Monday, December 11, 2000.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 5, 2000

MASOUD

MAGID MASOUD

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: SHEENA MACASKILL, Vice-Chair, Presiding

APPEARANCES:

MAGID MASOUD, representing himself
TERRI HILBORN, Counsel, representing the Ontario New Home
Warranty Program
STEVE PAPAICONOMOU, Agent, representing the Added Party,
Town Wood Homes Limited

DATE OF
HEARING: November 16, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal from a decision of the Ontario New Home Warranty Program (the "Program") dated June 16, 2000.

The Applicant and his spouse and Town Wood Homes Limited (the "vendor"), entered into an Agreement of Purchase and Sale (the "Agreement") dated August 18, 1996, in terms of which the vendor built a single family residential home for the Applicant at 119 Galleon Crescent, Mississauga, Ontario. The Applicant took possession on February 25, 1997.

Prior to the date of possession and subsequent to February 25, 1997, the Applicant made numerous complaints to the vendor and to the Program concerning deficiencies in the house. The Program conducted an inspection of the home on August 26, 1999, which results are summarized in the Conciliation Inspection report dated September 6, 1999 (Ex. 3, Tab 6). Re-inspections were conducted on November 4, 1999 and April 20, 2000, resulting in reports dated November 16, 1999 (Ex. 3, Tab 9) and April 27, 2000 (Ex. 3, Tab 14), respectively.

Many of the items claimed were warrantable and the vendor attended at the home at various times to make repairs. Subsequent to the second re-inspection on April 27, 2000, the Program issued its decision letter dismissing all ten of the Applicant's remaining claims. The Applicant appeals the following claims:

- 1.all interior walls should be painted with semi-gloss latex;
2. poor finishing defects on the parquet floors;
3. warpage of the master bedroom and ensuite doors;
4. minor and major creaks and squeaks;
5. poor finish on the kitchen cabinets;
6. shingles buckling under the master bedroom window;
7. water accumulation in eavestrough and dent;
8. poor finish of some heat registers;
9. cracked grout on ensuite shower floor; and
10. basement floor cracks.

ISSUES:

The issues to be decided in these proceedings are as follows:

1. Whether the claims fall within the warranty prescribed in section 13(1) of the *Ontario New Home Warranties Plan Act* (the “Act”)?
2. Whether the Applicant has a cause of action for damages resulting from a breach of warranty pursuant to section 14(1) of the Act?

THE LAW:

Section 13(1) of the *Ontario New Home Warranties Plan Act* states:

13(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(i) is fit for habitation, and

(ii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

Section 14(1) of the *Ontario New Home Warranties Plan Act* states:

14(1) Where,

.....

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; or

the person of owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

.....

EVIDENCE:

The Applicant testified on his own behalf. He did not call any other witnesses or adduce any expert evidence.

The Program relied on the evidence of the warranty representative, Mark Roccatagliata, who attended at the three inspections and authored all of the reports. Mr. Roccatagliata has worked as a warranty representative with the Program for fourteen years and has a degree in architectural technology.

The vendor relied on the evidence of its agent, Steve Papaikonomou, who is an employee of Town Wood Homes Limited.

1. interior walls

Schedule "A-1" to the Agreement states that the vendor agrees to include certain items in the purchase price including "standard semi gloss paint throughout". The Applicant states that the vendor used a flat latex on the interior walls instead of semi gloss paint. After complaining to the vendor about this error, the vendor offered to pay to the Applicant the sum of \$200 which represents the difference in cost, to the vendor, between semi gloss latex and flat latex. The Applicant states that he wants a semi gloss finish on the walls because he has children and it is easier to clean. He specifically asked for semi gloss because this was the paint finish used in his previous home. He asserts that it is much harder to wash fingermarks and dirt from walls painted with a flat latex finish.

On cross-examination, the Applicant stated that he only wants damages awarded to cover the cost of re-painting the walls. He is content to leave the ceiling and trim as is. The estimated cost of re-painting the walls in the home is approximately \$2200.

Mr. Roccatagliata testified that he was aware at the time of the conciliation that Schedule "A-1" to the Agreement provided for standard semi gloss paint throughout. He stated that the vendor made a substitution of materials and that according to section 19 of Reg. 892 to the Act, where a vendor makes a substitution, the item must be of "equal or better quality than the item referred to in the purchase agreement." It is Mr. Roccatagliata's view that the vendor's offer of \$200 fairly compensates the Applicant for the difference in value between semi gloss latex and flat latex.

On cross-examination by the Applicant, Mr. Roccatagliata conceded that in his experience, semi gloss paint is more resistant to moisture and dirt than flat latex. Mr. Roccatagliata also agreed that it would cost a homeowner approximately \$2200 to repaint the walls but that the cost to the vendor to repaint would be approximately \$1200.

Mr. Papaikonomou confirmed that the cost differential between the two paint finishes was \$200 at the time that the Agreement was signed. This is reflected on a Lead Sheet dated August 18, 1996, prepared by the vendor's sales representative (ex. 18). The

Lead Sheet indicates that the base price of the house was \$224,900. The extra items in the contract total \$8475 for a stated grand total of \$233,375. The final purchase price of the home was \$230,000; a difference of \$3375. Mr. Papaikonomou argues that the cost of the semi gloss paint was included in the purchase price and therefore the Applicant did not pay an additional \$200 for this item. However, a Work Order produced by the vendor dated May 15, 1997 (Ex. 5, page 11) states:

“Homeowner did not receive the oil base painting as requested and as quoted in his offer and for which he paid \$200.”

In the alternative, Mr. Papaikonomou asserts that the fact that one type of paint costs more does not necessarily make it a better product.

2. finishing defects on parquet floor

The Applicant identified two problem areas on the parquet flooring. Ex. 6 includes three photographs showing an area of parquet flooring in the Master Bedroom located directly below the northwestern window. The Applicant complains that there are black marks on the wood with lifting of the parquet. It is noted that black marks are evident in this photograph adjacent to the wall extending approximately four feet in length along the wall.

Ex. 8 is a photograph of an area of parquet flooring in the family room near a heat register. The Applicant asserts that this area of the floor is also blackened and lifted although this was not obvious from a review of the photographs filed.

The Applicant testified that he was told by Mr. Roccatagliata that these two blackened areas were caused by moisture accumulation. Specifically, he says that he was told that the heat registers were not producing enough heat below the windows to prevent condensation. As well, venetian blinds on the windows were blocking the heat. The Applicant states that he has venetian style blinds on all of his windows in the house. He does not accept the explanation that venetian blinds are responsible for moisture accumulation in only the master bedroom and family room.

The Applicant estimates that it will cost approximately \$220 to repair the floors.

Mr. Roccatagliata testified that he addressed the Applicant's complaints of poor finishing defects and squeaks in the parquet floor at paragraph 3 of his Conciliation Report dated September 6, 1999 (Ex. 3, Tab 6).

Specifically, paragraph 3(c) describes an area in the Master Bedroom approximately one foot inside the door near the heat register where the floor has lifted. Paragraph 3(e) describes a six-foot area in the family room in front of the right windows near the right heat register. These items were deemed warrantable and have been repaired by the vendor.

It is Mr. Roccatagliata's opinion that the Applicant's present complaints of black marks are not warrantable because they relate to condensation and over accumulation of moisture due to insufficient venting by the windows. Mr. Roccatagliata could detect no other source of moisture which would explain the black marks.

3. warpage of master bedroom and master ensuite doors

The original concern with the master ensuite door was that it did not lock properly. This claim was deemed to be warrantable at the first inspection, and the vendor repaired the problem. The Applicant states that while the door locks, it is now warped at the top. The Applicant states that a serviceman told him that the framing of the door shifted, thereby causing the door to shift.

With respect to the master bedroom double doors, the Applicant complains that when the doors are latched, there is excessive rattling and movement of the doors when one enters the room. The Applicant filed photographs of the master ensuite door and the master bedroom doors (Ex. 10 and 9), however these photographs, unfortunately, were not of great assistance to the Tribunal.

Mr. Roccatagliata stated that the Applicant made no complaint about a warped door during the first year of possession. In any event, it is his opinion that the slight warpage of the door at the top is within acceptable standards of workmanship.

With respect to the master bedroom double doors, Mr. Roccatagliata agreed that there is some minor movement or “play” of the doors; however, it is his view that some play is necessary to facilitate the latching mechanism at the top of the door.

4. minor and major squeaks throughout the house

The Applicant states that all areas of the parquet floor that squeak were reported to Mr. Roccatagliata at the time of the conciliation. The Applicant further states that Mr. Roccatagliata made a determination that these squeaks were not covered under warranty, without documenting the specific location of the squeaks.

Mr. Roccatagliata states that he did consider the claim of minor and major squeaks at the time of the conciliation. At paragraph 3, ‘Items Not Covered Under Warranty’, he concludes:

Reason: It is the opinion that some of the squeaks heard are a result of transformation of loading on the floor joists and the noise heard is caused by the deflection of the wood joists. All the floor areas listed on the Schedule A1 of this report are the only locations where excessive floor movement is occurring.

Paragraph 3 of Schedule A1 refers to five specific areas of the floor under the heading “Complaint: some areas in the parquet floor have poor finishing defects.” It is the Applicant’s contention that these areas relate only to poor finishing defects and that the warranty representative forgot to address the concern about squeaks.

Mr. Roccatagliata testified that he dealt with the complaint of squeaks under “Items Not Covered Under Warranty” in his initial report and this has resulted in a misunderstanding between Mr. Roccatagliata and the Applicant. At the time of the re-inspection on November 4, 1999, the issue of minor and major squeaks was revisited. Mr. Roccatagliata stated that he and the Applicant went through the whole house again and new areas of squeaks were documented. Mr. Roccatagliata stressed that although these new areas were outside the one year warranty period, he gave the Applicant the

“benefit of the doubt” in his report. At paragraph 19 of the Re-Inspection Report dated November 16, 1999 (Ex. 3, Tab 9) it states:

Observation/Comment – This was previously stated as item #3 sched. A2

Re-inspec – Nov. 4 – The builder is to repair the flooring at the following locations to eliminate the excessive movement – a) Approximately 4’-0” from the right set of windows in the master bedroom b) In the upper hall along the outside of the main washroom wall c) in the family room approximately 2’-0” from the hall along the kitchen wall d) in the kitchen approximately 2’-0” and 4’-0” from the sink.

Reason: Poor workmanship

Mr. Roccatagliata stated that to the best of his knowledge, the above identified squeaks have been repaired by the vendor. Further, he stated that any other squeaks reported at the time of the third inspection on April 20, 2000 were well outside the one year warranty period and therefore not warrantable.

Mr. Papaikonomou testified that the vendor has acted in good faith by repairing squeaks in the floor 2 ½ years after the date of possession. Mr. Papaikonomou produced a written checklist of items repaired following the November 4, 1999 re-inspection (Ex. 5, page 3). This document indicates that the four areas identified in the Re-Inspection Report at paragraph 19 were repaired. It also indicates that these repairs were initialed by the Applicant.

5. poor finish on kitchen cabinet doors

The Applicant states that the finish is peeling off the kitchen cabinets at the seams. The worst defects are found on the two cabinets directly under the sink and adjacent to the dishwasher. The builder’s serviceman told the Applicant that the problem was due to steam from the dishwasher. According to the Applicant, the warranty representative told him that the problem was caused by water spillage from the sinks. In addition, some of the kitchen drawers are evidencing peeling of the finish by the handles and the seams. The Applicant filed six photographs of the kitchen cabinets and drawers (Ex. 11). These photographs were taken two days before the commencement of this hearing – some 3 ½ years after the Applicant took possession.

The Applicant does not accept the explanation given to him by the warranty representative that the peeling of the finish is due to human oils and/or cleaning products. He states that human oils cannot be responsible for the peeling of the cabinets at the seams because the seams are generally not touched by hands. In addition, he states that cleaning products cannot be responsible for the peeling because the same product is used on all of the cabinets and the problem is only occurring in certain areas under the sink and beside the dishwasher.

Mr. Roccatagliata testified that the peeling of the finish on the kitchen cabinets has been caused by excessive humidity from the sink and the dishwasher. He stated that it is a common problem for cabinets situated beside dishwashers to peel in homes where the humidity levels are extreme.

On cross-examination, Mr. Roccatagliata agreed that if the manufacturer had not stained or sealed the cabinets properly then peeling might result. However, he went on to state that if this was the case, he would expect the peeling to be uniform on all of the cabinets.

Mr. Papaikonomou's evidence was most helpful on this point. He pointed out that the finish on the kitchen cabinets is exactly the same as the finish on the powder room cabinets " Princess Bleach Burgundy H-1" (Ex. 4, page "A-2-1"). Mr. Papaikonomou contends that the Applicant has made no complaint about the cabinets in the powder room, therefore the problem in the kitchen must be due to excessive humidity.

6. shingles under master bedroom buckling

This claim was denied because it was the opinion of the Program that it was not reported within the warranty period. The Applicant contends that this claim was made in his letter listing all first year end deficiencies (Ex. 4, page B-1 5):

"shingles on some areas of the roof are popping"
"one area underneath shingles is not levelled, seems to be sagging"

On cross-examination, the Applicant admitted that his letter does not refer specifically to the area of the roof under the master bedroom window. The Applicant also admitted that the builder did perform some repair work on the roof on May 2, 1998 (Ex. 3, Tab 5). However, it should be noted that the builder's Work Order dated May 2, 1998, does not mention any repairs to the shingles (Ex. 19).

Mr. Roccatagliata testified that this claim is not warrantable for three reasons. Firstly, the claim was not made within the one year warranty period; Mr. Roccatagliata stated that the Applicant first brought this concern to his attention at the re-inspection on November 4, 1999. Secondly, Mr. Roccatagliata states that the complaint about some shingles not being level was addressed in his Conciliation Report dated September 6, 199 (Ex. 3, Tab 6) at paragraph 13:

The following items were repaired prior to conciliation.

...

13. Complaint: one area underneath shingles is not levelled.

In addition, Mr. Roccatagliata stated that he made a handwritten notation "rep" as a short form for the word " repaired" in the margin of the Applicant's letter at the time of the conciliation on August 26, 1999. This notation is documented at Ex. 3, Tab 2.

Thirdly, Mr. Roccatagliata testified that even if the claim had been made in a timely manner, it is his opinion, based on his review of recent photographs of the roof (Ex. 12), that the workmanship is acceptable. Mr. Roccatagliata describes a slight lifting of the shingles near the bottom corners of the window which is caused by the counterflashing underneath. It is his opinion that this slight lifting is within acceptable standards of workmanship.

7. water accumulation in eavestrough and dent

The Applicant states that approximately 1 – 2 inches of water accumulates in the northwest corner of the eavestrough after every rainfall. He is concerned that this accumulation of water will attract dirt and insects. The Applicant admitted that no damage has been caused by the water accumulation in the eavestrough.

The Applicant also complains that there is a dent in the southwest corner of the eavestrough as illustrated in a photograph marked as Ex. 13. The Applicant states that both of the foregoing complaints were made on February 24, 1998.

Mr. Roccatagliata testified that in his view, the installation of the eavestroughs have been done to an acceptable tolerance of workmanship and materials. He stated that it is normal to have some accumulation of water in an eavestrough after a rainfall and that 1-2 inches of water will not cause any damage.

With respect to the dent at the southwest corner of the eavestroughs, Mr. Papaikonomou testified that this complaint was not mentioned in the Applicant's letter to the vendor following the pre-delivery inspection of the home on February 21, 1997. Mr. Papaikonomou states that it is impossible to attribute responsibility for the dent because it was not reported until one year after the Applicant took possession of the house.

8. heat registers have poor finish where they meet the floor.

The Applicant states that the heat registers are not finished properly at the level of the floor. His specific complaint is that the opening to the duct is rough, making it difficult to remove the grate for cleaning. The Applicant filed three photographs of heating registers without the grate in place (Ex. 14 and 15).

Mr. Roccatagliata testified that the ducts and heat registers in the Applicant's home are common in production homes. He stressed that neat workmanship is not required as long as the heat flow is preserved and the duct is generating adequate heat to the room. Mr. Roccatagliata also stated that when the removable grate is in place, the rough finish cannot be seen.

9. cracked grout on ensuite shower floor

The Applicant complains that there is a crack in the grout in the ensuite shower floor running from the drain to the back wall. He states that the vendor caulked the area, but the grout came apart after only two weeks.

On cross-examination, the Applicant agreed that his letter to the Program received February 24, 1998 refers only to separation of caulking around the tub and floor area. There is no mention in this letter of cracked grout in the shower stall.

Mr. Roccatagliata testified that this complaint was not raised at the time of the first inspection on August 26, 1999. Paragraph 12 of the Conciliation Report dated September 6, 1999 (Ex. 3, Tab 6) refers to caulking around the tub and floor area only. Repairs were done to these areas subsequent to the conciliation. Mr. Roccatagliata stated that the first time that the Applicant complained of a crack in the shower floor was in a letter dated October 11, 1999 (Ex. 3, Tab 8). At the time of the re-inspection on November 4, 1999, Mr. Roccatagliata made a notation to check to see if this complaint

was reported in the first year. Although the complaint was not made within the first year, the builder agreed to fix the cracked grout as a courtesy to the Applicant.

10. basement floor cracks

The Applicant testified that there are cracks in his concrete basement floor. He stated that he understands that normal shrinkage of materials caused by drying can cause cracks in the floor, however he is concerned that there are different levels in the floor between the cracks. The Applicant filed two photographs of the cracks in the basement floor (Ex. 17). It is the view of this Tribunal that these photographs do not depict different levels in the floor.

Mr. Roccatagliata testified that in the thousands of homes that he has inspected during his career, he has never seen a concrete basement floor without cracks. He stated that these floor cracks are caused by normal shrinkage and therefore are excluded from warranty coverage. Mr. Roccatagliata does not recollect seeing any evidence of different levels in the floor between the cracks.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to show that his ten complaints fall within the one year warranty pursuant to section 13(1) of the Act. The onus is also on the Applicant to prove lack of proper workmanship or defect in materials.

1. interior walls

Schedule "A-1" to the Agreement states that the vendor agrees to include, as an upgrade, standard semi gloss paint throughout. Instead, the vendor used flat latex paint on the interior walls without the consent of the Applicant. The cost to the vendor to upgrade to semi gloss paint product is \$200. This is the amount that the vendor has offered to pay to the Applicant to compensate him for the substitution of materials. It is uncontroverted that it would now cost the Applicant at least \$2200 to re-paint his walls with semi gloss paint.

Section 19, Reg. 892 to the Act states:

Every vendor of a new home warrants to the purchaser that where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

The evidence before the Tribunal is that semi gloss paint costs more than flat latex paint and that semi gloss paint is more resistant to moisture and dirt than flat latex.

The functionality of the substituted item must be considered in an assessment of whether the substituted item is of equal or better quality than the specified item. This has been stated in the case of Mr. And Mrs. Stephen Wood (1994) CRAT 26, Pt. II, p. 671.

The Applicant did not choose semi gloss paint for aesthetic reasons. He chose semi gloss because of it's functionality. The evidence is clear that functionally, flat latex is not of equal or better quality than semi gloss paint. Accordingly, the Applicant is entitled to have standard semi gloss paint throughout his house as was contracted for in the Agreement.

2. poor finishing defects on parquet floor

The evidence before the Tribunal is that the black marks and lifting of the parquet flooring in the master bedroom and family room were caused by moisture due to insufficient venting by the windows. Accordingly, this item is excluded by virtue of s. 13(2)(e) which states:

(2) A warranty under subsection (1) does not apply in respect of,

...

(d) damage caused by dampness or condensation due to the failure by the owner to maintain adequate ventilation.

3. warpage of the master bedroom and ensuite doors

No complaint was made of a warped ensuite door within the first year warranty period therefore this item does not fall within s. 13(1) of the Act. The Tribunal accepts the evidence of the warranty representative that the minor movement of the master bedroom double doors is within acceptable standards of workmanship.

4. minor and major squeaks

The documentary and oral evidence shows that minor and major squeaks that were reported within the first year were repaired. The evidence also shows that four additional complaints of minor and major squeaks made at the time of re-inspection on November 4, 1999 were repaired by the vendor.

Counsel for the Program relies on the statement made in the Teitelman decision 16 CRAT (1987) 178 at 181:

"....no house, new or old, is perfect or is warranted to be perfect. Floors and stairs will squeak, wood will shrink and warp, cracks will appear and paint will peel. All that can be done is to keep these imperfections at reasonably acceptable levels. The limited warranty provided by the Ontario New Home Warranties Plan Act recognizes these facts, and this Tribunal is obliged to make it's findings in accordance with the statutory provisions and not otherwise."

This Tribunal concludes that the vendor has repaired all areas of parquet floor that were reported on or before November 4, 1999 to an acceptable level of workmanship and materials.

5. poor finish on kitchen cabinets

The uncontroverted evidence is that the peeling of the finish on the kitchen cabinets below the sink has been caused by excessive humidity and moisture from the dishwasher. The Applicant did not prove lack of proper workmanship or defect in materials. This claim is excluded from warranty by virtue of s. 13(2)(e).

6. shingles under the master bedroom window buckling

The Applicant has not satisfied this Tribunal that this claim was made within the one year warranty period. Furthermore, the only evidence before the Tribunal is that a slight lifting of the shingles near the bottom corners of the window is within acceptable standards of workmanship and materials.

7. Water accumulation in eavestrough and dent

The Applicant has not discharged his onus of proving that the eavestrough has not been installed to an acceptable level of workmanship nor has he proven that any damage has occurred as a result of the water accumulation.

With respect to the dent in the southwest eavestrough, this damage was not reported by the Applicant until one year after he took possession. Accordingly, it is impossible for this Tribunal to attribute responsibility to the vendor for this damage.

8. heat registers have poor finish

The Tribunal accepts the evidence of the warranty representative that the rough finish around the opening to the heat registers is common in production homes. Further, the Tribunal accepts the evidence that neat workmanship is not required because the grate covers the opening on the floor.

9. cracked grout on ensuite shower floor

The Applicant has not satisfied that Tribunal that this claim was made within the one year warranty period.

10. basement floor cracks

There is no clear evidence that there exists different levels between the cracks in the basement floor. There is evidence that cracks in a basement floor are common and within an acceptable standard of workmanship and materials. Accordingly, the Applicant has failed to discharge his onus of proving lack of proper workmanship or defect in materials.

ORDER:

Pursuant to the authority vested in it by section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal directs the Program to complete the painting of the interior walls of the Applicant's home, 119 Galleon Crescent, Mississauga, Ontario with standard semi gloss latex paint, such work to be completed within three months of the release of this Order, and provided further that the Applicant provide the Program or its agents with reasonable access to the home to complete this work.

This Tribunal directs the Program to disallow all other claims.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice Chair, presiding

Released: December 6, 2000

1078370 ONTARIO INC. O/A CANATOURS

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1078370 ONTARIO INC. O/A CANATOURS
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*

TO REVOKE REGISTRATION
- Proposal dated: February 25, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1078370 ONTARIO INC. O/A CANATOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1078370 Ontario Inc. o/a Canatours, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 5, 2000

B E T W E E N:

1078370 ONTARIO INC. O/A CANATOURS

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. 1078370 Ontario Inc. o/a Canatours (hereinafter referred to as "the Registrant") is a corporation incorporated pursuant to the laws of Ontario and registered as a travel agent (Registration No. 4316303/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration as a travel agent on December 12, 1994.
2. On December 5, 1994, the Registrant, signed an acknowledgement of terms and conditions of registration in which it agreed, among other things, to maintain trust accounting, and maintain a minimum working capital.
3. The Registrant submitted the Form 1 filing for the period ended August 31, 1995, and due by October 15, 1995, on October 25, 1995.
4. On January 02, 1996, the Registrant filed the financial statements for the fiscal year ended August 31, 1995. These statements were due on November 30, 1995.
5. By letter on January 17, 1996, the registrant was informed that the August 31, 1995 revealed a working capital shortfall of \$10,903. The registrant was asked to address this shortfall by January 31, 1996.
6. By letter on February 22, 1996 the Registrant was sent a second request to address the working capital shortfall of \$10,903.
7. On March 5, 1996, the Registrant's accountant advised that the working capital shortfall was addressed by shareholder advances of \$32,500.
8. The Registrant submitted the Form 1 filing for the period ended February 29, 1996, and due by April 15, 1996, on April 12, 1996.

9. The Registrant submitted the Form 1 filing for the period ended August 31, 1996 and due on October 15, 1996 on December 16, 1996.
10. On November 19, 1996, the registrant was advised that the letter of credit that was being held had expired on November 3, 1996 and was being returned to them.
11. On December 12, 1996 the Registrant's registration lapsed.
12. On February 14, 1997 the financial statements for the year ended August 31, 1996, were received. These statements had been due on November 30, 1996.
13. By letter dated February 17, 1997, the registrant was notified that the financial statements for the fiscal year ended August 30, 1996 revealed a working capital deficiency of \$40,886.
14. On February 20, 1997 Pamela Stout, an inspector designated by the Registrar made a telephone report indicating that the Registrant's accountant would be couriering evidence of the working capital injection on February 21, 1997.
15. On February 21, 1997, the Registrant submitted signed Terms and Conditions of Registration to the Ministry of Consumer and Commercial Relations. Part of the Terms and Conditions was to maintain minimum working capital.
16. On February 26, 1997 the Registrant submitted evidence that the working capital shortfall reflected in the August 31, 1996 fiscal year end financial statements had been corrected.
17. On April 9, 1997 the Registrant's registration was reinstated.
18. The Registrant submitted the Form 1 filing for the period ended February 28, 1997 and due on April 15, 1997 on April 11, 1997.
19. The Registrant submitted the Form 1 filing for the period ended August 31, 1997 and due on October 15, 1997 on October 21, 1997.
20. On January 13, 1998 the Registrant filed their financial statements for the fiscal year ended August 31, 1997. These statements had been due on November 30, 1997
21. By letter dated February 13, 1998, the Registrant was notified that the financial statements for the fiscal year ended August 31, 1997 revealed a working capital deficiency of \$43,815. The registrant was asked to address the deficiency on or before February 27, 1998.
22. The Registrant submitted the Form 1 filing for the period ended February 28, 1998 and due on April 15, 1998 on April 17, 1998.

23. On June 3, 1998 a financial site inspection was made by Ed Holba, an inspector designated by the Registrar, TIA. The inspection revealed invoicing deficiencies and the registrant was unable to provide documentation of when the working capital shortfalls for the last two years were addressed. The inspector concluded that the registrant could be a threat to the Fund.
24. By letter dated June 18, 1998, the Registrant was requested by the Registrar to address the working capital deficiency revealed as of the fiscal year ended August 31, 1997. This information was due on or before July 17, 1998.
25. On July 23, 1998, the Registrant submitted copies of evidence of cash infusions into the Company in order to satisfy the working capital requirements. The letter also indicated that the Registrant was amalgamating this company with Dale Tours International in September 1998.
26. The Registrant submitted the Form 1 filing for the period ended August 31, 1998 and due on October 15, 1998 on November 11, 1998.
27. On November 30, 1998, the Registrant filed the financial statements for the fiscal year ended August 31, 1998. The financial statements reflected a working capital deficiency of \$28,507 and a working capital shortfall of \$33,507.
28. By letter dated March 8, 1999, the Registrant was notified that TICO had not received an update on the proceedings of the proposed amalgamation, nor the proposed pro-forma financial position as promised at the January 27, 1999 inspection. The Registrant was also requested to address the working capital shortfall of \$33,507 that existed as of the fiscal year ended August 31, 1998. The Registrant was requested to submit this information by March 31, 1999.
29. On March 26, 1999, the Registrant submitted evidence of injection of working capital to address the deficiency that existed as of the fiscal year ended August 31, 1998.
30. The Registrant submitted the Form 1 filing for the period ended February 29, 1999 and due on April 15, 1999 on April 23, 1999.
31. By letter dated August 9, 1999 the Registrant was requested to file financial statements for the fiscal year ended August 31, 1999 by November 30, 1999.
32. On September 19, 1999 a site inspection was performed by Jack Foster, an inspector designated by the Registrar, TIA. The inspection was to determine if the operations of Dale Tours and Canatours had been consolidated. The Registrant indicated that the amalgamation was expected to be completed by October 31, 1999.
33. The Registrant submitted the Form 1 filing for the period ended August 31, 1999 and due on October 15, 1999 on October 22, 1999.
34. On October 29, 1999 the Registrant's solicitor indicated by letter that the amalgamation of the two companies would be completed on or before November 12, 1999.

35. On November 30, 1999 the Registrant's accountant requested an extension until December 31, 1999 in filing the August 31, 1999 fiscal year end financial statements.
36. By letter dated December 1, 1999, the Registrant was again requested to file the financial statements for the fiscal year ended August 31, 1999 which was due on November 30, 1999.
37. On January 18, 2000 the Registrant filed the financial statements for the fiscal year ended August 31, 1999. The statements had been due on November 30, 1999.
38. The registrant's gross sales reported in the fiscal year-end financial statements for August 31, 1999 were \$1,469,724, which required the registrant to have a minimum working capital of \$5,000.
39. By letter dated February 3, 2000 the Registrant was notified that the financial statements for the fiscal year ended August 31, 1999 revealed a working capital deficiency of \$47,675. The registrant was requested to address the deficiency on or before February 21, 2000.
40. By letter dated February 3, 2000 the Registrant was also requested by TICO to provide a reconciliation of customer funds and customer obligations, which had been previously requested in TICO's request for financial statements, but which had been omitted from the filing. This information was to enable TICO to determine the customer deposit position or the "trust" position. This information has not been received.
41. On February 25, 2000 the Registrar issued a proposal to revoke the Registrant's registration for failure to maintain working capital.
42. On February 28, 2000 the Registrant submitted documentation to support the working capital injection. However the documentation revealed that there were new shareholders. TICO was not advised of this information. The Registrant was asked to report the new shareholder information to TICO. The information provided was not sufficient to satisfy the working capital requirements.
43. The Registrant submitted the Form 1 filing for the period ended February 29, 2000 and due on April 15, 2000 on May 9, 2000.
44. On April 28, 2000 the Registrant submitted a letter indicating that there has been cash infusions in both companies and that the evidence would be remitted by May 2, 2000.
45. On June 5, 2000 the Registrant submitted the documentation showing the change in shareholders.
46. The Registrant submitted the Form 1 filing for the period ended August 31, 2000 and due on October 15, 2000 on October 16, 2000.

47. To date the Registrant has not submitted satisfactory evidence that the working capital deficiency revealed in the August 31, 1999 fiscal year end financial statements has been corrected.
48. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 6(4) and (5) of the Act directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 25, 2000, with respect to 1078370 Ontario Inc. o/a Canatours;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - (a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation");
 - (b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - (c) The Registrant shall submit a renewable and irrevocable Letter of Credit in the amount of \$5,000.00 (Canadian), on or before January 8, 2001 with the beneficial interest in favour of the Travel Industry Council of Ontario (TICO). TICO shall hold this letter of credit for so long as the Registrar shall so require;
 - (d) The Registrant shall maintain a proper trust account pursuant to and in accordance with section 36 of the Regulation and such account shall be properly designated as a *Travel Industry Act* trust account. The Registrant shall forward to TICO a letter from their bank confirming that the account has been properly designated on or before January 8, 2001;
 - (e) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 28th day of February, 2001, for the month of December, 2000;
 - (f) If the above-noted trust account reconciliation as filed according to (ii)(f) is incomplete or reveals a customer deposit deficiency, the Registrant will have ten (10) days from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;

- (g) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending August 31, 2000, on or before December 31, 2000;
 - (h) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended February 28, 2001, on or before April 14, 2001;
 - (i) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended August 31, 2001, on or before October 15, 2001;
 - (j) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending August 31, 2001, on or before November 30, 2001;
 - (k) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended February 28, 2002, on or before April 14th, 2002;
 - (l) If any of the above-noted financial statements as filed are incomplete or reveal an unacceptable deficiency, the Registrant shall have thirty days (30) from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - (m) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - (n) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - (o) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions (ii) (d) to (l) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.
 - (iv) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by the signature below that it has obtained or has had full opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of November, 2000.

1078370 Ontario Inc. o/a Canatours
Registrar, *Travel Industry Act*

Mr. Dale Cloutier, President
I have authority to bind the corporation

Michael Pepper, Registrar
Travel Industry Act

1078371 ONTARIO INC. o/a DALE TOURS INTERNATIONAL

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
1078371 ONTARIO INC. O/A DALE TOURS INTERNATIONAL
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*

TO REVOKE REGISTRATION
- Proposal dated: February 28, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

1078371 ONTARIO INC. O/A DALE TOURS INTERNATIONAL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by 1078381 Ontario Inc. o/a Dale Tours International, the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 5, 2000

B E T W E E N:

1078371 ONTARIO INC. O/A DALE TOURS INTERNATIONAL

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACT

1. 1078371 Ontario Inc. o/a Dale Tours International (hereinafter referred to as "the Registrant") is a corporation incorporated pursuant to the laws of Ontario and registered as a travel agent (Registration No. 4316345/R) under the *Travel Industry Act*, R.S.O. 1990, c. T-19, as amended (hereinafter referred to as "the Act"). The Registrant was originally approved for registration as a travel wholesaler on December 12, 1994.
2. On December 3, 1994, the Registrant, signed an acknowledgement of terms and conditions of registration in which it agreed, among other things, to maintain trust accounting, and maintain a minimum working capital.
3. The Registrant submitted the Form 1 filing for the period ended August 31, 1995, and due by October 15, 1995, on October 25, 1995.
4. On January 02, 1996, the Registrant filed the financial statements for the fiscal year ended August 31, 1995. These statements were due on November 30, 1995.
5. By letter on January 17, 1996, the registrant was informed that the August 31, 1995 revealed a working capital shortfall of \$14,295. The registrant was asked to address this shortfall by January 31, 1996.
6. By letter on February 27, 1996 the Registrant was sent a second request to address the working capital shortfall of \$14,295.
7. On March 5, 1996, the Registrant's accountant advised that the working capital shortfall was addressed by shareholder advances of \$15,118.
8. The Registrant submitted the Form 1 filing for the period ended February 29, 1996, and due by April 15, 1996, on May 14, 1996.

9. On August 30, 1996, the registrant was requested to file financial statements for the fiscal year ended August 31, 1996 by November 30, 1996.
10. On December 9, 1996, the registrant was advised that the letter of credit that was being held had expired on November 3, 1996 and was being returned to them.
11. On December 11, 1996 a second request was sent to the Registrant to file the financial statements for the year ended August 31, 1996. The statements had been due on November 30, 1996.
12. On December 12, 1996, the Registrant's registration lapsed.
13. The Registrant submitted the Form 1 filing for the period ended August 31, 1996 and due on October 15, 1996 on December 16, 1996.
14. By letter dated December 31, 1996, the Registrar advised the Registrant that the financial statements for the fiscal year ended August 30, 1996 must be filed by January 14, 1997.
15. On February 27, 1997 the financial statements for the year ended August 31, 1996 were received. These statements had been due on November 30, 1996.
16. By letter dated March 20, 1997, the registrant was notified that the financial statements for the fiscal year ended August 30, 1996 revealed a working capital deficiency of \$42,015. The registrant was advised that this shortfall must be addressed on or before April 11, 1997.
17. By letter dated March 26, 1997, the Registrant was advised to update the officers and directors of the corporation with Companies Branch of the Ministry of Consumer and Commercial Relations
18. On April 3, 1997 a letter was received from the Registrant's legal counsel advising that the Registrant is making arrangements to address the working capital shortfall revealed in the fiscal year ended August 31, 1996 financial statements.
19. On April 8, 1997, the Registrant's counsel submitted evidence that the working capital deficiency as of August 31, 1996 had been addressed by a deposit of \$43,361.10.
20. On April 9, 1997 the Registrant was advised that their licence had been reinstated by the Ministry of Consumer and Commercial Relations. The registrant also submitted a Notice of Business Change to the Ministry.
21. The Registrant submitted the Form 1 filing for the period ended February 28, 1997 and due on April 15, 1997 on April 11, 1997.
22. The Registrant submitted the Form 1 filing for the period ended August 31, 1997 and due on October 15, 1997 on October 21, 1997.
23. On January 13, 1998 the Registrant filed their financial statements for the fiscal year ended August 31, 1997. These statements had been due on November 30, 1997.

24. By letter dated March 2, 1998, the Registrant was notified that the financial statements for the fiscal year ended August 31, 1997 revealed a working capital deficiency of \$39,074. The registrant was asked to address the deficiency on or before March 16, 1998.
25. The Registrant submitted the Form 1 filing for the period ended February 28, 1998 and due on April 15, 1998 on April 17, 1998.
26. On June 3, 1998 a financial site inspection was made by Ed Holba, an inspector designated by the Registrar, TIA. The inspection revealed invoicing deficiencies and the registrant was unable to provide documentation of when the working capital shortfalls for the last two years were addressed. The inspector concluded that the registrant could be a threat to the Fund.
27. By letter dated June 18, 1998, the Registrant was requested by the Registrar to address the working capital deficiency revealed as of the fiscal year ended August 31, 1997. This information was due on or before July 17, 1998.
28. On July 23, 1998, the Registrant submitted copies of evidence of cash infusions into the Company in order to satisfy the working capital requirements. The letter also indicated that the Registrant was amalgamating this company with Canatours in September 1998.
29. The Registrant submitted the Form 1 filing for the period ended August 31, 1998 and due on October 15, 1998 on November 11, 1998.
30. On November 30, 1998, the Registrant filed the financial statements for the fiscal year ended August 31, 1998. The financial statements reflected a working capital deficiency of \$63,521.
31. On January 27, 1999 a site inspection was performed by Ed Holba. The purpose of the inspection was to follow up on the working capital injections and the proposed amalgamations of the two companies. The inspection revealed that the amalgamation was scheduled to be completed by February 29, 1999. The inspector's conclusion was that the Registrant posed a threat to the Fund.
32. By letter dated March 8, 1999, the Registrant was notified that TICO has not received an update on the proceedings of the proposed amalgamation, nor the proposed pro-forma financial position as promised at the January 27, 1999 inspection. The Registrant was also requested to address the working capital shortfall of \$63,521 that existed as of the fiscal year ended August 31, 1998. The Registrant was requested to submit this information by March 31, 1999.
33. On March 26, 1999, the Registrant submitted evidence of injection of working capital to address the deficiency that existed as of the fiscal year ended August 31, 1998.
34. The Registrant submitted the Form 1 filing for the period ended February 29, 1999 and due on April 15, 1999 on April 23, 1999.
35. By letter dated August 9, 1999 the Registrant was requested to file financial statements for the fiscal year ended August 31, 1999 by November 30, 1999.

36. On September 19, 1999 a site inspection was performed by Jack Foster, an inspector designated by the Registrar, TIA. The inspection was to determine if the operations of Dale Tours and Canatours had been consolidated. The Registrant indicated that the amalgamation was expected to be completed by October 31, 1999.
37. The Registrant submitted the Form 1 filing for the period ended August 31, 1999 and due on October 15, 1999 on October 22, 1999.
38. By letter dated December 1, 1999, the Registrant was again requested to file the financial statements for the fiscal year ended August 31, 1999 which was due on November 30, 1999.
39. On January 17, 2000 the Registrant filed the financial statements for the fiscal year ended August 31, 1999. The statements had been due on November 30, 1999.
40. The registrant's gross sales reported in the fiscal year-end financial statements for August 31, 1999 were \$448,394, which required the registrant to have a minimum working capital of \$5,000.
41. By letter dated February 3, 2000 the Registrant was advised by TICO of the working capital deficiency of \$53,675 and the total shortfall of \$58,675. The letter advised that 1078371 Ontario Inc has operated in a non-compliant position since 1995, and requested information regarding steps taken to address the working capital shortfall to be submitted by February 21, 2000.
42. By letter dated February 3, 2000 the Registrant was also requested by TICO to provide a reconciliation of customer funds and customer obligations, which had been previously requested in TICO's request for financial statements, but which had been omitted from the filing. This information was to enable TICO to determine the customer deposit position or the "trust" position. This information has not been received.
43. On February 28, 2000 the Registrant advised by letter that the working capital deficiency as revealed in the August 31, 1999 fiscal year end financial statements was corrected. This documentation did not provide sufficient evidence that the working capital had been corrected.
44. On February 28, 2000 the Registrar issued a proposal to revoke the Registrant's registration for failure to maintain working capital.
45. On March 1, 2000 the Registrant appealed the proposal to revoke its registration.
46. On April 28, 2000 the Registrant submitted a letter indicating that there has been cash infusions and that the evidence would be submitted by May 2, 2000.
47. The Registrant submitted the Form 1 filing for the period ended February 29, 2000 and due on April 15, 2000 on May 9, 2000.
48. The Registrant submitted the Form 1 filing for the period ended August 31, 2000 and due on October 15, 2000 on October 16, 2000.

49. To date the Registrant has not submitted satisfactory evidence that the working capital deficiency revealed in the fiscal year ended August 31, 1999 financial statements has been corrected.
50. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsection 6 (4) and (5) of the Act directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated February 28, 2000, with respect to 1078371 Ontario Inc. o/a Dale Tours International;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - (a) At all times, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of Ontario Regulation 806/93, as amended (hereinafter referred to as "the Regulation");
 - (b) The Registrant shall keep and maintain business records at the business premises pursuant to section 37 of the Regulation;
 - (c) The Registrant shall maintain a proper trust account pursuant to and in accordance with section 36 of the Regulation and such account shall be properly designated as a *Travel Industry Act* trust account. The Registrant shall forward to TICO a letter from their bank confirming that the account has been properly designated on or before January 8, 2001;
 - (d) The Registrant shall submit a monthly trust account reconciliation to the Registrar, on or before the 28th day of February, 2001, for the month of December, 2000;
 - (e) If the above-noted trust account reconciliation as filed according to (ii)(f) is incomplete or reveals a customer deposit deficiency, the Registrant will have ten (10) days from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - (f) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending August 31, 2000, on or before December 31, 2000;

- (g) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended February 28, 2001, on or before April 14, 2001;
 - (h) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended August 31, 2001, on or before October 15, 2001;
 - (i) The Registrant shall file the financial statements as required, pursuant to section 24 of the Regulation, for the fiscal year ending August 31, 2001, on or before November 30, 2001;
 - (j) The Registrant shall file the Form 1 filing and make the corresponding payment to the Fund as required by the Regulation for the period ended February 28, 2002, on or before April 14th, 2002;
 - (k) If any of the above-noted financial statements as filed are incomplete or reveal an unacceptable deficiency, the Registrant shall have thirty days (30) from the date of the notice of the deficiency to fully and completely address the deficiency and provide proof acceptable to the Registrar in his sole discretion of the correction. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant;
 - (l) In future, the Registrant shall file any and all interim and final Form 1 filings along with the required payment to the Fund for every year of registration as required by the Act on or before the legislated due date;
 - (m) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by the Act on or before the legislated due date; and,
 - (n) If any of the Registrant's future financial statements reveal an unacceptable deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by courier or registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions (ii) (d) to (k) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice delivered by hand or by registered mail, and if sent by registered mail, service shall be deemed to be effective on the fifth day that is not a holiday after the day of mailing.
 - (iv) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by the signature below that it has obtained or has had full opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at _____ this ____ day of November, 2000.

1078371 Ontario Inc. o/a Dale Tours International
Registrar, *Travel Industry Act*

Mr. Dale Cloutier, President
I have authority to bind the corporation

Michael Pepper, Registrar
Travel Industry Act

BARAK, ARON EHUD o/a FIVE STAR MOTORS

ARON EHUD BARAK O/A FIVE STAR MOTORS

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *MOTOR VEHICLE DEALERS ACT*

TRIBUNAL: MARJORIE L. HILEY, VICE-CHAIR

APPEARANCES:

ANTHONY BAK, Counsel, representing the Applicant
AVIVA HARARI, Counsel, representing the Registrar, *Motor Vehicle Dealers Act*

DATES OF
HEARING:

August 14 and 15, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Registrar by his Proposal dated May 1, 2000 proposed to revoke the registration of the Applicant on the grounds of odometer tampering, failure to maintain books and records and failure to operate from registered premises. The Applicant by his letter of May 11, 2000 requested a hearing before the Tribunal. The hearing was held on August 14 and 15, 2000.

ISSUES:

Does the Registrar have reasonable grounds to believe that the Applicant will fail to carry on business in accordance with the law and with honesty and integrity?

EVIDENCE:

There was an initial issue about the testimony of a witness via the telephone. Counsel for the Registrar was to check to see if the witness could not come at another time even if it split the case so that there was the opportunity of personal cross-examination. If not the Tribunal would rule on the issue. Later in the hearing it was determined that the witness could testify in person and the matter did not need a decision of the Tribunal.

Opening Statement of the Registrar:

Counsel for the Registrar stated that the Registrar wished to revoke the registration of the Applicant who was operating as Five Star Motors, a sole proprietorship. This

proprietorship had been registered in November, 1991. The registered premises for the dealer was unit 55, 4801 Keele Street. It was the position of the Registrar that the Applicant was not operating from those premises.

Counsel stated that the investigator for the Registrar attempted to inspect the books and records of the dealership but was unable to complete the inspection. The books and records were never complete. The inspector was obstructed, according to the Counsel, because the Applicant failed to provide access to the complete books and records.

Counsel stated that the main issue was the odometer misrepresentation. The Applicant purchased cars at the wholesale auction. The cars were sent to the United States of America ("U.S.A."). There the cars were titled in Virginia. There was a discrepancy between the odometer reading at the time of purchase and at the time of being titled in Virginia. There were thirteen incidences of this happening.

It was stated by Counsel for the Registrar that the Applicant should not be registered due to his conduct. Counsel alleged that the Applicant has continued to show non compliance with his duties as a registrant. Counsel stated that the Act does not distinguish between a registration as a retail or wholesale dealer.

Opening Statement of Counsel for the Applicant:

Counsel stated that there are four issues before the Tribunal:

1. the evidence of obstruction – the Tribunal needs to look at the particulars. The language of obstruction does not enter into this matter.
2. Notice of Particulars and Further Particulars: Six of the allegations deal with technical or administrative breaches. Even if the Tribunal is satisfied that there is a breach in these matters Counsel for the Applicant stated that the sanction of revocation of the licence is too harsh a penalty. The proper remedy, according to Counsel for the Applicant, is to have a conditional order.
3. The thirteen counts of odometer tampering: Counsel for the Applicant stated that there was a lot of "finger pointing" but no direct evidence that the Applicant is a party or principal in any illegal act. The evidence, according to Counsel, is hearsay and is unreliable as there are reasons for the misrepresentation of the facts. There is a presumption of innocence under the Charter of Rights. Odometer tampering is a criminal act. Though hearsay is permissible under the *Statutory Powers Procedures Act* the Tribunal must decide what weight to give to it.
4. The Act is a public protection statute. Counsel stated that no one has been misled or inconvenienced by the Applicant's actions. Although there might be some technical breaches, no one has been injured. Here the Applicant is not conducting business with the public.

Testimony of Robert V. Whitmore:

Mr. Whitmore is a senior special agent with the Department of Motor Vehicles, Commonwealth of Virginia. He has held that position since 1993. Prior to that time he was a Sargeant in Investigations with the police department of Orange County, New York.

Mr. Whitmore testified that in Virginia an individual has to supply proof of ownership, fill out a Form 17A and then obtain the Virginia registration paper.

Mr. Whitmore examined a number of documents that had been submitted as exhibits in this proceeding dealing with the thirteen vehicles in question. These included a certificate of record from the Department of Motor Vehicles, Commonwealth of Virginia Form 17A (front and back pages, though in some cases both pages were not available) and the Province of Ontario registration permit (front and back pages, though in some cases both pages were not available). Mr. Whitmore explained that when pages were missing it was likely the error of the clerk who had microfiched the originals. In some cases there were original Ontario registration permits and original Form 17A forms were submitted as exhibits, and in those circumstances Mr. Whitmore reviewed those originals as well as their microfiche copies.

Regarding a 1998 Ford vehicle with an Ontario registration permit number 92760368, (car #1), Mr. Whitmore stated that the owner on the Form 17A was AceHy, a dealership registered in Virginia. Both the Ontario registration form and the Form 17A showed an odometer reading of 39414.

Mr. Whitmore explained that the purchaser would enter the Vehicle Identification Number ("VIN"), the vehicle permit number and the odometer reading from the Ontario registration permit on the Form 17A. The purchaser would then sign and date the form and provide it to a clerk at a motor vehicle office for it to be checked and then given Virginia title. There is a great deal of reliance placed on the information provided by the Ontario registration permit.

Mr. Whitmore stated that Virginia uses miles rather than kilometers so the mileage on the Ontario car would have to be calculated on the basis of .62 km to a mile.

Regarding a 1996 Ford with a registration permit number of 92760369 (car #2), Mr. Whitmore stated that the odometer reading on the Ontario registration permit was 38336 while on the Form 17A it read 43462. He felt that one explanation for this discrepancy was that the dealer could have driven the vehicle for some time prior to formally applying for its title. The original documents for this vehicle were before the Tribunal.

Regarding a 1997 Ford with a registration permit number of 91047595 (car #3), the odometer reading on the Form 17A was 38483. It could not be compared to the Ontario registration permit due to a missing back page for that permit. There were no original documents for this vehicle.

Regarding a 1998 Ford with a registration permit number of 92752523 (car #4), the Form 17A and the Ontario registration permit showed an odometer reading of 34,843. The original documents for this vehicle were before the Tribunal.

Regarding a 1997 Ford with a registration permit number of 89904733 (car #5), the Form 17A showed an odometer reading of 37869. It could not be compared to the Ontario registration permit due to a missing back page for that permit. There were no original documents for this vehicle.

Regarding a 1998 Ford with a registration permit number of 94267998 (car #6), the Form 17A and the Ontario registration permit showed odometer readings of 44659. The original documents for this vehicle were before the Tribunal.

Regarding a 1998 Ford with a registration permit number of 92753238 (CAR #7), the Form 17A and the Ontario registration permit showed odometer readings of 39355. The odometer statement signed by a representative of Global Leasing showed an odometer reading of 39355. There were no original documents for this vehicle.

Regarding a 1997 Ford with a registration permit number of 94267999 (car #8), the Form 17A showed an odometer reading of 33969. The Ontario registration permit had no odometer reading on it. The original documents for this vehicle were before the Tribunal.

Regarding a 1997 Ford with a registration permit number 92533365 (car #9), the Form 17A and the Ontario registration permit showed odometer readings of 37314. The odometer statement signed by a representative of Global Leasing showed an odometer reading of 37314. There were no original documents for this vehicle.

Regarding a 1996 Ford with a registration permit number of 93349185 (car #10), the Form 17A and the Ontario registration permit showed odometer readings of 52760. The odometer statement signed by a representative of Global Leasing showed an odometer reading of 52760. There were no original documents for this vehicle.

Regarding a 1997 Ford with a registration permit number of 92533366 (car #11), the Form 17A and the Ontario registration permit showed odometer readings of 39455. The original documents for this vehicle were before the Tribunal.

Regarding a 1997 Ford with a VIN number of 1FMDU34E4VU1336818 (car # 12), (this could be slightly incorrect as the microfiche copy was very difficult to read) the odometer reading on the Ontario registration permit was 32616. There was no odometer reading on the Form 17A. There were no original documents for this vehicle.

Regarding a 1997 Ford with a registration permit number of 90233428 (car #13), the Form 17A and the Ontario registration permit showed odometer readings of 39012. There were no original documents for this vehicle.

Mr. Whitmore explained the VIN numbers on the above mentioned vehicles as they appeared on the Ontario registration permits and the Form 17A forms. Four of the vehicles did not have sufficient documentation to permit him to make this comparison. The other nine vehicles had the same VIN number on the Ontario registration permit as was shown on the Form 17A.

Mr. Whitmore testified that there was a consent search of AceHy Enterprise's offices. One hundred and sixty one blank odometer disclosure statement forms in the name of Five Star Motors with the address of 131 Snowshow Crescent, Thornhill, Ontario were located there. These type of forms are used between the wholesale dealers to indicate the odometer readings of the cars.

Mr. Whitmore had an interview with a Mr. Gormic of AceHy. Initially Mr. Gormic disclaimed any knowledge of these blank forms. Then Mr. Gormic stated that he had wanted Mr. Barak to fill out these forms so that he could complete his paperwork on the

deals. AceHy had the documents respecting the Virginia title to these vehicles and who were the vehicles' purchasers.

Mr. Whitmore stated that Mr. Barak has been indicted by the Grand Jury for one count of conspiracy, motor vehicle fraud.

Mr. Whitmore stated that he had some knowledge of the State of Florida seizing three vehicles belonging to a dealer, Vinlow Motors. Mr. Carstaria of that dealership had been arrested. Mr. Whitmore stated that he had been told that Mr. Carstari told the Florida officials that Mr. Carstari knew Mr. Barak's brother. From that relationship, Mr. Carstari established a business relationship with Mr. Barak. Mr. Carstari would purchase odometer disclosures from Mr. Barak, and Mr. Barak would get the Florida titles and then drive the vehicles to Florida.

Under cross-examination, Mr. Whitmore stated that his background was 21.5 years with the police force. He was 2 years as a deputy in the courts, 8 years on the road, and 11.5 years as an investigator, of which 5 of those years was as a Sergeant. He was familiar with criminal prosecutors and aware of plea bargains and courtroom deliberations.

Mr. Whitmore stated that Form 17A for the 1998 Ford with the title number of 92760368 (car #1), was a preprinted form for AceHy Enterprises filled out by a Mr. Gormis in the State of Virginia. Mr. Barak did not fill out this form. While the odometer reading is 39414, the form does not state the unit of measurement. As well, there is no check in any of the three boxes following the odometer reading. Mr. Whitmore agreed that a clerk would check this form prior to processing it and that this form was not properly filled out prior to registration.

Mr. Whitmore agreed that the cars in question were purchased either by Global Leasing or AceHy Enterprises. The 7501 is a form used for customs purposes when a car crosses the border. There was no such document for this car. Mr. Whitmore testified that due to this particular case, it is now obligatory to have such a customs form. This new requirement came into force in the State of Virginia approximately two months prior to August, 2000.

Regarding the Application for Transfer document, Mr. Whitmore agreed that the signature on it plus an initial by the odometer reading was in blue ink, but the rest of the form was in black ink. The Form 17A for this vehicle was also in black ink.

Mr. Whitmore agreed that the easiest way to register ownership in Virginia was to have the Ontario registration form filled out.

Regarding the 1996 Ford Number 92760369 (car #2), Mr. Whitmore agreed that the VIN number had not been put on the Form 17A. There was an odometer reading of 43,462 with no unit of measurement. It was registered in Virginia in February 18, 2000. The Ontario registration had an odometer reading of 38,386. Part of the paperwork was in black ink and Mr. Barak's signature and the date was in blue ink.

Regarding the 1997 Ford number 91047595 (car #3), there was no check off in the boxes following the odometer reading on the Form 17A.

Regarding the 1998 Ford number 92752523 (car #4), there was an odometer reading struck off and a new reading inserted. The ownership document had two different colours of ink.

Regarding the 1997 Ford number 89904733 (car #5), there was only the front page of the Ontario registration which does not show the odometer reading. None of the boxes following the odometer reading on the Form 17A were checked off.

Regarding the 1998 Ford number 94267998 (car #6), none of the boxes following the odometer reading on the Form 17A were checked off. The Ontario registration had two different colours of ink, with Mr. Barak's signature and the date being in blue ink and the rest in black ink.

Regarding the 1998 Ford number 92753238 (car #7), none of the boxes following the odometer reading were checked off. The odometer statement was filled out by a representative from Global Leasing.

Regarding the 1997 Ford number 94267999 (car #8), the Ontario registration was left blank for odometer reading. Such a reading is necessary prior to registration of the car in Virginia.

Regarding the 1997 Ford number 92533365 (car #9), there were no boxes checked off after the odometer reading on the Form 17A. The odometer statement was signed by a representative of Global Leasing and their stamp was on the Ontario registration form.

Regarding the 1996 Ford number 93344185 (car #10), there were the same document defects as the previous vehicle.

Regarding the 1997 Ford number 92533366 (car #11), there were no boxes checked off following the odometer reading.

Regarding the 1997 Ford number 90233427 (car #12), there is no back page to the Ontario registration and no odometer reading. The signature on the front page of the registration form does not seem the same as the other signatures on the other registration forms.

Regarding the 1997 Ford number 90233428 (car #13), it is on an old Form 17A which says the odometer reading is correct unless there is something saying it is an exception.

Mr. Whitmore examined the preprinted forms for the odometer disclosure statements. He stated that an American printing company printed the forms in Virginia. There were one hundred copies of the form. There were discovered at the offices of AceHy Enterprises. At first, Mr. Gormis denied knowledge of the forms, but later he stated that his partner had them printed. The invoice for the forms show Five Star as the purchaser of the documents.

Mr. Whitmore testified that Mr. Gormis has been indicted in the U.S.A. for 6 felonies, including as false application for Virginia title. As well, he is charged with 3 misdemeanours. The penalties would be a maximum of two years in a state prison plus a \$5,000.00 fine. If Mr. Gormis assisted the prosecution, he could receive a more lenient position on sentencing. Mr. Whitmore has found Mr. Gormis not to be a truthful person.

He has lied to Mr. Whitmore. There is no transcript of Mr. Gormis's statements before this Tribunal.

Mr. Whitmore testified that Mr. Caricas is on probation. Mr. Whitmore has no documents respecting the case being handled by the State of Florida.

Testimony of David Wagner:

Mr. Wagner is an investigator with the Ontario Motor Vehicle Industry Council ("OMVIC") since May, 1997. Prior to that, he was a Metropolitan Toronto police officer for 22 years, 8 years in traffic and almost 15 years dealing with auto theft and the fraud unit. As well, Mr. Wagner has been licenced as a sole proprietor/manager under the *Motor Vehicle Dealers Act* for the past 8 years.

He became involved in this case at the request of Louise Gingras in December, 1999. He did a follow up investigation through Carfax which showed the third party source of the vehicle, the lien, and write off data, and the title data.

Mr. Wagner explained that the RIN is the registrant identification number. It is assigned to a particular individual or firm in the motor vehicle industry.

Mr. Wagner testified that he investigated the sale of vehicles to the United States. He found data in both the State of Virginia and the State of Florida.

Although Mr. Wagner had received the notes provided by Louise Grangras as to her contacts with Mr. Barak, Mr. Wagner was never able to set up an appropriate time to meet with Mr. Barak. On a couple of occasions Mr. Barak never contacted him despite saying he would do so. Mr. Wagner drove by the premises on a couple of occasions. He saw the name Five Star Motors posted on a sign outside the building. It was a small sign in the glass door of unit 55.

Mr. Wagner testified that he contacted Mr. Wagner and another investigator in Virginia and he was sent a number of documents on the vehicles in question. Based on that documentation, he felt there had been some misrepresentation on the documents that were leaving Ontario.

Mr. Wagner executed a search warrant dated March 27, 2000 on March 29, 2000 at 4801 Keele Street, Toronto, Ontario. At that time, he found no documents relating to Five Star Motors. All the property at that premises was identified as belonging to Manny's Auto Repair. Even the desk calendar on the desk in the premises was identified as belonging to Manny. Mr. Wagner's notes on this matter indicate that he spoke to a Mr. Butavia (Manny). He was told that Mr. Barak had been using the premises for about 5 years for no rent. Mr. Butavia stated that Mr. Barak gets parts from UPS in the United States. Mr. Butavia also said that he told Mr. Barak to fix up his problem with OMVIC.

Mr. Wagner testified that he obtained a search warrant to search the UPS offices. There documents were seized of which copies were made for Mr. Wagner. These documents show shipping records from a Higgins Auto Wrecking in the USA of a number of 1996 Explorer clusters to Five Star Motors at 4801 Keele Street unit 54.

Mr. Wagner testified that unit 54 and 55 are joined. The units are in an industrial complex with about 80 to 90 units. One may drive up to each individual unit. Access through the door at unit 54 as the door to unit 55 is closed. There is an office behind that closed door.

Mr. Wagner testified that he telephoned Higgins Auto Wrecking in Bakersfield, California. He was faxed a number of documents that related to 4 speed head clusters. The mileage was included with each cluster.

Mr. Wagner testified that the conversion factor from kilometres to miles is .6214.

Mr. Wagner stated that the Canadian Auction Group ("CGA") obtained a 1998 Ford Explorer (car #1) from Ford Credit Canada. It had an odometer reading of 118,253 km or 73,482 miles. The Auction Group sold this vehicle to Five Stars Motors. The Form 17A showed the odometer reading as 39,414 which is a difference of 34,608 miles.

Car Source sold car #2 to Five Star Motors. The Canadian Auction Group document shows the odometer reading to be 157,917 km or 92,129 miles. The Form 17A showed the odometer reading as 43,462 and the Ontario registration form showed the odometer reading as 38,386.

The Canadian Auction Group sold Car #3 to Five Star Motors. The CAG document shows the odometer reading to be 112,958 or 38,493 miles. The Form 17A showed the odometer reading at 38, 483 miles or a difference of 31,699 miles.

The Canadian Auction Group sold car #4 to Five Star Motors. The CAG document shows the odometer reading to be 103,328 km or 64,208 miles. The Form 17A showed the odometer reading at 34,843 miles or a difference of 29,365 miles.

The Canadian Auction Group sold car #5 to Five Star Motors. The CAG document shows the odometer reading to be 137,687 km or 85,458 miles. The Form 17A showed the odometer reading at 37,869 miles or a difference of 47,589 miles.

The Canadian Auction Group sold Car #6 to Five Star Motors. The CAG document shows the odometer reading to be 194,173 km or 120,659 miles. The Form 17A showed the odometer reading at 44,659 miles or a difference of 76,000 miles.

The Canadian Auction Group sold car #7 to Five Star Motors. The CAG document shows the odometer reading to be 179,458 km or 111,515 miles. The Form 17A showed the odometer reading at 39,355 miles or a difference of 72,160 miles.

The Canadian Auction Group sold car #8 to Five Star Motors. The CAG document shows the odometer reading to be 131,703 kms or 81,839 miles. The Form 17A showed the odometer reading at 33,964 miles or a difference of 47,875 miles.

Under cross-examination Mr. Wagner stated that he found no bills of sale from AceHy Enterprises or Global Leasing.

Mr. Wagner testified that the Ministry of Transportation (Ontario) search showed the address of Mr. Barak to be 72 Peter Andrew Crescent, Thornhill. That was the same address as the address for the RIN # 101856153 registered under his name. A second RIN# 111865157 under his name also had that address. The blank odometer

disclosure statement showed the address of Five Star Motors to be 132 Snowshow Crescent, Thornhill. Mr. Wagner went to the Snowshow Crescent address and found a number of vehicles there registered under the 111865157 RIN number. He believed that Mr. Barak lived at the Snowshow Crescent address. Five Star Motors had a RIN # 108376523 with an address of 72 Peter Andrew Crescent Thornhill. Mr. Wagner stated that a dealer as a sole proprietorship should only have one RIN number.

Mr. Wagner stated that there is no legislative authority for a "trade freeze". It is an administrative measure. He stated that at the time he executed the warrant there was a sign for Five Star Motors on display at 4801 Keele Street, Toronto, Ontario.

Mr. Wagner agreed that there was nothing illegal in selling vehicles outside of Ontario. He stated that the thrust of his investigation dealt with the odometer discrepancies. If there are fifty incidents of discrepancy with an odometers, he does not treat the matters as random incidents.

Mr. Wagner stated that when he went to the premises of Five Star Motors, he did not make a written inventory of the contents of the room as Mr. Butavai had said everything in it was his. Mr. Wagner did not see anything that looked like paperwork for a dealership.

Mr. Wagner stated that he had attended at 72 Peter Andrew Crescent in Thornhill perhaps four or five times. It was a residential area. He did not speak to anyone inside that residence.

Testimony of Menhem Butavai:

Mr. Butavai is a registrant under the *Motor Vehicle Dealers Act*. He has his business at 4801 Keele Street in Toronto, unit 54 and 55. He has been there since 1991. Mr. Barak used his address and office to get his licence as a motor vehicle dealer. Mr. Barak does wholesale, not retail sales, but Mr. Butavai does not know exactly what Mr. Barak does in the business. There is no rental agreement between Mr. Butavai and Mr. Barak, and Mr. Barak does not pay rent.

Mr. Butavai testified that he usually does not see Mr. Barak. Sometimes he takes deliveries on behalf of Mr. Barak. These are packages sent via UPS. Some of them were from OMVIC. Mr. Butavai stated he would call Mr. Barak and tell him to come and get his mail.

There was a sign posted for Five Star Motors at 4801 Keele Street, but Mr. Butavai took it down. He was upset about the inquiries regarding Five Star Motors, and he wanted Mr. Barak to do something about this situation. Mr. Butavai stated that he spoke to a Mr. Wagner on March 29, 2000. Mr. Butavai does not know if Mr. Barak works with odometers. Regarding any instructions from Mr. Barak, Mr. Butavai stated that Mr. Barak told him not to show anyone from OMVIC any material unless they asked for it.

Mr. Butavai testified that there is a separate door for unit 55 that can be used. Mr. Butavai did not know if there were any goods belonging to Mr. Barak, in particular a box of paper, in that unit. Mr. Barak does not have his own telephone line there.

Testimony of Matthew Rispin:

Mr. Rispin is the operations manager for the Canadian Auction Group, Toronto branch. He testified that only licenced dealers can purchase at its auction.

The process at the auction is as follows: the vehicle is taken to the marshalling area, the dash card is filled in with the odometer reading and VIN, this dash card information is then entered into the computer system by a person on a headset speaking to the computer person, the information is verified, the odometer reading is put onto the contract, and a bill of sale is generated.

This auction house processes 1100 to 1500 cars per week. A contract is always printed, but the filing system to retrieve the contracts can be disorganized. A number of the contracts for cars involved in the hearing had no original bill of sale as it could not be located. The auctioneer writes down the selling price, and the purchaser signs the contract which also states the GST. The purchaser supplies a cheque. A copy of the contract is given to the buyer, the seller and the auction house.

Regarding the ownership papers, the process is usually that the seller turns in the ownership papers by Friday at noon. Then the auction house does the paperwork to transfer the ownership. The seller does not receive the cheque until the ownership papers have been received by the auction house.

Often the ownership papers have not been filled out by the seller, and the auction house will complete the paperwork and sign it. The Ministry of Transportation for Ontario permits the auction house to do this.

Mr. Rispin stated that Ford Credit supplies the ownership papers right at the time of the auction sale. On cars from Ford Credit, the ownership papers are not completed by the auction house but by the buyer who is to fill in the odometer reading on the transfer document.

The auction house keeps files on the licensed dealers. Information as to changes of address for dealers must be provided by the dealers themselves. Any mail is sent to the last known address on the file for that dealer.

Testimony of Louise Gingras:

Ms. Gingras is an inspector with OMVIC. On September 10, 1999 she attended at units 54 and 55, 4801 Keele Street to conduct an inspection of Five Star Motors. This was a routine inspection and was done without an appointment. The door was locked at unit 55, and the sign stated to enter via unit 54 which she did. In unit 54 there was a waiting area and an office to the right and also a garage area. Ms. Gingras stated that she spoke to a mechanic to inquire about the whereabouts of Five Star Motors. He showed her a room in front of the door to unit 55. Inside that room were mechanic's clothes, supplies, shelving and repair parts but no desk, filing cabinet or chair or any telephone or business cards for Five Star Motors.

Ms. Gingras testified that she thought this room was a storage area for the garage due to the boxes and materials in it. As she could not see any area for Five Star Motors to conduct business and she could not review the books and records, she decided to put a trade freeze on the dealership.

On September 13, 1999 Mr. Barak attended at the offices of OMVIC. Ms. Gingras interviewed him. She informed him that the premises were not conducive to a retail sales operation, but as most of his sales were wholesale, he needed to sign a wholesale affidavit. Mr. Barak told her that he would sign such an affidavit and that he would get a desk and keep his records at the Unit 55, 4801 Keele Street location.

On September 14, 1999 Ms. Gingras met Mr. Barak at unit 55. There was a table and chair there amidst the boxes. Mr. Barak gave her some purchase bills of sale and some retail bills of sale but no wholesale bills nor sales bills for the actual sale. She told him that she wanted documents from the customs brokers and the sales contracts.

On September 16, 1999 Mr. Barak attended at the offices of OMVIC and provided Ms. Gingras with a fax of an invoice from a broker in Niagara Falls. He also provided her with some retail bills of sale which showed that the cars were shipped to the United States. Mr. Barak told her that sometimes he drove the cars into the United States and sometimes he used this broker in Niagara Falls. He provided Ms. Gingras with a business card of a dealer in the United States but no customs documents or bills of sale for export.

Ms. Gingras subsequently investigated through CARFAX the purchase bills of sale Mr. Barak gave to Ms. Gingras. Most of the cars involved were Ford Expeditions. She found odometer discrepancies between the information provided on these cars using CARFAX and the information on the purchase bills given to her by Mr. Barak.

Under cross-examination, Ms. Gingras stated that during her three years as an inspector she has taken the certificate course offered to the dealers. She explained that a trade freeze means that the dealer is prevented from transferring ownership on the cars in his possession. A trade freeze is not specifically mentioned in the legislation, and it does not require a court order. In deciding on a trade freeze, Ms. Gingras did consult with her supervisor. The trade freeze was lifted when Mr. Barak got a desk and chair for the office. Ms. Gingras stated that the trade freeze was not related to the issue of the records of the company.

Ms. Gingras stated that she is more lenient about the office premises when it is a wholesale operation. She stated that she did not know the requirements of US customs when cars are brought into the United States to be sold there. Ms. Gingras could not remember if the discrepancies she noted when she checked on the CARFAX related to the thirteen vehicles that are the subject of this Proposal. She stated that Mr. Barak did swear to a wholesale affidavit and that his operation is now a wholesale operation.

Testimony of Mary Jane South:

Ms. South is the Deputy Registrar for OMVIC since the inception of OMVIC in 1997. Prior to that, she had worked for a number of years at the Ministry of Consumer and Commercial Relations (Ontario) including being the Registrar and Deputy Registrar for the branch dealing with the *Motor Vehicle Dealers Act*.

She stated that the purpose of the *Motor Vehicle Dealers Act* is that of a public protection statute. The public wants to have a level of confidence in motor vehicle dealerships and their salespeople. There is a requirement that the dealerships and salespeople show financial responsibility. Under section 5 of the *Motor Vehicle Dealers*

Act, you are entitled to registration if you can demonstrate that you act with honesty, integrity, in accordance with the law and with financial responsibility.

Ms. South stated that the registered premises of Five Star Motors is 4801 Keele Street unit 55. That was its registered premises in September, 1999. OMVIC's records show Mr. Barak's address to be 72 Peter Andrew Crescent, Thornhill. There has been no record of any change in the addresses for Mr. Barak or Five Star Motors.

Ms. South testified that a trade freeze is an administrative step. Each dealer has an active number with the Ministry of Transportation (Ontario). OMVIC would deactivate that number in their system and say that dealer number is not on file and please call OMVIC. Then the Ministry would call OMVIC and request approval to transfer the vehicle. Their authorization then overrides the deactivation in the OMVIC system. Trade freezes are used when there are issues as to the trade premises. The dealer is still deemed to be registered under the *Motor Vehicle Dealers Act* (Ontario) even with the trade freeze. Regulation 801 under that statute deals with the issue of the premises and states that the premises have to be approved by the Registrar, *Motor Vehicle Dealers Act*. Besides the approval of the Registrar the dealership has to have the approval of the local municipality to allow retail sales at that address. Ms. South testified that if a dealer is a wholesale operation, the dealer must have an office and must maintain the dealer's books and records at the premises. She testified that a dealer cannot operate a motor vehicle business out of a residence.

Ms. South explained that the concept of "phantom dealer" means one who operates away from a business premises. In such cases there are problems of disclosure and gaining access to the books and records of that dealer.

Under section 10 and 11 of the *Motor Vehicle Dealers Act*, the Registrar can inspect the dealer's books and records. Often these inspections are done without prior arrangement. Under the *Highway Traffic Act* the garage register must be stored at the place of business.

Ms. South stated that the Registrar acts in a preventative fashion and does not require complaints to investigate activities such as odometer rollbacks. Those who export cars are not exempt from the requirements of the Act and Regulations. She cited section 16(2) of Regulation 801 which does not exempt the books and records for used motor vehicles being exported.

Ms. South testified that she is concerned about the actions of Mr. Barak. She felt he is responsible for at least an act of omission in allowing odometer rollbacks. There is a lack of documentation.

Under cross-examination Ms. South stated that Mr. Barak has been registered since 1991. The certification course became effective as of November, 1999 and those registered prior to that time are not required to take it.

Testimony of Mr. Barak:

Counsel for Mr. Barak stated that Mr. Barak would not be testifying at the hearing. Currently there are Grand Jury investigations in the United States. There have been indictments for Mr. Gormic and AceHy Enterprise.

Counsel for Mr. Barak stated that there is some uncertainty as to the applicability of section 5 of the *Evidence Act* (Ontario) to these American jurisdictions. Accordingly, Mr. Barak exercised his right to remain silent. There had not been time to consult with legal counsel in Virginia on these issues.

Submissions:

Counsel for the Registrar:

Counsel for the Registrar stated that the issues are as follows:

1. conduct of Mr. Barak in operating Five Star Motors
2. participation of Mr. Barak in odometer rollbacks
3. his compliance with the requirements for books and records
4. whether or not he is operating from a licensed premises
5. his failure to cooperate with the inspector regarding access to his books and records

Counsel stated that the onus rests with the Registrar to establish he has the grounds under the legislation to deny registration. The Divisional Court decision of Brenner and the Registrar of Motor Vehicle Dealers and Salesman (orally) heard March 9, 1983 sets out the test in this matter. This is a hearing as to the continuation of Mr. Barak's registration.

Counsel stated that the Tribunal must look at the totality of the evidence, not at each incidence in a vacuum. The conduct, according to Counsel, is interrelated and must be viewed in its totality.

Regarding the failure to maintain books and records, Counsel stated that it is an important tool for the Registrar to inspect and ensure compliance. Here, there were no documents available which is akin to non compliance under sections 10 and 11 of the *Motor Vehicle Dealers Act*. Counsel referred to the Markview decision. Books and records must be kept at the premises and an inspector must be allowed access to them. Counsel referred to the evidence that on September 14 during a pre arranged meeting, Mr. Wagner found no such documents at the registered premises.

Counsel stated that under section 16 of Regulation 801, bills of sale are required as part of the business records. There is no exemption for sales outside of Ontario. For instance, the dealer needs to record the distance travelled by the vehicle in the records. Under section 19 of Regulation 801, replacement odometers are to have records kept. No such records were provided by Mr. Barak.

Counsel stated that under section 15 of Regulation 801, records are to be kept for at least two years of reconditioning or repairs. Here, Mr. Barak provided some limited number of retail contracts and some purchase of sale documents. He provided none of the subsequent sales bills when the vehicles were sold. Counsel contended that the lack of documentation was a deliberate act to cover up the discrepancies in the odometer readings. This, in the opinion of Counsel, shows a lack of integrity.

Regarding the access to documents, Mr. Barak has a duty to provide the inspector with existing documents. If the documents do not exist, they ought to exist.

Regarding the premises, Counsel stated that section 3(4) and section 13(4) of Regulation 801 deals with the requirement to operate a dealership from registered premises. There is a requirement under section 13(4)(b) to have an office. Here, Mr. Butavai allowed Mr. Barak to use his address and accepted deliveries for him. Counsel stated that Mr. Barak breached the requirement for an office and also did not provide the Registrar with up-to-date information as to his address. Although Mr. Barak's RIN indicated one address, Mr. Wagner, the investigator, felt that Mr. Barak was at another address.

Regarding the odometer issue, Counsel stated that the application for transfers appear to have the signature of Mr. Barak. It is in the normal course of business that the odometer reading is recorded on the documentation. Under section 11 of the *Highway Traffic Act*, it is the responsibility of the seller to complete the paperwork. Canadian Auction Group acted as an agent, but the seller needs to complete the section regarding the odometer reading.

Counsel cited the Herman case as to how odometer readings affect the value of the vehicle. There is no explanation given by Mr. Barak for the inconsistencies of the odometer readings. It is irrelevant whether or not there are victims. Counsel cited the Vogelsburg Divisional Court case.

Counsel felt this was an appropriate case for revocation of the registration rather than terms and conditions as the conduct of the Applicant will continue if he is permitted his registration. This is a regulated industry and odometer tampering is a serious issue. Mr. Barak showed no good faith when he failed to provide bills of sale for the sales of the vehicles. This is not one mistake. Thirteen vehicles have been the subject of this hearing.

By Counsel for the Applicant:

Counsel stated that the concept of an office is not defined in the legislation. Mr. Barak did make his office more presentable. He was not conducting a retail business. OMVIC was aware of his business address.

Regarding the issue of records, Counsel stated that there were no wholesale records to provide to the inspector. It is the responsibility of the purchaser to provide customs documents. The issue of maintenance of documents can be remedied under terms and conditions to the registration.

Regarding the issue of the odometers, Counsel stated that the allegations regarding the conduct of Mr. Barak were made by those who were either convicted or being charged in the United States. There were no transcripts or affidavits to prove these allegations. Mr. Barak provided the information on the transfer documents, and there was no evidence that he intentionally misrepresented the odometer readings. Indeed, the documents show that different colour of ink was used which indicates that more than one person filled in the forms. Original documents are missing and some documentation is incomplete. One could characterize this situation as Mr. Barak being careless. There is evidence that numerous dealers permit the auction staff to fill out the transfer of ownership forms.

Counsel stated that it was wrong to take away the livelihood of a person based on poor evidence and hearsay. The stronger the penalty the greater the need to be vigilant in assessing the evidence.

Counsel stated that the other issues can be dealt with by a conditional order. The Applicant should not lose his licence due to his sloppiness.

LEGISLATION:

The relevant legislation in this matter is the *Motor Vehicle Dealers Act*.

Section 5

.....

(1)(b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with law and with integrity and honesty; or

.....

(2) A registration is subject to such terms and conditions to give effect to the purposes of this Act as are consented to by the applicant, imposed by the Tribunal or prescribed by the regulations.

Section 7

.....

(4) Where an applicant or registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and, on the application of the Registrar at the hearing, may by order direct the Registrar to carry out the Registrar's proposal or refrain from carrying it out and to take such action as the Tribunal considers the Registrar ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Registrar.

.....

(5) The Tribunal may attach such terms and conditions to its order or to the registration as it considers proper to give effect to the purposes of this Act.

Section 3

.....

(3) A registered motor vehicle dealer shall not carry on business in a name other than the name in which it is registered or invite the public to deal at a place other than that authorized by the registration.

Section 10

(1) The Registrar or any person designated by him or her in writing may at any reasonable time enter upon the business premises of the registrant to

make an inspection to ensure that the provisions of this Act and the regulations relating to registration and the maintenance of trust accounts are being complied with.

.....

Section 11

(1) Upon an inspection under section 9 or 10, the person inspecting,

- (a) is entitled to free access to all books of account, cash, documents, bank accounts, vouchers, correspondence and records of the person being inspected that are relevant for the purposes of the inspection; and

.....

and no person shall obstruct the person inspecting or withhold or destroy, conceal or refuse to furnish any information or thing required by the person inspecting for the purposes of the inspection.

Regulation 801

Section 13

.....

(4) It is a condition of registration as a motor vehicle dealer that the motor vehicle dealer,

- (a) operates from premises located in Ontario that are approved by the Registrar;
- (b) has an office for the conduct of business at each premises where the motor vehicle dealer operates; and
- (c) has erected at each premises where the motor vehicle dealer operates, a sign that is clearly visible to the public that identifies the motor vehicle dealer's registered name.

.....

Section 15

Every motor vehicle dealer shall, with respect to the purchase or sale of a motor vehicle, maintain for a period of two years from the date of expiry of any warranty or service plan covering the vehicle all purchase orders, sales orders and written records of all transactions resulting in the purchase or sale of the motor vehicle and in the case of a used motor vehicle,

- (a) a complete record of any reconditioning or other work performed on the vehicle that includes the date and particulars of the work done, repair orders and the cost of the work done; and

(b) the details and cost of any inspection conducted under Regulation 611 of the Revised Regulations of Ontario, 1990 (safety inspections).

Section 16

.....

(2) Where a used motor vehicle is sold, the sales or purchase order shall show,

.....

(o) the distance travelled by the vehicle at the time of the sale; and

(3) Where a used motor vehicle is purchased or traded in, the sales or purchase order shall show,

.....

(g) the recorded odometer reading at the time of purchase or trade-in

.....

Section 19

(1) Except in the case of an exchange or repair of an odometer and subject to subsection (2), no motor vehicle dealer or salesperson shall alter, adjust or permit any alteration or adjustment to the odometer on any motor vehicle in the dealer's or salesperson's possession or control in such a manner that as a result of the alteration or adjustment the total distance indicated on the odometer is other than the total distance travelled by the motor vehicle.

(2) Where a motor vehicle dealer exchanges an odometer or effects any repairs to the odometer of a motor vehicle in the dealer's possession or control or to any other part of the motor vehicle that is directly related to the odometer, the dealer shall record in the reconditioning record of the motor vehicle the reading in miles or kilometres that was on the odometer prior to the exchange or repair and shall ensure that the identical reading appears on the odometer of the motor vehicle after the exchanges or repairs have been effected.

ANALYSIS OF LAW AND FACTS:

This is a case whereby the Registrar, *Motor Vehicle Dealers Act*, wishes to revoke the registration of Aron Ehud Barak who carries on business under the name of Five Star Motors. The Registrar contends that Mr. Barak's conduct violates the requirements under section 5 of the Act that he act with honesty, integrity and in accordance with law. There was no evidence presented that dealt with the financial responsibilities of Mr. Barak and his business.

The motor vehicle industry is a regulated industry and those who wish to sell vehicles or operate a dealership must be registered in accordance with the legislation. Such people must also abide by the requirements in the Act and its regulations as to the maintenance of records and the need for a business premises distinct from their residence. It is trite law to state that the Tribunal in considering the proposal of the

Registrar must abide by the rationale stated in Brenner v Ontario (Registrar of Motor Vehicle Dealers and Salesmen) (1983) O.J.No. 1017 Divisional Court. Mr. Justice Southey stated, "The effect of s.7(4) is that the Tribunal should only have refused to direct the Registrar to carry out his proposal if it thought the Registrar was in error in concluding that the past conduct of the applicant afforded reasonable grounds for belief that he would not carry on business in accordance with law and with integrity and honesty." It is not for the Tribunal to try to second guess the Registrar. The "past" conduct of the applicant is the conduct that must be considered, not whether the Applicant could act within the dictates of the Act in the future.

The Tribunal must examine all of the evidence, both written and oral, and based on the totality of the evidence make its findings. The *Motor Vehicle Dealers Act* is legislation designed to protect the public who deal with the motor vehicle industry. The Tribunal, as does the Registrar, has a responsibility to ensure that the public has confidence in those who work within the motor vehicle industry. But the Tribunal is also aware of its responsibilities to those who wish to make a livelihood in this industry. It is a serious matter to deny the ability for someone to work within a regulated industry, and the Tribunal must be satisfied that the evidence presented is credible and trustworthy.

In this case, the Registrar has presented a number of issues upon which he states the Applicant should not be permitted to continue to be registered within the Act. The Tribunal will examine each issue separately.

1. Premises issue

The Registrar has stated that the Applicant did not have a proper office to conduct his business. The evidence of Ms. Gingas and Mr. Wagner was that in September, 1999 and then in March, 2000 they did not see an office space at 4801 Keele Street unit 55 which could be called the office premises of Five Star Motors. Ms Gingas did state that upon her second visit to the premises on September 14, 1999 there was now a desk and chair visible. She also stated that Mr. Barak did sign an affidavit that his business was wholesale and that the premises issue is not as significant for a wholesale operation. If that was the main issue of this hearing, the Tribunal would not have found it of significance to revoke the registration of the Applicant. It is true that an office premises is required under the legislation but the Applicant was operating a wholesale operation, and he was showing some attempt to comply with the requirement. Terms and conditions on the registration would have been appropriate to those circumstances.

2. Maintenance of books and records

and

3. Access to the Applicant's books and records by the inspector

These two issues are of more serious nature. Throughout the investigation, Ms. Gingas only received a few pieces of the business documentation of the Applicant. It is evident from the vehicles listed in the RIN reports conducted by the Registrar that the Applicant had an active business. There were a number of vehicles listed under each of the three RINs that can be attributed either to the Applicant personally or to Five Star Motors. Under these circumstances it is unusual that Ms. Gingas was only provided with some purchase bills of sale and some retail bills of sale but no wholesale bills, no customs forms and no sales bills for the export for sale of the cars to the United States. At no

time either in September, 1999 or afterwards when the Applicant's premises were the subject of a search warrant did any other documentation come forward from the Applicant. His Counsel stated that the Applicant had no responsibility for obtaining the customs forms for the United States. That was the responsibility of the purchasers. But the Applicant had nothing in his files. No records whatsoever to account for the export sale of these vehicles to the United States. This was not an omission for one or two vehicles but for all the vehicles that he sold to purchase in the United States. It was stated that he signed an affidavit saying his operation was that of a wholesale dealer, but he provided no wholesale forms to the inspector. Any documents that formed part of the materials at the hearing appeared to have been provided by Mr. Whitmore of the State of Virginia or by Canadian Auction Sales.

The Applicant did not testify, and the Tribunal has no information from him directly as to what has happened to all of this paperwork. The Applicant has obligations in the regulations to maintain proper books and records and in the case of used motor vehicles to keep repair bills for two years and to keep documentation on what vehicles had replacement odometers. There is evidence that Mr. Barak purchased Explorer clusters from a Higgins Auto Wrecking in the United States. That in itself is perfectly acceptable. But the Tribunal finds it unusual that there is no documentation of what happened to these Explorer clusters which is a contravention of section 19(2) of the Regulation 801 if these clusters were inserted into other automobiles. In the Tribunal's opinion that is a reasonable assumption, particularly as the actual clusters were not themselves located at the registered premises for the dealership at 4801 Keele Street, either by the investigation during the search of the premises in March of 2000 or subsequently by the Applicant himself.

Counsel for the Applicant argues that the Applicant is sloppy with his paperwork and this can be corrected by terms and conditions on his registration. The Tribunal disagrees with that characterization of the circumstances. It is one matter to find that a number of documents are missing or incomplete but it is quite another matter to find no documents whatsoever relating to any wholesale contract or export sale of vehicles to the United States. Such a massive failure to provide proper records cannot be attributed to poor record keeping methods but as intentional behaviour on the part of the Applicant.

The Tribunal finds that on this issue the Registrar has shown reasonable grounds for his proposal to revoke the registration of the Applicant.

4. discrepancies with odometer readings

Evidence was presented to the Tribunal of thirteen cars who were purchased by the Applicant, and transferred to one or two dealers in the State of Virginia. The documentation presented was not fully complete and some of the vehicles lacked original documents. But the scale of the documentation when coupled with the testimony of Mr. Whitmore and Mr. Wagner shows that the odometer discrepancies cannot be attributed to inadvertence. The Tribunal could understand one transfer form where the odometer readings could have been incorrect through sloppy paperwork or other such inadvertence. But in this case the Tribunal has before it significant discrepancies in the odometer readings of thirteen cars purchased by Mr. Barak and transferred by him to AceHy Enterprises or Global Leasing. The Tribunal had before it the evidence from Mr. Whitmore that dealers in the United States, in particular Mr. Gormic of AceHy in the State of Virginia and a Mr. Carstaria of a dealership in the State

of Florida have made accusations against Mr. Barak being part of a scheme to sell Ontario cars in the United States with tampered odometers.

The Tribunal agrees with Counsel for the Applicant that such hearsay must be viewed with considerable caution. The Tribunal has reviewed the considerable documentation provided by Mr. Whitmore and Mr. Wagner including blank odometer disclosure statement forms with the name of Five Star Motors and the address of 131 Snowshow Crescent, Thornhill. This is an address that has been alleged to be the correct address of Mr. Barak. The Tribunal has carefully examined the original documents and noted the different colours of ink on some of the originals. In many instances Mr. Barak's signature would be in one colour of ink and the rest of the information would be in a different colour of ink.

Counsel for the Applicant is correct in stating that there is no direct evidence that Mr. Barak filled in the American Form 17A and put down the wrong odometer reading, an odometer reading that was substantially lower than was the actual odometer reading from the Ontario documents, in particular the bills of sale from the Canadian Auction Sales organization. The Tribunal reviewed the whole of the materials before it, both documents and verbal testimony. The Tribunal finds that the Applicant failed to act responsibly in his duties to transfer the vehicles with the proper and accurate information on the odometer reading. The legislation indicates that tampering of odometer readings is a serious issue as evidenced by section 19 in Regulation 801. The Applicant has been registered since 1991. He has experience in the motor vehicle industry and should be aware of his responsibilities to transfer vehicles using accurate information. Unlike auction sales organizations who are exempt under section 14 of Regulation 801 from the responsibilities of the Act and its regulations, the Applicant has specific responsibilities as found in section 16 of Regulation 801. The Applicant cannot now say this is all a mystery, particularly when the Applicant has failed to provide any documentation on his wholesale sales which would have recorded the odometer readings for the vehicles being sold to the United States. Based on the totality of the evidence presented, the Tribunal finds that the Registrar acted in a reasonable fashion in holding that the Applicant did not act in an honest manner or with integrity in his sales of these thirteen cars to dealers in the United States, all of which had considerable discrepancies in the odometer readings when compared to the odometer readings from the Ontario documentation.

ORDER:

Therefore, by virtue of the authority vested in it by section 9(4) of the *Motor Vehicle Dealers Act*, the Tribunal directs the Registrar to carry out his Proposal.

LICENCE APPEAL TRIBUNAL

Marjorie L. Hiley
Vice-Chair

Released: December 7, 2000

MED - 301

Appeal under section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Minister pursuant to section 32(12)(b)(i) of that Act.

TO CHANGE THE CLASS OR CLASSES OF MOTOR VEHICLE IN RESPECT OF WHICH THE LICENCE WAS ISSUED

TRIBUNAL: ROSS C. BENNETT M.D., Presiding Member

APPEARANCES: Ms. KIM BEINTEMA, Respondent
Representative for the Minister

Applicant,
only by written submissions, not represented

DATE OF
HEARING: November 22, 2000
Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal the Applicant respecting a decision of the Minister (the "Respondent") pursuant to section 32(12)(b)(i) of the *Highway Traffic Act* (Ontario).

FACTS:

The Applicant, a 46 year old heavy equipment driver (dump trucks, snowplows, pickup trucks etc, suffered an unwitnessed seizure in his kitchen on May 9,1999. He did not bite his tongue or void.

It was subsequently determined the seizure was caused by a right frontal brain tumour, an oligodendroglioma, which is malignant, but low grade. As much of the tumour was resected as possible, without damaging normal brain tissue and he received thirty (30) radiation treatments. Dilantin 500 mg. daily was ordered for an indefinite period.

Physician # 1, the neurosurgeon, on September 2, 1999, reported the seizure and resection of a brain tumour to the Ministry.

Physician # 2, the Applicant's family physician, also reported the Applicant's problems to the Ministry on October 7, 1999. He mentioned the condition was well controlled and there was no seizure activity.

The Ministry advised the Applicant on October 19, 1999 that his "AC" driver's licence was being suspended under section 47(1) of the *Highway Traffic Act*.

Physician # 1, reported to the Ministry on December 3, 1999 and stated that the Applicant had no neurological deficit and the CT scan looked as if the disease was well controlled.

Physician # 3, a radiation oncologist reported on December 14, 1999 he had examined the Applicant on that date and found no evidence of symptoms of progressive disease and his neurological status appeared to be stable.

All three doctors recommended the Applicant's licence status be re-assessed considering he had been seizure-free since his surgery in June, 1999.

Applicant requested reinstatement of his A,C licence. The Ministry's Medical Advisory Committee ("MAC") recommended re-instatement of the Applicant's "G" licence on March 7, 2000 but not his A,C licence. A neurologist's assessment on August 15, 2000 was requested.

Physician # 4, a neurologist, reported on May 2, 2000 that the Applicant had been re-assessed and was asymptomatic and without seizures. His MRI showed encephalomalacia in the right frontal area, consistent with the surgical intervention and radiation therapy. The EEG showed some short wave activity from the right frontal temporal area, but no evidence of any epileptiform activity.

Physician # 3 reported on September 12, 2000 that the Applicant's MRI showed some persistent enhancement in the tumour area, which was of uncertain significance. He again requested re-assessment considering the Applicant's clinical stability and seizure free status.

Physician # 5, a neurologist replacing Physician # 4, wrote on September 27, 2000 stating the Applicant's neurological status was essentially stable and there was no significant impairment preventing him from operating a motor vehicle.

MAC recommended on October 23, 2000 that only a class GM licence be allowed until a neurologist confirmed he had been seizure free for 5 years.

ISSUES:

Should the decision of the Minister to change the class or class of motor vehicles in respect of which the licence is issued in accordance with the result of the examination be varied, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffer from any mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Regulation 340/94, Section 17 and 18 states:

- 17. (1) Qualifications required by an applicant for a holder of a Class A, B, C, D, E or F driver's licence are that the applicant or holder,
 - (a) has no history or clinical diagnosis of diabetes that requires insulin for control;
 - (b) is not taking any drug that could, in the dosage prescribed or in the dosage recommended by the manufacturer, impair his or her ability to drive a motor vehicle of the applicable class safely;
 - (c) has no established medical history of myocardial infarction, angina pectoris, coronary insufficiency or thrombosis;¹⁴⁽¹⁾
 - (d) has no established medical history of heart disease including arrhythmia or of respiratory dysfunction likely to interfere with the safe driving of a motor vehicle of the applicable class;
 - (e) is not suffering from an aortic aneurysm, whether resected or not;
 - (f) is not suffering from hypertension accompanied by postural hypotension resulting in giddiness when under treatment;
 - (g) has no established medical history of loss of consciousness or awareness due to a chronic or recurring condition;
 - (h) has no established medical history of a disorder of the musculoskeletal or nervous system that may interfere with the safe driving of a motor vehicle of the applicable class;

- (i) has no established medical history of an intractable psychotic or psychoneurotic disorder, having particular regard for sustained hostile, aggressive, paranoid, suicidal or other destructive tendencies or depression unless it is medically determined that the condition from which the person has suffered is corrected or controlled;
 - (j) has a visual acuity by Snellen Rating, with or without the aid of corrective lenses, no poorer than 20/30 in the better eye and 20/50 in the weaker eye; and
 - (k) has a horizontal visual field of at least 120 degrees in each eye as measured by confrontation tests.
- (2) An applicant for or a holder of a Class A, B, C, D, E or F driver's licence who fails to meet the qualifications referred to in clauses (1)(a) to (i) may, despite the failure, qualify for the class of licence applied for or held if he or she demonstrated the ability to drive a motor vehicle in the applicable class as safely as any person who meets those qualifications.
- (3) An applicant for or a holder of a Class D driver's licence who fails to meet the qualification referred to in clause (1)(c) may, despite the failure, qualify for that class of licence if it is medically determined that he or she has made a full recovery and there is no established history of a second occurrence of myocardial infarction, thrombosis or recurring angina pectoris.
- (4) An applicant for or a holder of a Class B, C, E or F driver's licence whose hearing in one ear is better than in the other must be able to perceive in the better ear, with or without a hearing aid, a forced whisper at a distance of 1.5 metres or, if an audiometer is used to test the person's hearing, must not have a loss in the better ear of more than 40 decibels at 500, 1,000 and 2,000 hertz.
- 18. An applicant for or a holder of a G, G1, G2, L, M, M1, M2, or R driver's licence must have,
 - (a) in the case of a person whose vision in one eye is better than in the other, visual acuity in the better eye that is no poorer than 20/40 as measured by Snellen Rating; and
 - (b) a horizontal visual field of at least 120 degrees as measured by confrontation tests.

Section 32(12)(b)(i) of the *Highway Traffic Act* states:

- 32 No person shall drive a motor vehicle on a highway unless the motor vehicle is within a class of motor vehicles in respect of which

the person holds a driver's licence issued to him or her under this Act.

(12) An applicant for a driver's licence or a person who holds a driver's licence shall submit to the examinations that are authorized by the regulations relating to this section and required by the Minister at the time and places that the Minister may require and the Minister may,

(b) in the case of a person who holds a driver's licence,

(i) impose or remove the conditions or endorsements authorized by the regulations or change the class or classes of motor vehicles in respect of which the licence is issued in accordance with the result of the examinations, or

Section 50 of the Act states:

(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.

The Board may confirm, modify or set aside the decision of the Minister or Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) of the *Highway Traffic Act* unquestionably empowers the Registrar to "...suspend or cancel" a driver's licence for "any ...sufficient reason...".The original suspension came after the Registrar received two unsolicited Medical Condition Reports, from a Physician # 1, a neurosurgeon and Physician # 2, a family physician concerning the Applicant having a seizure and subsequently, a resection and radiation of a low grade brain tumour. The Applicant's "G" licence was re-instated five months later, but the Ministry refused to return his "AC" licence, inspite of positive reports from the four specialists and his family physician, who are treating him. The downgrade of a driver's licence is permitted under section 32(12)(b)(i) of the *Highway Traffic Act* and an appeal of that decision to this Tribunal is permitted under section 50(1) of the *Highway Traffic Act*.

Section 14 of Regulation 340/94 states " a holder of a driver's licence must not

(a) suffer from ... a physical disability likely to significantly interfere with his.. ability to drive a motor vehicle of the applicable class safely ...".

Section 17 of Regulation 340/94 provides further qualifications for the holder of a Class A,B,C,D,E, or F driver's licence.

A review of the medical reports available leave little doubt the Applicant had a seizure as a result of a brain tumour, which was removed and radiated successfully.

Regular follow up examinations by the neurosurgeon, two neurologists and an oncologist, with MRI's every three months have revealed no "epileptiform" activity and he is taking Dilantin 500 mg daily indefinitely.

The MAC recommended a neurologist's confirmation that the Applicant remain free of seizure activity for five (5) years before his "AC" licence is restored. This recommendation is based on a MRI which shows a lesion scar in the frontal lobe. The neurosurgeon and neurologists do not consider this of any significance since it is simply a surgical deficit.

The Tribunal finds the Applicant no longer suffers from a demonstrable physical disability likely to significantly interfere with his ability to drive a motor vehicle of the applicable class safely with the medical follow-up he is receiving.

DECISION:

Upon the application by the Applicant to appeal the decision dated October 19,1999 of the Minister ("Respondent") to change the class or classes of motor vehicle in respect of which the licence was issued pursuant to Section 32(12)(b)(i) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Respondent and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Minister be modified to reinstate the Applicant's Class C,A driver's licence so long as the Applicant remains seizure free and provided that every three months following the release of this decision the Applicant be examined by his family physician to confirm in writing to the Registrar of Motor Vehicles the Applicant's satisfactory medical condition, failing which the Applicant's Class C,A driver's licence is suspended.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D.
Presiding Member

RELEASED: December 4, 2000

CHECKER TOWING INC

CHECKER TOWING INC.

APPEAL FROM A NOTICE OF PROPOSAL OF THE
DIRECTOR OF VEHICLE INSPECTION STANDARDS
UNDER THE *HIGHWAY TRAFFIC ACT* R.S.O. 1990
CHAPTER H.8 AS AMENDED

TO REFUSE A REGISTRATION

TRIBUNAL: RAY KOLYNCHUK, Member, presiding
DINO BOTTERO, Member

APPEARANCES: GORDON V. MEAKINGS, Counsel, representing Checker
Towing Inc.
PATRICK MOORE, Counsel, representing the Director of
Vehicle Inspection Standards under the *Highway Traffic Act*.

DATES OF
HEARING: September 11, 2000 & November 14, 2000 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

Checker Towing Inc. ("Checker") appeals the Proposal of the Director of Vehicle Inspection Standards (the "Director") under the *Highway Traffic Act* (the "Act") to refuse Checker's registration as a motor vehicle inspection station. The Director's Proposal is dated May 9, 2000 and was issued in terms of section 95(1) of the Act which reads as follows:

95(1) Where the Director proposes,

- (a) to refuse to issue or renew a licence;
- (b) to refuse to make registration; or
- (c) to revoke a license or registration,

the Director shall serve notice of his or her proposal, together with written reasons therefor,

- (d) in the case of a proposal to refuse to issue a licence, upon the applicant;
- (e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;
- (f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and
- (g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

The Director bases his Proposal on section 91(3)(a) of the Act which reads as follows:

91(3)(a) Subject to section 95, the Director may refuse to issue a motor vehicle inspection station licence where, in his or her opinion,

- (a) the past conduct of the applicant or, where the applicant is a corporation, is of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity;

The Director's position is that Checker's application for registration as a motor vehicle inspection station should be refused as, having regard to the past conduct of Ross Ladouceur, the President and Officer of Checker, there is reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity.

During the first day of hearing on September 11, 2000, Vice-Chair, Derek Israel presided with Ray Kolynchuk and Dino Bottero, Members.

Derek Israel did not sit as he was taken ill and therefore the matter proceeded before Members, Ray Kolynchuk and Dino Bottero, only.

THE EVIDENCE INTRODUCED BY THE DIRECTOR:

The evidence presented at the hearing before the Tribunal consisted of a number of allegations. The witnesses for the Director were Mr. Ronald McGee, a transport enforcement officer with the Ministry of Transport and Mr. Carl Douglas Newton, a licensed mechanic who was employed by Checker.

FIRST ALLEGATION:

The first allegation concerns three Safety Standard Certificates whose numbers are 6852395, 7208283 and 8101782 dated April 11, 1997, July 4, 1997 and March 20, 1998 respectively.

Safety Standard Certificate 6852395

The first witness for the Director was Ronald McGee an inspector employed by the Ministry of Transportation and whose area of work is Barrie, Ontario. He testified that Mr. Ross Ladouceur ("Ladouceur") was the President of Checker and Carl Douglas Newton ("Newton") was employed by Checker as a licensed mechanic regarding inspections of motor vehicles for safety standard certificates. Checker was licensed to issue safety standard certificates in 1994 and first came to McGee's attention on May 1997 when Inspector Tomasoni of the Ministry of Transportation forwarded McGee an inspection report he had written pursuant to a complaint the Ministry had received. The complaint related to a 1991 GMC Sonoma motor vehicle and a safety Standard Certificate issued in respect thereof by Checker and signed by Newton and Ladouceur (Exhibit 1 Tab 5). The certificate stated that the date of inspection of the vehicle was April 11, 1997. According to the vehicle inspection report of Tomasoni, he inspected the vehicle 21 days after April 11, 1997. On May 15, 1997, Tomasoni attended at Checker's premises, inspected certain records and spoke to Ladouceur and Newton. Newton gave a written statement to Tomasoni in which he stated he was the certifying

mechanic regarding the inspection and that repairs were found necessary for certification. The parts and labour in respect of the repairs were to be supplied by Tim Byers, the customer who requested the certification.

When the safety standard inspection was conducted the following defects were noted and had to be corrected prior to issuance of the certificate. The defects noted were:

- lamps and reflectors
- exhaust system
- brakes – drums and discs
- brakes – parking brake performance, adjustment
- suspension – ball joints

On April 11, 1997, Checker issued an invoice to the customer and in terms of that invoice noted a charge of \$40.00 plus tax of \$6.00 in respect of the “Ministry of Transportation Safety Inspection.” No charge was made for the “parts and labour” which the customer, Tim Byers, supplied according to the invoice. The invoice reflected across its face the words “paid in cash” with the signature of C.D. Newton thereunder.

When Tomasoni inspected the vehicle pursuant to the complaint of Harwood, he noted some seven components that he considered defective. These seven components were:

- (1) Measured rotor thickness and drum diameter.
L/F rotor 0.880" R/F rotor 0.908"
L/R drum 9.600" R/R drum 9.600"
Manufacturer specifications: Discard rotor at 0.965"
 Machine drum to 9.560"

Also the left rear drum friction surface was scored, due to the lining on the primary shoe wearing down to the metal.
Reg. 611 Sch. 2 Sec. 1(b)(e) Pg 30

- (2) The automatic brake adjuster on both rear brake assemblies were seized
Reg. 611 Sch. 2 Sec. 1(o) Pg. 30
- (3) The friction material on the primary brake shoe – (left rear) – was worn to the metal.
The top inner surface of the brake shoe was worn down to the metal support.
Reg. 611 Sch 2 Sec. 1(l)(g) Pg 30
- (4) Both rear park brake cables were seized. The left rear was partially holding brakes in the applied position. The right rear would not apply at all.
Reg. 611 Sch 1 Sec. 2(2) Pg 17
- (5) Left front brake flex line was cracked beyond cord. The line was cracked at calliper side.
Reg. 611 Sch 1 Sec. 2(1)(b) Pg. 17
- (6) Both front tires had cracks along inside and outside circumferences. The left front also had visible bumps and cuts exposing the cords.
Reg. 611 Sch 1 Sec. 7(2)(d)(e) Pg. 28
- (7) The wheel cylinder on the left rear brake assembly had shifted and contacting the brake shoes at the outer diameter of the piston. This normally happens when backing plate is corroded around wheel cylinder mounting area.
Reg. 611 Sch 2 (1)(m) Pg. 30

In my opinion all defects were present the day SSC 6852395 was issued.

Pursuant to the statement made to Tomasoni and his field report and its findings, Newton and Ladouceur were charged with contravening section 90(3)(a) of the Act which reads as follows:

90.(3) A safety standards certificate in respect of a motor vehicle shall not be issued or a vehicle inspection sticker affixed to a vehicle unless,

- (a) the vehicle has been inspected by a motor vehicle inspection mechanic in the motor vehicle inspection station and the vehicle complies with the inspection requirements and performance standards prescribed by the regulations; and

Both Newton and Ladouceur pleaded guilty to the charge and a fine of \$400.00 was imposed.

Newton also testified for the Director. He stated that he was employed by Ross Ladouceur to work as a motor vehicle inspection mechanic at Checker. He was paid \$200.00 cash per week. He confirmed that his signature appears on this safety standard certificate as well as on certificate numbers 7208283 and 8101782.

Prior to becoming employed by Checker, Newton suffered a broken back that effectively precluded him from working as a motor vehicle mechanic.

Prior to working for Checker, Newton worked for 5 Star Mechanical Services doing paper work. While there, Ladouceur would come to Newton with mileage and ownership information regarding motor vehicles to be certified. Newton would write out the safety standard certificates regarding these vehicles and have the owner of 5 Star Mechanical Services sign same. Newton and the owner of 5 Star Mechanical Services did not see the vehicles to be certified. Ladouceur would pay Newton for the certification and Newton would give the money received to 5 Star Mechanical Services' owner.

When 5 Star Mechanical Services closed its doors in December 1994, Newton began working for Ladouceur at Checker. Newton was hired by Ladouceur because he was a licensed safety standards certificate mechanic. His duties involved signing the certificates issued by Checker.

Some safety standard certificates issued by Checker were legitimate although the great majority were not. Newton did not see the majority of motor vehicles in respect of which he signed safety standard certificates nor did he inspect them for defects prior to the issue of safety standard certificates.

Ladouceur worked with curb siders and he merely presented details of vehicles and their mileages to Newton who would complete and sign safety standard certificates for such vehicles without seeing the vehicles.

Newton stated that he kept a list – which he referred to as a journal – of all motor vehicles for which safety standard certificates were issued while Newton was working at Checker. Part of the list is contained in Exhibit 1 Tab 9 commencing from page 42 up to and including page 60. Other than very few entries on this list all are in Newton's handwriting. According to Newton, "98%" of the safety standard certificates listed on the various pages of the list are false in that the vehicles were never seen or inspected by Checker. The cash cost to the customers in regard to the issue of the certificates

was entered onto the list at a price that was higher than the cost reflected on the customer's invoice. This was done so as to save Checker income tax. Where on the list the word "Ross" appears after customer cost that means, according to Newton, that the customer's vehicle was not seen or inspected but the information necessary for the issue of the safety standard certificates was supplied by Ladouceur. Newton, using the information given to him by Ladouceur then made out the safety standard certificates and signed same as the issuing mechanic.

Newton admitted he did not see the motor vehicle for which safety standard certificate number 6852395 was issued.

Safety Standard Certificate 7208283

The evidence of Officer McGee and Newton surrounding this certificate was as follows:

A safety standard certificate was signed by Newton as inspecting mechanic and by Ladouceur on behalf of Checker. The date of inspection according to the certificate was July 4, 1997.

A complaint was made on July 25, 1997. McGee investigated the complaint which related to the safety standard certificate issued under number 7208283 by Checker. On July 28, 1997 a field inspection of the vehicle was conducted by McGee and a report was completed by him. (Exhibit 1 Tab 6)

Twenty-four days had elapsed since the date of the safety standard inspection as stated on the safety standard certificate issued by Checker. The field inspection by McGee indicated the following six defects:

- Defect #1 = Left lower ball joint measured .031" radial play. Right lower ball joint measured .049" radial play. Man-Specs: No perceptible play allowed. Contrary to Reg 611 Schedule 1 clause 4(1)()
- Defect #2 = R.R. parking brake cable binding, L.R. parking brake cable seized. Actuating handle travels to top and no parking brake action. Will not hold forward or reverse. Contrary to HTA Reg 611 Schedule 1 Sub 2(2) and clause 2(8)(a)
- Defect #3 = Hole in passenger side floor pan, right rear section rust perforation – measured 11½" x 5¼" hole. (affected area) Left rear floor pan, rear passenger foot area rust perforation, measured, measured 4" long rm affected are contrary to Reg 611 clause 1(4)(b)
- Defect #4 = Back plate of muffler ½ " x ¼" hole measured contrary to Reg 611 clause 1(9)(b)
- Defect #5 = Horn not operational. Attempting to actuate horn causes smoke visible in steering column. Contrary to Reg 611 clause 5(1)(b)
- Defect #6 = One of two licence plate lamps not operational. Contray b Reg 611 clause 6(1)(a)

McGee stated that item numbers 1, 2 and 3 on the field inspection report would have been present at July 4, 1997. Pursuant to the field inspection report, McGee called at Checker's premises on August 29, 1997 and spoke with Ladouceur and Newton in regard to the circumstances surrounding the issue of this safety standard certificate. McGee made notes of the discussion that took place.

Ladouceur admitted signing the safety standard certificate for Checker. He could not remember the vehicle's defects although he did remember the vehicle had been in Checker's premises. Newton, however, refused to make a statement to McGee.

Subsequently, both Checker and Newton were charged under section 90(3)(a) of the Act. Both pleaded guilty as charged and convictions were registered on November 3, 1997 and fines were imposed.

Newton testified that after these convictions relating to safety standard certificate 7208283, he and Ladouceur discussed the future course of how they would proceed regarding the issue of safety standard certificates. They agreed that in future they would only "sell" certificates to people that they knew and not to strangers. It was also agreed that they would reduce the number of safety standard certificates that would henceforth be issued by Checker and that they would have to be more careful in the issue of safety standard certificates.

Newton stated further, that Checker had purchased, on behalf of the vehicle's owner, parts to be used in the vehicle to which this certificate applies. The owner had paid Checker for these parts and the safety standard certificate was handed to the owner. The owner drove off with the certificate together with the spares which he was supposed to install in the vehicle. However, the owner never had the opportunity of doing as he was arrested while the spares were still in the back of the vehicle together with the safety standard certificate issued by Checker.

SECOND ALLEGATION:

This allegation by the Director concerns three safety standard certificates numbered 7367978 to 7367980 inclusive. The Director contends that these three certificates were pre-signed in blank by Newton in anticipation of later being completed by Checker's Ladouceur.

The evidence of the Director in regard to this allegation was given by McGee and Newton.

McGee stated that he visited Checker on August 29, 1997 in order to carry out a garage inspection. Pursuant to the inspection, McGee noted the following:

Investigation re = pre-signed SSC # 7367978 to 7367980 by inspecting mechanic Carl D. Newton. Also several issued in series 7367961 to 7367980 issued when mechanic Newton on vacation.
Voided SSC # 7367978 to 7367980. Design made to issue written warning via this document.

Present during this inspection were Ladouceur and Newton both of whom signed having received above quoted note.

McGee stated that upon completion of his visit to Checker, he took with him the book containing the three pre-signed safety standard certificates and made copies thereof. Apart from these three certificates, the booklet contained about 20 other certificates which McGee has misplaced.

Newton, in his testimony, conceded that he did sign the safety standard certificate numbers 7367978 to 7367980 inclusive. The date of inspection was left blank on each

certificate that he signed as was all details of the vehicle namely, the VIN number, the make, year, type of body and odometer reading.

Newton stated that he remembered he was going on a short vacation and he left the incomplete certificates when he departed for vacation. Ladouceur told him to sign the incomplete safety standard certificates and he did so as he would have had no job had he refused to do so as instructed. Before this occasion, Newton had pre-signed partially blank safety standard certificates. This previous occasion was prior to Newton being hospitalised in 1995 or 1996. Ladouceur suggested that Newton pre-sign the certificates before entering hospital and Newton accordingly did so.

McGee also testified that the Ministry was concerned regarding the high number of safety standard certificates Checker was issuing. According to the Ministry of Transportation's records, Checker issued 2,412 certificates during the period December 16, 1994 to April 1998. The Ministry was also concerned that people appeared to be coming to Checker for safety standard certificates from places as distant as Midland/Penetanguishene when there were garages nearer to such people that could issue safety standard certificates. Furthermore, the Ministry was receiving complaints from the police relative to safety standard certificates that were being issued by Checker.

The Ministry decided to do a full audit of Checker to determine the position in regard to the question of safety standard certificates. An audit involves the seizure of garage records and the immediate re-inspection of vehicles which were the subject of safety standard certificates. On April 30, 1998, McGee visited Checker. There he met with Ladouceur and Newton and informed them of the full audit that was to take place. McGee was asked what could be done in view of the impending audit and McGee stated he could not advise on what should be done. McGee, however, did advise that as an option, if Checker surrendered its licence an audit would not occur. Ladouceur commented that the "way out" would be to surrender the licence and enquired of McGee as to "how long, if we surrendered the licence would we have to stay out?" McGee told Ladouceur that if Checker "stayed out " for two years "and let the dust settle" an application could then be made. Ladouceur and Newton then had a discussion and they then took the licences down as well as the sign regarding Checker being an authorized motor vehicle inspection station. McGee then completed his audit report reading as follows:

Close MVIS Type II station. Rec'd MVIS 1998 licence. MVIS manual and MVIS sign.
Voluntary termination of licence. Rec'd insp. certificate # D732085 to D732090. Agreed
to by Ross 'Ladouceur' = owner.

Note = SSC # 8228133 to 8228140 had been partially filled out. (Name of station).
These SSC's have been removed and destroyed.

Refund to be issued to = Checker Towing Inc.

228 'Tiffin' St.
Barrie Ont.
L4N – 2N4

McGee stated that subsequent to April 30, 1998, Newton came to him with information, which had not been solicited by him from Newton. This information related to the journal kept by Newton. The journal showed a series of dated entries cross referenced back to Checker work orders/invoices. The final column of this journal showed customer cost. In almost all cases, the Journal entry when checked to the referenced invoices shows a higher actual cost paid by customers. For example, the Journal

shows that Central Ontario Tire paid \$64.20 in respect of invoice No. 0134 dated August 12, 1997 whereas, the actual invoice No. 0134 shows they paid \$42.80.

Mr. Newton stated that the difference in customer cost on the invoice and what was recorded in the Journal was taken by Mr. Ladouceur.

EVIDENCE INTRODUCED BY APPLICANT:

The witnesses for the Applicant were Ross Ladouceur, owner of the Applicant and his wife, Kathleen Luck-Ladouceur.

ROSS LADOUCEUR'S EVIDENCE

Ladouceur's background presented a history in the automotive towing, repair and resale business. The current business, the Applicant, is operated on the same premises as Ladouceur's principal residence.

Ladouceur's response to the improper issuance of the following safety standard certificates:

- Safety Standard Certificate No. 6852395, April 11, 1997;
- Safety Standard Certificate No. 7208283, July 4, 1997; and
- Safety Standard Certificate No. 8101782, March 20, 1998

was that blame rested with the company's mechanic, Carl Newton. Ladouceur stated that he had trusted Newton to comply with all requirements of the *Highway Traffic Act* with respect to motor vehicle inspections. He also stated that he had difficulties reading and writing in English. He often asked Newton to assist him by having Newton explain written words to him.

Ladouceur stated he released Carl Newton from his employment at the Applicant's business in 1998 shortly after the company voluntarily gave up the licence issued by the Ministry.

Ladouceur summarized his situation by stating that his business difficulties were a result of providing Carl Newton too much leeway and also, because he was away from the business "a lot".

He had voluntarily given up his license on the assumption that he could reapply for such licence after a waiting period. He further stated that if his application was successful he would be using Bert Jolly from ATD Auto Sales as the Applicant's new mechanic.

In cross-examination by the counsel for the Director, Ladouceur acknowledged that he had not notified the Ministry of the change of mechanics.

He also stated that his business dealings resulted in his being away from the business for 3 to 4 days per week. He further stated that of all the safety certificates issued from Checker Towing, only 25% were properly approved by him. In the remaining cases, Ladouceur stated that Carl Newton had improperly signed his (Ladouceur's) name and issued the certificates.

KATHLEEN LUCK LADOUCEUR'S EVIDENCE

Kathleen Luck-Ladouceur indicated that she was employed outside the business of the Applicant and was at the business infrequently. She indicated that she signed only three or four of the certificates issued by the Applicant and only after asking Carl Newton if the work was completed. She confirmed that she signed Safety Standard Certificate 8101782 dated March 20, 1998. She also indicated that she was principally involved in receiving the payments from Carl Newton and making the deposits to the company bank account. She further stated that the first she saw of Carl Newton's Journal was "as part of these Tribunal proceedings".

FACTS FOUND PROVEN:

The following are the facts found to have been proven:

1. Checker Towing Inc. (the "Applicant") was registered as a motor vehicle inspection station under the *Highway Traffic Act* and Regulations to issue Safety Standard Certificates in respect of motor vehicle's.
2. Carl Newton was at all relevant times employed by the Applicant as an Inspecting Mechanic under the *Highway Traffic Act* and Regulations and was authorized to inspect motor vehicle's prior to the issue of safety standard certificates and to sign and complete such certificates.
3. Ross Ladouceur was at all relevant times the President and directing mind of the Applicant and Kathleen Luck-Ladouceur was at all relevant times the Secretary/Treasurer of the Applicant.
4. Safety Standard Certificate 6852395 was issued by the Applicant on or about April 11, 1997 and such certificate was signed on behalf of the Applicant by Ross Ladouceur and Carl Newton. The aforementioned Certificate was issued by the Applicant in contravention of Section 90(3) of the *Highway Traffic Act* and pursuant thereto Ross Ladouceur and Newton plead guilty to a charge under that section and were fined \$400.00.
5. Safety Standard Certificate 7208283 was issued by the Applicant on or about July 4, 1997 and such certificate was signed on behalf of the Applicant by Ross Ladouceur and Carl Newton. The aforesaid Certificate was issued by the Applicant in contravention of Section 90(3) of the *Highway Traffic Act* and pursuant thereto Ross Ladouceur and Carl Newton plead guilty to a charge when that section and paid fines as imposed.
6. Safety Standard Certificate 8101782 was issued by the Applicant on or about March 20, 1998 and such certificate was signed on behalf of the Applicant by Kathleen Luck-Ladouceur and Carl Newton. The aforesaid Certificate was issued by the Applicant in contravention of Section 90(3) of the *Highway Traffic Act* and pursuant thereto guilty pleas were entered by Ross Ladouceur and Carl Newton and \$900.00 in fines were paid by them pursuant to the guilty plea.

7. Certain Safety Standard Certificate numbers 7367978 to 7367980 inclusive were presigned by Carl Newton in an incomplete form as to motor vehicle details, VIN numbers and the make, year, type of body and odometer reading. The aforesaid Certificates were signed by Carl Newton at the instigation and on the directions of Ross Ladouceur who at all relevant times knew that certain Safety Standard Certificates were presigned by Carl Newton.

DECISION AND REASONS:

The onus of proof in this matter rests upon the Director to prove that the past conduct of the Applicant and its Officers and Directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity; and that accordingly, the Director is entitled to refuse the Applicant's registration as a motor vehicle inspection station in terms of section 91(8)(a) of the *Highway Traffic Act*.

The grounds upon which the Director bases his refusal are dealt with in the Director's Appeal Book (Exhibit 1, Tab 1) and are set out fully in this decision under the evidence adduced by the Director.

Ronald McGee, a transport enforcement officer with the Ministry of Transportation and Carl Newton a licenced mechanic who was employed by the Applicant were the witnesses for the Director. The Tribunal has no hesitation in accepting the testimony of McGee who was found to be honest and forthcoming and whose testimony the Tribunal has no hesitation in accepting. At all stages of his investigation of the Applicant, he made full and comprehensive notes of what took place, which notes were made contemporaneously with the events related therein. At the hearing, McGee made reference to those notes when giving evidence. He was in no way shown during the hearing to be either untruthful or unreliable as a witness.

Newton's evidence corroborated McGee's evidence and he too was not shown to be untruthful in his answers to various questions posed to him. He freely admitted his part in issuance of false and/or blank Safety Certificates.

The evidence against Ross Ladouceur was substantiated. He admitted to being an officer and director of the Applicant and he did not deny he was the controlling mind of the Applicant. He did not deny his signatures on the safety standard certificates which formed the basis of the Directors case (except for the certificate signed by his wife Kathleen). His conduct was dishonest and ongoing. He plead guilty to three separate charges of contravening section 90(3) of the *Highway Traffic Act* which in and of itself is an admission of having practiced deception in the issuance of certificates. He knew and encouraged Newton to sign incomplete certificates which were found in the Applicant's offices. The abnormally high number of certificates issued by the Applicant in and of itself is supportive of the facts testified to by McGee and Newton that safety standard certificates were issued without any inspection having taken place or inadequate inspections.

The evidence indicates an ongoing course of conduct in the issuing of certificates which was dishonest or at the very least negligent. The attitude of the Applicant as manifested by the conduct of Ross Ladouceur indicates a serious disregard to the safety of

consumers, who in good faith purchase motor vehicle's in the belief that they are safe to drive whereas the motor vehicle is unsafe and not worthy of being upon a public road.

Accordingly, by virtue of the authority vested in it by virtue of Section 95(4) of the *Highway Traffic Act*, the Tribunal directs the Director to carry out his proposal to refuse registration of the Applicant as a motor vehicle inspection station.

LICENCE APPEAL TRIBUNAL

Ray Kolynchuk, Presiding Member

Dino Bottero, Member

RELEASED: December 8, 2000

FRATTAROLI

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
DAVID AND MARY FRATTAROLI

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DAVID AND MARY FRATTAROLI

Applicants

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

-and-

1160373 ONTARIO LTD.

Added Party

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter
on December 13 and 14, 2000;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing to
commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto,
Ontario, at 9:30 a.m., on Wednesday, February 14, 2001 and to continue February 15,
2001 if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 15, 2000

MILECS DESIGN BUILT HOMES

MILECS DESIGN BUILT HOMES

APPEAL FROM A PROPOSAL OF THE REGISTRAR
UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

TO REFUSE TO RENEW REGISTRATION

TRIBUNAL: BEVERLEY READE, Vice-Chair

APPEARANCES:

ZUZANA MILEC, representing herself
TERRI HILBORN, Counsel, representing the Ontario New Home
Warranty Program

DATE OF
HEARING: December 7, 2000

Windsor

ORDER

WHEREAS a written Notice of Proposal dated July 26, 2000 to refuse to renew the registration of Milecs Design Built Homes (the AApplicant@) was issued by the Registrar of the Ontario New Home Warranty Program (the ARegistrarA) pursuant to the *Ontario New Home Warranties Plan Act*;

AND WHEREAS prior to the commencement of the hearing, the Applicant and counsel for the Program advised the Tribunal of a settlement;

AND WHEREAS the Applicant and the Registrar have entered into terms of settlement in regard to the Proposal;

NOW THEREFORE on consent of counsel for the Applicant and counsel for the Registrar, the Tribunal orders as follows:

1. The terms of settlement arrived at between the parties, a copy of which is attached hereto marked AA@, are hereby made an Order of this Tribunal;
2. The proceedings in this matter are hereby concluded.

LICENCE APPEAL TRIBUNAL

Beverley Reade, Vice-Chair

Released: December 15, 2000

SCHEDULE 'A'

ONTARIO NEW HOME WARRANTY PROGRAM and MLIECS DESIGN BUILT HOMES

Minutes of Settlement

Whereas the Ontario New Home Warranty Program ("ONHWP") issued a Notice of Proposal to refuse to renew the registration of Milecs Design Built Homes ("Milecs") dated July 26, 2000.

And whereas, ONHWP and Milecs desire to resolve the matters in issue in the Notice of Proposal:

Now therefore, in consideration of the mutual promises contained herein, ONHWP and Milecs agree as follows:

1. Milecs will provide ONHWP with the financial statements of Milecs for the year ended December 31, 1999 by no later than the close of business on January 21, 2001.
2. Milecs will provide ONHWP with the up to date Personal Net Worth statement of Zuzana and Michael Milec, including all necessary back up information, by no later than the close of business on Jan. 21, 2001.
3. Milecs will provide ONHWP with the completed application for renewal of registration of Milecs for the period June 19, 2000 to June 19, 2001, by no later than the close of business on Jan. 21, 2001.
4. Upon satisfaction by Milecs of the above terms, ONHWP will withdraw the notice of proposal.
5. If and when ONHWP receives the above documents, it will review the financial documentation and reassess the need for the imposition of terms and conditions on the builder's registration, including the need for security.
6. If Milecs fails to comply with paragraphs 1, 2 and 3 by the close of business on January 21, 2001, Milecs hereby consents to an Order of this Tribunal directing the Registrar to carry out his proposal, as set out in the notice of proposal, to refuse to renew the registration of Milecs, upon ONHWP providing written notice to this Tribunal of such failure to comply with the above terms.
7. ONHWP and Milecs consent to these Minutes of Settlement being made on Order of the Tribunal.

All of which is agreed to this 7th Day of December, 2000.

R & S TRANSPORTATION INC., and HARJ-MIN EXPRESS CARRIERS INC.

IN THE MATTER OF THE HIGHWAY TRAFFIC ACT, Revised Statutes of Ontario, 1990, Chapter H.8, as amended;

AND IN THE MATTER OF Commercial Vehicles Operator's Registration Certificate No. 126-488-670 issued to R&S Transportation Incorporated and Commercial Vehicles Operator's Registration Certificate No. 133-189-137 issued to Harj-Min Carriers Incorporated;

AND IN THE MATTER OF the Order of Suspension and Seizure by the Registrar of Motor Vehicles dated July 26th, 2000, of Commercial Vehicles Operator's Registration Certificates, the Plate Portion of Permits and Number Plates for all commercial motor vehicles and trailers registered to R&S Transportation Incorporated and to Harj-Min Carriers Incorporated;

AND IN THE MATTER OF the Safety Records of R&S Transportation Incorporated and Harj-Min Carriers Incorporated.

**R&S Transportation Incorporated and
Harj-Min Carriers Incorporated,**

Applicants

and

The Registrar of Motor Vehicles

Respondent

APPEAL FROM A SUSPENSION AND SEIZURE ORDER ISSUED BY THE REGISTRAR OF MOTOR VEHICLES DATED JULY 26, 2000.

TRIBUNAL:

Terence A. Wardrop Q.C., Vice Chair,
Norman Mealing, Member, and
Clarke Wallace, Member.

APPEARANCES:

Patrick Di Monte, Counsel on behalf of the Applicants,
Murray G. Forbes, Counsel on behalf of the Respondent.

**DATE OF
HEARING:**

December 6, 2000,

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

The Respondent issued a Suspension and Seizure Order dated June 26, 2000 (the "Suspension Order") whereby it ordered the Commercial Vehicle Operator's Registration ("CVOR") issued to each of the Applicants and plate portion of permits for all commercial motor vehicles and trailers in the name of each of the Applicants be suspended for a period of 30 days. The Respondent, in the Suspension Order, also notified the Applicants that the plate portion of permits, or if issued by a jurisdiction other than Ontario, the permits and the number plates, will be seized. The Suspension Order was to be in effect at 8:00 a.m. Eastern Daylight Savings Time on July 4, 2000 to 7:59 a.m. Eastern Daylight Savings Time on August 3, 2000.

The Applicants appealed the Suspension Order by a Notice of Appeal dated June 27, 2000, which was received by the License Appeal Tribunal on June 28, 2000.

At the hearing, Counsel addressed this Tribunal to the effect that they had mutually reached a settlement of the issues between the Parties late in the afternoon on December 5, 2000, and as a result did not propose to present any evidence at the hearing beyond the documentary Exhibits filed with the Registrar of the Tribunal and the Appeal Records filed by each of the Parties prior to the hearing.

The Tribunal after reviewing the material filed expressed some concern respecting the terms of the proposed settlement.

The Tribunal requested the Parties to complete a written consent with respect to the terms of settlement reached between the Parties.

The Parties thence executed a Consent in the following terms:

CONSENT

1. The Parties hereto by their respective counsel consent to the following order.

The appeal is hereby allowed in part, without costs, varying the suspension order to provide for suspension of CVOR certificate No 126-488-670 and CVOR certificate No 133-189-137 commencing December 18, 2000 at 9:00 a.m. TORONTO time and to continue for a period of 24 days inclusive of December 18, 2000 on the terms set out in the Registrar's order as amended.

2. It is recognized by the parties that the respondent shall continue to monitor the Applicant in accordance with the *Highway Traffic Act* and regulations thereunder in accordance with its mandate and exercise his jurisdiction as he may see fit under all the circumstances.

Dated at Toronto, this 6th December 2000

R&S Transportation Incorporated and Harj-Min Courier Inc. by their Solicitor
"Patrick Di Monte"

The Registrar of Motor Vehicles by its Solicitor "Murray Forbes"

THE LAW:

The appeal comes to this Tribunal by virtue of section 50(1) of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, which provides:

50. (1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or Registrar.

DECISION AND ORDER:

The appeal is hereby allowed in part, without costs, varying the Suspension Order to provide for the suspension of CVOR certificate No 126-488-670 issued to R&S Transportation Incorporated and CVOR certificate No 133-189-137 issued to Harj-Min Couriers Incorporated, together with the plate portion of permits for all commercial motor vehicles and trailers in the name of each of R&S Transportation Incorporated and Harj-Min Couriers Incorporated for a period of 24 days at 9:00 a.m. Eastern Standard Time on December 18, 2000 to 8:59 a.m. Eastern Standard Time on January 11, 2001, on the terms set out in the Suspension Order as hereby amended.

The Respondent shall continue to monitor the Applicants in accordance with the Highway Traffic Act and regulations thereunder in accordance with its mandate and exercise its jurisdiction as it may see fit under all the circumstances.

The safety record and safety rating of each of the Applicants pursuant to Sections 16 to 23 of the Highway Traffic Act shall not be affected by this Order, nor shall this Order be deemed to confirm or deny any alleged facts, issues or arguments contained in any documents filed with the Registrar of this Tribunal by either Party.

This Tribunal notes that certain undertakings made by the Applicants to the Tribunal with respect to medical certificates have not been met, and hereby waives further compliance with such undertakings.

LICENCE APPEAL TRIBUNAL

Terence A. Wardrop Q.C.,
Vice-Chair, Presiding

Norman Mealing,
Member

Clarke Wallace, Member

RELEASED: December 15, 2000

KIM KENNEDY

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: STUART CORK, Presiding Member

WILLIAM WARBURTON, Member

APPEARANCES: KIM GROSSKURTH
Representative for the Registrar of Motor Vehicles

KIM KENNEDY, Applicant
unrepresented

DATE OF HEARING: December 5, 2000

DECISION RELEASED: December 15, 2000 Toronto

REASONS FOR DECISION

A hearing was held on December 5, at Toronto, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the “Registrar”), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Kim Kennedy (the “Applicant”)
Motor Vehicle:	1989 Chrysler Lebaron (the “vehicle”) Plate # AACW399
Date of Appeal:	November 16, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the “Tribunal”) together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that vehicle owner exercised due diligence (i.e. all reasonable efforts) to determine that the driver's licence was not suspended and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(c) and (d) of the Act.

This matter came before this Tribunal on December 5, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing. The Respondent submitted a set of copies of documents bearing original certification seals.

All documents were submitted into evidence with the consent of both parties.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I am a single mother two, my son 11yrs and daughter 10 yrs. I am their sole provider and have struggled to give them a home and a decent life. I have no means of paying the impound cost which would result in my losing my car which took me 4 yrs to pay for. It is the only transportation me and my children have. We have suffered greatly because of this, both of my children have given up there afterschool activities (i.e. hockey, skating, riding) as a result of not having a vehicle. I would not have put my family in this situation had I had knowledge of my suspension which I did not. My licence was never taken from me when I was notified my licence was to be reinstated October 17, 2000 which to my knowledge it was. Please release my car so my situation does not worsen beyond repair. I am a commision salesperson and my income has gone from modested to nothing leaving me unable to support my family.

The Applicant stated that she was being driven home one evening by her boyfriend when, upon seating herself in the driver's seat after dropping him at his house, she was apprehended by police. The Applicant's driver's driver's licence was found to be then under suspension, and her vehicle was subsequently impounded.

The Applicant believed that her driver's licence had been re-instated, and that it had been returned to her seven months following her original suspension of December 1998. In July of 2000 she had been pulled over for a seat belt violation, and the police officer did not indicate to her that her driver's licence was not then valid. The Applicant stated that she never received any information from the Registrar indicting that her licence was not valid, nor had she ever attended at the court hearings regarding the charges and subsequent appeal of her Impaired Driving conviction. Therefore, she did not realize that her licence suspension had been reimposed by the Appellate Court in May of 2000.

The Applicant stated that she relies upon her vehicle for her delivery business in the town of Jackson's Point where she lives. There is no public transit available in this small rural community, and she has been unable to maintain her business or to take her children to their various extra curricular activities.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Kim Kennedy;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;

4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of Impaired Driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until December 25th, 2000.

The Respondent also submitted a certified copy of the Notice of Suspension that was served on the Applicant by registered mail, dated June 1, 2000. This document was entered into evidence as exhibit #4.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(c) and (d).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. Law. The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
 - (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
 - (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).
 - (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension as per section 50.2(3)(c) of the Act?

In this case the owner and the driver of the vehicle at the time of the impoundment were the same person. Therefore, in order to meet the onus under the legislation, the Applicant would have had to exercise some manner of due diligence on determining that her own licence was not under suspension at the time of the impoundment.

In this hearing, there was no evidence before the Tribunal that any actions that could be considered due diligence, as described by section 50.2(3)(c) of the Act, were performed by the Applicant. In fact, the forthright testimony of the Applicant was that she had assumed that her licence was valid since she had no reason to suspect otherwise. Furthermore, the Applicant also stated that she relied upon the police officer who charged her with a seat belt infraction, and who made no mention of her licence being under suspension, to verify the status of her licence. The Applicant's passive reliance upon the MTO or the police to forward to her, without request, information regarding the status of her licence can not be considered an act of due diligence on the part of the Applicant.

By failing to take any initiative to actually determine the status of her driver's licence, or to potentially leave this determination up to the actions of some third party such as the local police, the Applicant in her own testimony has failed to meet the onus under the Act.

The Applicant has also appealed on the grounds of exceptional hardship, in accordance with section 55.2(3)(d). Section 22 of Regulation 632/98 is very specific, in that it provides the Tribunal with the specific criteria the Applicant must meet to determine if in fact exceptional hardship will result from the impoundment. The Tribunal is precluded from considering any other factors not arising from or directly related to the impoundment itself.

In the matter before this Tribunal, there was no evidence before the Tribunal that the impoundment had contributed to the pre-existing financial hardships or uncertainty that the Applicant and her family may have had to endure. The Applicant has made no specific claims of exceptional hardship as described by section 22(1)(a) or (b).

The Applicant has claimed that the impoundment has jeopardized her own employment and financial situation. However, section 22(3)(d) of Regulation 632/98 precludes the Tribunal from considering the impact of any loss as a result of the impoundment that may be upon the person who was driving the vehicle at the time of the impoundment while their driver's licence was then under suspension. Here, the Applicant was the driver of the vehicle at the time of the impoundment. Therefore, the Tribunal may not consider the impacts of the loss that may be experienced by the Applicant.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

William Warburton, Member

RELEASED: December 15, 2000

FRANZE, VINCENT and FRANZE AUTOMOTIVE INC.

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
VINCENT FRANZE AND FRANZE AUTOMOTIVE INC.

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REVOKE REGISTRATIONS
- Proposal dated: August 23, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

VINCENT FRANZE AND FRANZE AUTOMOTIVE INC.

- and -

Applicants

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Vincent Franze and Franze Automotive Inc., Applicants, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicants and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 15, 2000

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Franze Automotive Inc. and Vincent Franze
78 Charterhouse Cres.
Rear Unit B
London, ON N5W 5V5

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act* (hereafter the "Act") the parties to the proceeding, Vincent Franze and Franze Automotive Inc., (collectively hereafter the "Applicant") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to its registration as a motor vehicle dealer:

- a) The Applicant acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Applicant.
- b) The Applicant further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Applicant.
- c) The Applicant agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Applicant further agrees to store its books and records at the location approved by the Registrar.
- d) The Applicant will ensure that all advertisements placed by or on behalf of the Applicant will identify their registered name and the address of the location approved by the Registrar.
- e) The Applicant agrees not to invite the public to deal at a place other than their approved location.
- f) The Applicant agrees to operate exclusively from the location approved by the Registrar. The Applicant agrees to apply for the Registrar's approval, by way of prior written notice, of any change in business location in the form required by the Registrar. The Applicant further agrees to store all books and records at the registered premises and to display a sign that is visible to the public, stating the dealership name.
- g) The Applicant will not knowingly conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
- h) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser within 8 days of sale to the purchaser.

- i) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- j) The Applicant agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
- k) The Applicant agrees that he is under a positive obligation to disclose in writing, all material facts about the vehicles he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Applicant agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Applicant has sold, the Applicant will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
- l) The Applicant agrees that where the odometer of a vehicle has been repaired or exchanged, full disclosure of such will be written on the bill of sale. Disclosure shall be in accordance with Section 2.2 of OMVIC's Standards of Business Practice.
- m) The Applicant acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Applicant knows that the purchase or sale of those vehicles will facilitate an illegal act.
- n) The Applicant shall file all remittances and make all returns required pursuant to the Retail Sales Tax Act.
- o) The Applicant acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
- p) The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
- q) The Applicant agrees that now and in the future, he is required to provide full disclosure of all charges pending and convictions under the Criminal Code to the Registrar within 5 business days of that event and shall make full and accurate disclosure on all future applications.
- r) The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
- s) The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this 14 day of December, 2000.

EDGAR HISS

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

**TO APPEAL AN ORDER TO IMPOUND A
MOTOR VEHICLE ISSUED BY THE
REGISTRAR OF MOTOR VEHICLES**

TRIBUNAL: ANTOINE AOUAD, M.D.
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

EDGAR HISS, Applicant
unrepresented

DATE OF HEARING: December 13, 2000

DECISION RELEASED: December 18, 2000 Hamilton

REASONS FOR DECISION

A hearing was held on December 13, 2000, at Hamilton, Ontario, to consider the Applicant's appeal pursuant to Section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner:	Edgar Hiss (the "Applicant")
Motor Vehicle:	1981 Chev CHV, Plate # RZS 402 (the "vehicle")
Date of Appeal:	November 27, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the motor vehicle was stolen at the time it was being driven and the loss of the vehicle will result in exceptional hardship as provided in sections 50.2(3)(a) and (d) of the Act.

This matter came before this Tribunal on December 13, 2000 and proceeded as an oral hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

The Applicant and the Respondent agreed that the herein mentioned documents be filed at the hearing as evidence.

There being no other preliminary matters and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the motor vehicle was stolen at the time in respect of which the order was made?

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

I, Edgar Hiss am the registered owner of the impounded vehicle. My son Michael L. Hiss took the car from my house without consent during a time I was out of the country. I have documentation to support my claim.

Applicant claims his son took the car without permission

At the hearing, the Applicant gave evidence that the vehicle was driven without permission while the family was away. Nonetheless, no charges were laid, as the Applicant commented “...*how can you charge your own son...*”

In direct viva voce and cross-examination the Applicant testified that the family “...*has three vehicles in the driveway...*”. The family has been managing with the one other car that they own. However, it is getting more difficult as the Applicant's wife needs to run errands. The impoundment vehicle was normally driven by the Applicant's wife.

The Applicant attested to the fact that no significant financial loss has been incurred as a result of the impoundment.

Michael Hiss, the Applicant's son testified that his mother was a victim.

In cross-examination he declared that he impulsively took the car, as he needed to use it, but had no intention of stealing it.

In closing the Applicant stated that all he wants is “...*for his son to get his life back in shape...*”

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows:

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Michael E. Hiss;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until April 25, 2005.

At the hearing, the Respondent provided the Tribunal with certified copies of Ministry of Transportation documents on file.

The Respondent in the closing remarks gave a brief definition of the word “*stolen*” as defined by Black's legal dictionary: “...*the act has to be dishonest and with the intent to*

deprive another person permanently...". The Respondent contends that this was not the case as Mr. Hiss' son admitted that he took the car to use only as needed. Thus the grounds of "*stolen vehicle*" have not been met.

The Respondent further argued that the grounds for hardship were also not met, as the Applicant owns another vehicle and there is no evidence of any financial losses incurred.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

(3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,

- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
- (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of sections 50.2(3)(a) and (d).

With respect to an appeal under subsection 50.2(3)(a) alleging that the vehicle was stolen, the meaning of "stolen" is not provided in *The Highway Traffic Act*.

The Shorter Oxford Dictionary, provides the definition of "stolen" as follows:

Stolen: 1. Obtained by theft. 2. Accomplished or enjoyed by stealth; secret. 3. Of time: obtained by contrivance

Theft: 1. The action of a thief; the felonious taking away of the personal goods of another; larceny 2. That which is or has been stolen; the proceeds of thieving.

Black's Law Dictionary (Sixth edition), page 1419-1420 provides the definition of "stolen" as follows:

Stolen: Acquired, or possessed, as a result of some wrongful or dishonest act or taking, whereby a person willfully obtains or retains possession of property which belongs to another, without or beyond any permission given, and with the intent to deprive the owner of the benefit of ownership (or possession) permanently.

The word "stolen" as used in the crime of interstate transportation of stolen motor vehicles includes all wrongful and dishonest taking of motor vehicles with the intent to deprive the owner of the rights and benefits of ownership, regardless of whether theft constitutes common-law larceny; and felonious taking may be effected by diverse means known to both common and statutory law, such as larceny, embezzlement, false pretenses, larceny by trick and other types of wrongful acquisition. *Lake v. U.S.*, Colo, 338F.2d 787,788. It is not necessary that the taking of the vehicle be unlawful. Even if possession of the vehicle is lawfully acquired, the vehicle will be deemed "stolen" if the defendant thereafter forms the intent to deprive the owner of the rights and benefits of ownership, and converts the vehicle to his own use. *United States v. Turley*, 352 U.S. 407, 417, 77 S.Ct. 397, 402. 1 L.Ed.2d 430.

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

- (4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

- (h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22 (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety or any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.
- (2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Board shall not, subject to subsection (3), consider whether the impoundment will result in,
 - (a) inconvenience to any person;
 - (b) financial or economic loss to any person;
 - (c) loss of employment or employment opportunity to any person; or
 - (d) loss of education or training or of an educational or training opportunity to any person.
- (3) The Board may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,
 - (a) no alternative to the impounded motor vehicle is available;
 - (b) the loss will be immediate, significant and lasting;
 - (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
 - (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

- (4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

The onus is on the Applicant to establish the ground of appeal that the vehicle had been stolen at the time of the impoundment, as provided in subsection 50.2(3)(a) of the Act.

No charge of theft was laid against the suspended driver and the evidence does not support an intention to steal the vehicle. The Tribunal finds that there is insufficient evidence before it to support the ground of appeal that the vehicle was stolen at the time of the impoundment, as described by section 50.2(3)(a) of the Act. Accordingly, the Applicant's ground of appeal based on the vehicle being stolen is dismissed.

Regarding the hardship ground for appeal, the onus is also on the Applicant to establish exceptional hardship, as provided in subsection 50.2(3)(d) of the Act.

In considering its decision, the Tribunal has reviewed several questions which delineate the criteria and establish the merits on the evidence.

Is there no alternative to the impounded vehicle?

Subsection 22(3)(a) Regulation 574 as amended by O. Reg. 632/98 provided that this Tribunal may not consider financial or economic loss as a ground of appeal unless no alternative to the impounded vehicle is available.

The Applicant testified the family has been managing to get about, as there are at times *"...three cars in the driveway..."*, one of which belongs to his son, but the Applicant does own another vehicle.

As the Applicant has alternate methods of transportation available, the Tribunal may not consider the provisions of 22.1 of Regulation 574.

Is the loss immediate, significant and lasting?

The Applicant does not meet the criteria of O. Reg. 632/98, Subsection 22(3)(b) which provides that the Tribunal may not regard economic loss unless the Applicant shows proof that loss will be immediate, significant and lasting. The Applicant denied having incurred any financial burden.

The Applicant has not satisfied the Tribunal that she has in fact incurred any loss of income or extra expenses which could be considered hardship.

Is the loss upon a person ordinarily transported in the motor vehicle?

The Applicant's wife was normally the driver of the impounded vehicle. Nonetheless, there was no evidence of any losses financial or otherwise created by the loss of the vehicle. The Applicant's wife inconvenience cannot be considered, therefore the does the requirements under O. Reg. 632/98, Subsection 22(3)(c) are not met.

Is the loss upon a person other than the driver of the motor vehicle and not a result of that driver's loss?

O. Reg. 632/98, Subsection 22(3)(d)(i)(ii), amending Regulation 574 provides that this Tribunal may not consider economic loss unless the owner demonstrates that:

d) the impact of the loss,

i) will be upon a person other than the person whose driving while his or her driver's license was under suspension resulted in the order to impound the motor vehicle and...

ii) will not be a result of a loss by the suspended driver of the type set out in clause 2(b)(c) or (d).

According to the Applicant there were no such losses.

In any event, the provisions of section 22 are cumulative, and must all be established, which has not been done.

After assessing the evidence presented, the Tribunal finds that the Applicant has not established exceptional hardship under section 50.2 of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: December 18, 2000

KETER

MORRIS KETER

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: SHEENA MACASKILL, Vice-Chair

APPEARANCES:

MORRIS KETER, representing himself
ANDREA YORK, Counsel, representing the Ontario New Home
Warranty Program
MICHAEL COHEN, Counsel, representing the Added Party,
Townwood Home Inc.

DATE OF
HEARING: December 18, 2000 Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31 as amended, Morris Keter, (the "Applicant") appealed a decision of the Ontario New Home Warranty Program (the "Program") set out in a decision letter dated August 14, 2000;

WHEREAS, the hearing was to be heard on December 18, 2000 at the Tribunal;

AND WHEREAS, upon motion made by counsel for the Respondent at the onset of the hearing on December 18, 2000, that the Tribunal allow the matter to be adjourned as the Program's witness was not available;

This Tribunal Orders that:

- 1) The hearing in this matter is adjourned on consent of all parties to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m., on Friday, March 16, 2001.

LICENCE APPEAL TRIBUNAL

Sheena MacAskill
Vice-Chair

Released: December 18, 2000

MAIOLO

PREHEARING

CATERINA MAIOLO

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSES OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: DAVID HUNT, Vice-Chair

APPEARANCES:

PAUL J. OSIER, Counsel, representing the Applicant
NETANUS RUTHERFORD, Counsel, representing the Ontario New
Home Warranty Program
BRENT T. HURST, Counsel, representing the Added Party, 929763
Ontario Limited.

DATE OF

PREHEARING: December 18, 2000

Toronto

ORDER

Following attendances on December 18, 2000 at a prehearing *by teleconference* before the Licence Appeal Tribunal of Paul J. Osier, counsel for Caterina Maiolo (the "Applicant") and Netanus Rutherford, counsel, for the Ontario New Home Warranty Program (the "Program"), and Brent T. Hurst, counsel for 929763 Ontario Limited (the "Added Party");

The Tribunal makes the following Order:

- 1) The parties present at the prehearing by teleconference stated that there was no resolution of any of the issues in this matter.
- 2) The parties are to provide any reports by experts intended to be used at the hearing within the time limits of the Rules of Practice set by the Tribunal.
- 3) The Added Party will provide a copy of any waivers signed by the Applicant and relevant to the outstanding claims to the counsel for the Applicant, forthwith.
- 4) The Applicant will provide notice to the Respondent and Added Party of the withdrawal of any claims by 12:00 noon, on December 22, 2000.
- 5) The Tribunal is to be notified in writing immediately of any withdrawal or settlement between the parties.

- 6) The hearing of this matter is scheduled to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario at 9:30 a.m. on Thursday, January 25, 2001 and to continue if necessary, on Friday, January 26, 2001.

LICENCE APPEAL TRIBUNAL

David Hunt
Vice-Chair

Released: December 18, 2000

SAFA, ALI REZA KATEB and NORTH YORK AUTO GALLERY LIMITED

NORTH YORK AUTO GALLERY LIMITED AND ALI REZA KATEB SAFA

APPEAL FROM A PROPOSAL OF THE REGISTRAR UNDER
THE *MOTOR VEHICLE DEALERS ACT*

TO REFUSE REGISTRATIONS

TRIBUNAL: DEREK ISRAEL, Vice-Chair

APPEARANCES:

ADAM R. ALTMID, Counsel, representing the Applicants
AVIVA R. HARARI, Counsel, representing the Registrar, *Motor
Vehicle Dealers Act*

DATE OF

HEARING: December 18, 2000

Toronto

ORDER

FOLLOWING attendances on December 18, 2000, before the Licence Appeal Tribunal of Adam R. Altmid, Counsel for North York Gallery Limited and Ali Reza Kateb Safa (the "Applicants") and Aviva R. Harari, Counsel, for the Registrar, *Motor Vehicle Dealers Act* (the "Registrar");

WHEREAS, upon motion made by counsel for both the Applicants and the Registrar at the onset of the hearing on December 18, 2000, that the Tribunal allow the matter to be adjourned and upon hearing the submissions of counsel for the parties;

This Tribunal Orders that:

- 1) The hearing in this matter is adjourned *peremptory against the Applicants* to commence at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario, at 9:30 a.m. on Monday, March 26, 2001 and to continue March 27 and 28, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Derek Israel
Vice-Chair

Released: December 18, 2000

EASTERBROOK, BASIL and EASTERBROOK, JUSTIN and 1159274 ONTARIO LTD.
o/a THRIFTY AUTO SALES

1159274 ONTARIO LTD. O/A THRIFTY AUTO SALES AND BASIL EASTERBROOK
AND JUSTIN EASTERBROOK

MOTION FOR AN ORDER TO STAY

TRIBUNAL: MARJORIE L. HILEY, VICE CHAIR

APPEARANCES: MICHAEL J. PRETSELL, Counsel, representing the Applicants.
MITCHELL GOLDBLOOM, Counsel, representing the Registrar,
Motor Vehicle Dealers Act

DATE OF
HEARING: NOVEMBER 27, 2000 TORONTO

REASONS FOR RULING

BACKGROUND:

This is a motion by the Applicants requesting an order to stay the revocation of the licence of Justin Easterbrook pending the appeal to the Divisional Court. The hearing in the matter was held before the Tribunal on August 9, 2000. By the order of the Tribunal released on August 25, 2000 the licence of Justin Easterbrook as a motor vehicle salesperson was revoked. The registration of his father, Basil Easterbrook, was to continue if he took and passed the certificate course approved by the Ontario Motor Vehicle Industry Council ("OMVIC"). As well the dealership, 1159274 Ontario Ltd. o/a Thrifty Auto Sales was to notify the owners of the three vehicles in question of the particulars of the disclosure within thirty days of the date of the order.

FACTS:

The Applicants by their Notice of Appeal dated September 22, 2000 have appealed to the Divisional Court (General Division). There is no date scheduled for the hearing of this appeal.

1. Affidavit Evidence:

In support of the Applicants motion two affidavits have been filed. One is from Basil Easterbrook and the other from Justin Easterbrook.

Mr. Basil Easterbrook states that he is 76 years of age and has worked in the used automobile business for fifty years. His business currently has ten employees, including himself and his son Justin. Mr. Basil Easterbrook states that he and his son Justin are the only employees to purchase automobiles for the business and this type of purchasing requires frequent trips to auctions in Toronto and Montreal. Mr. Basil Easterbrook states that the viability of the business depends on the person doing the

purchasing having the ability to purchase the appropriate vehicles at the correct price so that the vehicles can be resold at a profit.

In his affidavit, Mr. Basil Easterbrook also states that he depends on his son Justin to do the purchasing because he can trust his son. Mr. Basil Easterbrook is concerned that if he must do all of the purchasing, he cannot maintain the pace of the travelling and would have to lay off two employees. He states that it is difficult to find someone who has these particular skills and who he can trust to purchase the vehicles. He states that he has made an agreement with the owner of the Venture Automobile (one of the three motor vehicles noted above) and the car will be replaced, and he will resell it with the appropriate disclosure. He undertakes to review each and every transaction of Justin Easterbrook.

Mr. Justin Easterbrook, in his affidavit, states that he did comply with the order of the Tribunal and has negotiated a settlement with the owners of the vehicles having the body damage. He paid \$2,000.00 to the owner of the Cheyenne and \$3,000.00 to the owner of the 1997 Cavalier.

In his affidavit Mr. Justin Easterbrook states that he further investigated the odometer which was put into the third vehicle. He has determined that the odometer reading was 59,194 km some two weeks prior to purchasing the vehicle.

Mr. Justin Easterbrook states that his only source of income is that of working for the company of his father. If he cannot purchase cars, then he will have to take some other position with the company, and an employee will be displaced. He states that he is more than willing to have OMVIC scrutinize each and every transaction that he conducts at the company.

There was no affidavit evidence on behalf of the Registrar, *Motor Vehicle Dealers Act*.

2. Decision of the Tribunal which is appealed:

The Tribunal found, inter alia, the following:

- a) that there were sufficient grounds for the Registrar's decision to revoke the registration of Justin Easterbrook as a motor vehicle salesperson,
- b) that the Registrar's decision to revoke the registration of Justin Easterbrook is based on section 5(1) of the Act, which reads as follows:

5(1) An applicant is entitled to registration or renewal by the Registrar except where,

.....

- (b) the past conduct of the applicant affords reasonable grounds for belief that the applicant will not carry on business in accordance with the law and with integrity and honesty;
- (c) that Basil Easterbrook could continue with his registration as a motor vehicle salesperson if he passed a certification course approved by the Ontario Motor Vehicle Industry Council for salespersons

- (d) that the company, 1159274 o/a Thrifty Auto Sales had thirty days to notify the owners of the three motor vehicles in the transactions complained of, giving them the particulars of the disclosure. Copies of these notifications were to be sent to OMVIC.

3. Grounds of Appeal:

The Applicants Notice of Appeal lists the following grounds upon which it bases its appeal:

- a) that findings of fact were not supported by the evidence, that the infractions alleged had an effect on public safety;
- b) that 1159274 Ontario Ltd. is not responsible in law for the actions of Justin Easterbrook;
- c) that Basil Easterbrook is not responsible in law for the actions of Justin Easterbrook;
- d) that opinion evidence should not have been before the Tribunal when it had not been disclosed in advance, contrary to the *Ontario Evidence Act* and the Rules of Practice of the Licence Appeal Tribunal
- e) that it was an unreasonable sentence to revoke the registration of Justin Easterbrook as a salesperson
- f) such further and other grounds as Counsel may advise and review of the transcript may disclose

4. Grounds for Stay of Proceedings:

The Applicants rely on the following grounds for a stay of the Tribunal's decision:

- a) that the Applicants have a strong prima facie case on appeal;
- b) that there will be irreparable harm if the order is not stayed;

ARGUMENT BY COUNSEL:

By Counsel for the Applicants:

Counsel stated that there has been no request for cross-examination on the affidavits in support of the motion. There is also acknowledgement by both counsel that there is a serious issue to be tried.

Counsel stated that there had been three problems – two of repairs not disclosed and one of non disclosure of a replacement odometer. All three customers have been dealt with by the Applicants in accordance with the requirements of the Tribunal's decision.

Counsel stated that a main issue on the appeal will be the fact that no notice was given by the Registrar of the intent to call evidence from Ms. Harari. As well it is the position of the Applicants that Ms Harari is not qualified to give opinion evidence.

Counsel cited a number of cases in support of the application for the stay.

RJR-MacDonald Inc. v. Canada (Attorney General) (1994) 1 S.C.R.311 is the pivotal case which defines the current test for stay applications. Counsel stated that the

Supreme Court of Canada held that it is not the magnitude but whether the wrong can be righted when looking at the concept of irreparable harm. Counsel stated that there are no damages available from the Ontario Motor Vehicle Industry Council. In this case, the nature of the damages is irreversible.

Regarding the test of balance of convenience, Counsel stated that the situation can be monitored by Basil Easterbrook or copies of the sales bills can be provided to OMVIC.

Uppal v Toronto (Metropolitan) Licensing Commission (1998) O.J. No. 2406 was distinguished by Counsel as a case involving a taxicab company where the Applicant indicated a preference to continue working in that business.

Counsel stated that *Dudzic and Law Society of Upper Canada* 71 O.R. (2d) 272 is a case in 1989 where the Divisional Court said that irrevocable harm has to be to the individual applying for the stay. But this concept has been clarified by *RJR MacDonald supra*.

Counsel stated that *Falkiner v Ontario (Ministry of Community and Social Services)* 49 O.R. (3d) 564 used the wrong test, as the court found no irreparable harm but granted the stay.

James Kenneth Foster, a CRAT case released April, 1993, was decided prior to *RJR MacDonald supra*. The case held that the ability to practice your profession was not serious enough issue to grant a stay.

Off Lease Motor Car Sales Inc. (Re) (1999) O.C.R.A.T.D.I 292, Counsel submitted, did not mean that there must be exceptional circumstances in order to grant a stay. That case cited *Jacob Sales and Service Inc.*, Ont. Div. Ct. file No. 558/98, in which a stay was granted and irreparable harm found as the applicant would be put out of business.

Counsel stated that the role of Justin Easterbrook was essential to the well being of the business as his role was to purchase the vehicles at auction and then the business would sell those vehicles at a profit. His position is not one which could be easily replaced.

Golab (RE) (1998) O.C.R.A.T.D. No. 176 dealt with the seriousness of odometer tampering.

1240 Ontario Inc. (c.o.b. Delta Minivan & Cars Inc.) (Re) (1998) O.C.R.A.T.D. 160 dealt with the what is a serious issue to be tried.

Ontario Leasing supra distinguished *Foster supra* and held that the balance of convenience was tipped in favour of the applicant.

Counsel stated that in this case it can be confirmed that inappropriate incidents do not happen again through the scrutiny of the bills of sale.

Rosso (Re) the Tribunal distinguished *Foster supra* and allowed the stay application.

The dissenting judge in *Camp Cars Ltd. v Ontario (Registrar of Motor Vehicle Dealers and Salesmen)* (1973) O.J.578 held that as the applicant had been caught once it was doubtful that this type of incident would reoccur while waiting for the decision on appeal.

Counsel stated that the Applicants would be content with terms and conditions. Basil Easterbrook could review all of the bills of sale or the bills of sale could be sent to OMVIC to be reviewed there.

Counsel stated that there is a serious fairness issue here regarding the inclusion of opinion evidence. The Tribunal needs to balance all of the interests.

Counsel for the Registrar:

Counsel stated that the Tribunal needs to look back to the past conduct of the Applicants. The motor vehicle industry is a regulated industry. While the *Statutory Powers Procedure Act* section 25(1) speaks of an automatic stay, the *Motor Vehicle Dealers Act* section 7 states that the order of the Tribunal takes effect immediately, and the Tribunal can then consider a stay.

RJR Macdonald supra illuminates the three tests for a stay. *Foster supra* stands for the proposition that stays should not be easily given.

Counsel stated that this is not a case where Justin Easterbrook suffers irreparable harm. At worst, he displaces another employee at the company.

Counsel stated that in *OffLease Motor Car Sales Inc. supra*, the Applicant would lose his home. In *Milani (c.o.b. Milan Auto Sales) supra*, there was no other position for the Applicant. In *Golab (Re) supra*, the Applicant was the sole source of income. In *1240 Ontario Inc. (c.o.b. Delta Minivan & Cars Inc.) supra*, the business would be lost.

Counsel stated that was not the case here. Basil Easterbrook is stating he would prefer not to be doing all of the purchasing. There is no evidence of a search for another person to do the purchasing.

Counsel stated that the case of *Dudzic v Law Society of Upper Canada supra* stood for the proposition that a good and cogent reason is required for a stay to be given. The *Uppal v Toronto (Metropolitan) Licensing Commission supra* stated that being in a profession is not sufficient to grant a stay.

In *Agha (c.o.b. Saeid Aghomohammadi) (Re)* (1999) O.C.R.A.T.D. 69, the *RJR MacDonald supra* case was quoted on page 5, stating: "In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant."

Counsel stated that the facts in this case do not show irreparable harm.

THE LAW:

Section 25 (1) of the *Statutory Powers Procedures Act* states:

25(1) Unless it is expressly provided to the contrary in the Act under which the proceeding arises, an appeal from a decision of a Tribunal to a Court or other appellate tribunal operates as a stay in the matter except where the Tribunal or the Court or other body to which the appeal is taken otherwise orders.

Section 7(9) of the *Motor Vehicle Dealers Act* states:

7(9) Although a registrant appeals from an order of the Tribunal under section 11 of the *Ministry of Consumer and Commercial Relations Act*, the order takes effect immediately, but the Tribunal may grant a stay until disposition of the appeal.

Metropolitan Stores (MTS) Ltd. v Manitoba Food and Commercial Workers, Local 832 (1987) 38 D.L.R. (4th) 321 sets out a three stage test. This three stage test was followed by the Supreme Court of Canada in *RJR MacDonald Inc. v Canada (Attorney General)* (1994) 1 S.C.R. 311

The three stage test is as follows:

First test: A preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried.

Second test: It must be determined whether the Applicant would suffer irreparable harm if the application were refused.

Third test: An assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision.

ANALYSIS:

The operation of section 7(9) of the *Motor Vehicle Dealers Act* results in the decision by this Tribunal of August 25, 2000 taking immediate effect. An appeal from the decision does not operate as a stay to that decision but the Tribunal can grant a stay of the decision until the disposition of the appeal. The Applicants, 1159274 Ontario Ltd. o/a Thrifty Auto Sales, Basil Easterbrook and Justin Easterbrook have brought a motion before the Tribunal requesting that it stay one part of the decision of August 25, 2000, that being the immediate revocation of the motor vehicle salesperson registration for Justin Easterbrook. They have not requested any stay of those parts of the decision that relate to 1159274 Ontario Ltd. o/a Thrifty Auto Sales or Basil Easterbrook.

The Tribunal has reviewed the affidavit evidence and the law and legal analysis referred to by Counsel in their arguments.

It is trite law to state that in considering a stay this Tribunal is not in the position to judge on the merits of the appeal itself. The Supreme Court of Canada in *RJR MacDonald supra* has stated at paragraph 44 "In *American Cyanamid Co. Ethicon Ltd.* (1975) A.C.396, however, Lord Diplock stated that an applicant need no longer demonstrate a strong prima facie case. Rather it would suffice if he or she could satisfy the court that "the case is not frivolous or vexatious; in other words, that there is a serious question to be tried." The *American Cyanamid* standard is now generally accepted by the Canadian courts, subject to the occasional reversion to a stricter standard." The question before the Tribunal is whether or not based on a preliminary assessment, there is an arguable case. Here Counsel have agreed that there is such an arguable case.

Regarding the second test, it is necessary to consider whether the Applicants will suffer irreparable harm unless the stay is granted. The Supreme Court of Canada in *RJR MacDonald supra* stated at paragraph 58, "At this stage the only issue to be decided is

whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application." Here, the Tribunal needs to look at the irreparable harm to all of the Applicants, that being the corporate Applicant as well as Basil Easterbrook and Justin Easterbrook. The Applicants are stating through the affidavit evidence of Basil Easterbrook and Justin Easterbrook that the revocation of the motor vehicle salesperson registration to Justin Easterbrook during the period awaiting the decision on appeal will do irreparable harm to all of them.

The Supreme Court of Canada in the case of *RJR MacDonald supra* at paragraph 59 defines irreparable harm to mean, "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other."

In this case it is the position of the Applicants that the inability of Justin Easterbrook to purchase used motor vehicles at auctions will affect the continued financial well being of the company and lead to a reduction in the number of employees working for this company. Mr. Basil Easterbrook emphasizes his age (76) years and difficulty he would have to take on this purchasing by himself, particularly during the winter months when he would have to travel to these auctions from Belleville area. As well, Mr. Basil Easterbrook states that it would be exceedingly difficult to find a person with the skills of his son and who he can trust with these crucial financial decisions. If the purchaser does not act skillfully, then there can be no profit for the business which exists to resell those vehicles purchased at auctions. Mr. Basil Easterbrook makes the point that his son has been involved in some fashion with this family business for Justin's entire life. The son, Justin Easterbrook, states that his skills are with the purchase of used motor vehicles for this family business. The Tribunal reads his affidavit to say that his work experience has been confined to that particular job for that particular company.

The Tribunal finds these facts to fall within the definition of irreparable harm as set out in *RJR MacDonald supra*. The nature of the harm is not such that it could be quantified in strictly monetary terms nor could it be easily cured by an award of damages.

Regarding the third test, there must be a determination of which of the parties would suffer the greater harm from the granting or refusal of the stay pending the decision.

The Tribunal is aware of the public interest considerations within the *Motor Vehicle Dealers Act*. Considerations of the public interest are of great importance to this Tribunal. The Registrar has an obligation to be vigilant in protecting the public from motor vehicle salespersons who transgress the provisions of the Act.

This case deals with three incidents: one involves non disclosure of the replacement of an odometer and the two others with non disclosure of the history of prior repairs. The Tribunal is impressed with the reparation made by the Applicants to the owners of all three motor vehicles. All owners have been satisfied either with cash payments or the replacement of the vehicle.

As well, the Tribunal is impressed with the acknowledgement by Justin Easterbrook that he erred in these three transactions. The Applicants have stated that they would be willing to abide by terms and conditions.

There is no affidavit evidence from the Registrar regarding any special considerations to be considered when balancing the public interest with that of the Applicants. This is not a Charter case whereby the public interest becomes a "special factor" as stated in the case of *Metropolitan Stores supra*. There is no evidence before the Tribunal to indicate that there is any serious risk that Justin Easterbrook would continue with such behaviour during the time period while the appeal is before the courts. In these circumstances the public interest can be protected by the use of terms and conditions. The Applicants would suffer the greater harm from a refusal to grant the stay.

DECISION:

For the reasons stated above, pursuant to the authority vested in it by section 7(9) of the *Motor Vehicle Dealers Act*, the Tribunal directs that there shall be a stay of its order issued herein on August 25, 2000 respecting the revocation of the licence of Justin Easterbrook, until the disposition of the Applicants' appeal to the Divisional Court. The stay of the order contains the following terms and conditions:

1. The Applicant, Justin Easterbrook, cannot move his motor vehicle salesperson registration from the dealership, 1159274 Ontario Ltd. o/a Thrifty Auto Sales.
2. All of the sales bills of the Applicant, Justin Easterbrook, shall be reviewed by the Applicant, Basil Easterbrook. Full disclosure of any repairs or odometer replacements shall be made on the bills of sale.
3. All the sales bills of the Applicant, Justin Easterbrook, shall be available at any time for the review by employees of the Ontario Motor Vehicle Industry Council. Copies of such sales bills shall be provided to the Ontario Motor Vehicle Industry Council if so requested by them.
4. Any failure to abide by terms #1 through #3 will result in the Registrar having the ability to bring this matter back to the Tribunal for further consideration.
5. These terms shall be in force until such time as the Divisional Court has issued its decision on the appeal of the Applicants.

LICENCE APPEAL TRIBUNAL

Marjorie Hiley, Vice Chair

RELEASED: December 20, 2000

MARCHI

STEVEN AND DOLORES MARCHI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE *ONTARIO NEW
HOME WARRANTIES PLAN ACT*

TO DISALLOW A CLAIM

TRIBUNAL:

TERENCE A. WARDROP Q.C., Vice-Chair

APPEARANCES:

STEVEN AND DOLORES MARCHI, on behalf of themselves,
CAROL STREET, Counsel, for the Ontario New Home
Warranty Program,
HELEN MAIL, Agent, for Kevin Doble Properties Ltd., Added Party

DATES OF
HEARING:

October 31, 2000
and November 1, 2000

Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an Appeal by the Applicants, Steven and Dolores Marchi (the "Applicants") pursuant to their Request for a Hearing dated December 30, 1999, to the Commercial Registration Appeal Tribunal which, as of April 1, 2000, is known as the Licence Appeal Tribunal (the "Tribunal"), from a decision of the Respondent, Ontario New Home Warranty Program (the "Program").

The Applicants in this Appeal base their claim on the provisions of section 13 and section 14(1)(b) of the *Ontario New Home Warranties Plan Act* (the "Act"), R.S.O. 1990. Ch. 0.31.

The Applicants' claim was denied by the Program in its Decision Letter dated December 16, 1999, (the "Program's Decision") and the Applicants are appealing pursuant to section 16 of the Act.

Upon the application made by the Program to the Registrar of the Tribunal dated February 3, 2000, Kevin Doble Properties Ltd. (the "Builder") was joined in this Appeal as the Added Party by the Order of the Chairman of the Tribunal dated March 6, 2000, and the appropriate notice of application and notice of the Order were served upon the Parties.

ISSUES:

The Applicants have complained to the Program that the Builder is in breach of several of its warranties to construct the new home which it contracted to build for the Applicants in a workmanlike manner and free from defects in material, as part of the Agreement of Purchase and Sale entered into between the Applicants and the Builder (the "Agreement").

The Applicants, accordingly, requested conciliation services from the Program respecting the defective work and materials, and in response the Program provided such conciliation services between the Applicants and the Builder on July 15, 1999. The Program thence issued the Conciliation Inspection Report dated August 5, 1999 (the "Conciliation Report"), being a listing of twenty-one complaints made by the Applicants which the Program decided were either deficient or compliant with respect to the several warranties made by the Builder to the Applicants under the Act.

The Program's Decision was made with reference to nineteen of the twenty-one complaints made by the Applicants and, subsequent to making Observations/Comments and Reasons with respect to each of the said nineteen items considered by the Program to be "not covered under warranty", the Program made the following decision:

"Your claim that a breach of warranty exists ... resulting in a cause of action for damages against the vendor (Builder) is denied."

Following receipt of the Applicant's Request for a Hearing, the Applicants specified five of the nineteen items listed in the Program's Decision which they wished to appeal as follows:

- Item #3 Audible bang often occurs upon flushing toilet in main bathroom upstairs;
- Item #10 Damaged locking mechanism on overhead garage door;
- Item #11 Installation of Front Door;
- Item #13 Finished Basement Family Room not completed as agreed by Builder; and
- Item #18 Colour of Brick and colour contrast not as agreed by Builder.

At the hearing of the Applicants' Appeal before this Tribunal, it was agreed by all Parties that these five items would be dealt with separately and in the order specified as above noted. It was further agreed that the Applicants' Appeal to this Tribunal would be limited to the said five items out of the nineteen complaints listed in the Program's Decision, and as such, these five items become the sole five issues for decision by this Tribunal.

EVIDENCE:

Each of the Applicants, Steven Marchi and Dolores Marchi, testified as to the said five issues claimed as a breach of warranty with respect to their new home at 7 Northland Avenue constructed by the Builder as a Model Type Hewett Elevation "A" pursuant to the Agreement and situate on Lot 33L according to a Site Plan of Hunter's Farm in Brooklin, in the Town of Whitby, in the Province of Ontario (the "residential dwelling").

The Agreement was originally an offer by the Applicants to the Builder dated May 29, 1996, which was accepted by the Builder on May 30, 1996, and which included several Schedules. The Agreement was amended formally in writing on two occasions, June 6, 1996 and February 8, 1997, respectively.

Completion of the residential dwelling and closing of the transaction of purchase and sale was originally scheduled in the Agreement to be exactly one calendar year after acceptance on May 30, 1997, but was delayed and/or postponed. The pre-delivery inspection report is dated October 7, 1997, and occupancy of the residential dwelling was finally achieved by the Applicants on October 8, 1997, (the "Date of Possession").

The evidence for the Applicants was limited to the Applicants themselves as no expert testimony was submitted on their behalf and no other witnesses were called by the Applicants.

The Respondent called one witnesses, Chad Foreshow, a Warranty representative of the Program, who testified as to the inspection of the residential dwelling carried out by him and his various dealings with the Applicants and the Builder with respect thereto. The inspection and dealings lead directly to the Conciliation Report.

The evidence given by the Applicants in-chief examination was clear on each of the five issues, but tended to be confused during cross-examination by the Program's Counsel. Particularly in the case of the evidence given by Steven Marchi, it became confrontational and evasive to the extent of his responses being given in the manner he wished to rather than answering the question put to him by Counsel. The evidence given by Mr. Foreshow was straightforward and, in the few cases of conflicting evidence by all witnesses, is preferred by the Tribunal. The conclusions which are to be reached from the evidence submitted on the issues, are more difficult.

In correspondence subsequent to the Conciliation Report, the Applicants alleged that the views of the Program, and particularly Mr. Foreshow were biased in favour of the Builder. This Tribunal was disturbed by this allegation and took special care to question both Applicants on the subject. It became evident that such allegation was but an exaggerated disagreement with Mr. Foreshow's decisions contained in the Conciliation Report and the Program's Decision itself, and as such, this serious allegation was withdrawn with apologies.

ISSUES OF LAW:

The Applicants are appealing the Program's Decision to the Tribunal under Section 16(2) of the Act and this hearing and this decision of the Tribunal is issued pursuant to Section 16(3) of the Act.

"16(2). A notice under subsection (1) shall state that the person or owner served is entitled to a hearing by the Tribunal if the person or owner mails or delivers, within fifteen days after service of the notice under subsection (1), notice in writing requiring a hearing to the Corporation and the Tribunal.

(3). Where a person or owner gives notice in accordance with subsection (2), the Tribunal shall appoint a time for and hold the hearing and may by order direct the Corporation to take such action as the tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purpose the Tribunal may substitute its opinion for that of the Corporation."

Section 13(1) of the Act specifies certain warranties and sets out a list of circumstances in Section 13(2) in respect of which such specified warranties do not apply.

"13.(1) Every vendor of a home warrants to the owner,

(a) that the home,

(i) is constructed in a workmanlike manner and is free from defects in material,

(ii) is fit for habitation, and

(iii) is constructed in accordance with the Ontario Building Code;

(b) that the home is free of major structural defects as defined by the regulations; and

(c) such other warranties as are prescribed by the regulations.

(2) A warranty under subsection (1) does not apply in respect of,

(a) defects in material, design and work supplied by the owner;

(b) secondary damage caused by defects, such as property damage and personal injury;

(c) normal wear and tear;

(d) normal shrinkage of materials caused by drying after construction;

(e) damage caused by dampness or condensation due to failure by the owner to maintain adequate ventilation;

(f) damage resulting from improper maintenance;

(g) alterations, deletions or additions made by the owner;

(h) subsidence of the land around the building or along utility lines, other than subsidence beneath the footings of the building;

(i) damage resulting from an act of God;

(j) damage caused by insects and rodents, except where construction is in contravention of the Ontario Building Code;

- (k) damage caused by municipal services or other utilities;;
- (l) surface defects in work and materials specified and accepted in writing by the owner at the date of possession.”

It is notable that provision is made in Section 13(1)(c) of the Act for these specified statutory warranties to be expanded by regulation, and Part IV of Ontario Regulation 892 (Sections 14 to 24, inclusive) provides for such additional specific warranties by regulation together with terms, conditions, exceptions and exclusions which attach to these regulatory warranties. Such terms, conditions, exceptions and exclusions set forth in Part IV of Regulation 892 only apply to these additional regulatory warranties and do not affect those specified statutory warranties set out in Section 13(1)(a) and (b) of the Act.

Section 13(6) of the Act not only provides that all such specified statutory warranties and specified regulatory warranties apply despite any agreement or waiver to the contrary, but also recognizes that the owner may have other rights and other agreed warranties in addition to the warranties specified in Section 13(1) of the Act and the regulatory warranties prescribed in Section 13(1)(c).

“13.(6)The warranties set out in subsection (1) apply despite any agreement or waiver to the contrary and are in addition to any other rights the owner may have and to any other warranty agreed upon.”

Under Section 14(1)(b), where an owner has a cause of action against a vendor for damages resulting from a breach of warranty, such an owner is entitled to be paid out of the guarantee fund the amount of such damage. The right to make a claim is set out in Section 14(1) in the Act.

“14. (1) Where,

(a) ... ;

(b) an owner has a cause of action against a vendor for damages resulting from a breach of warranty; ...

(c) ... ,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by regulations.”

A warranty is a defined term under the Act. Section 1 provides:

“1. In this Act, ...

“warranty” means a warranty set out on section 13.”

The Applicants, as stated above, are owners as defined by the Act and the Tribunal finds them so to be as a fact. As such, they are entitled to compensation or remedies from the assets of the guarantee fund for any and all breaches of warranties by virtue of Section 14(1)(b) thereof, subject only to the limitation of amount as set out in the regulations thereto.

FACTS FOUND PROVEN:

As hereinbefore stated, all witnesses testified respecting the five issues claimed by the Applicants and there appears to be wide differences of opinion and many conflicting questions. It was unfortunate that the Tribunal did not have the benefit of any evidence from the Builder, whose representative chose to appear only during the first day of the hearing and did not call any witnesses to testify. The evidence of a knowledgeable representative of the Builder would have clarified many of the unanswered questions respecting the issues in this matter. The Tribunal was therefore denied a full understanding of the issues before it and neither the Program nor the Applicants chose to subpoena any of the officers of the Builder whose evidence would have been helpful to the decision by this Tribunal.

The Tribunal finds, pursuant to the evidence given in these proceedings, the following as proven facts:

- 1) The Agreement was reached on May 30, 1996;
- 2) Two amendments to the Agreement were made and agreed to between the Applicants and the Builder with respect to modifications to the Agreement on June 6, 1996, and February 8, 1997, respectively, and such modifications became part of the Agreement;
- 3) The pre-delivery inspection report was made on October 7, 1997, and the Date of Possession of the residential dwelling was October 8, 1997;
- 4) More than one year after the Date of Possession, the Applicants completed a list of "outstanding deficiencies" dated as of November 20, 1998, which was received by the Program on December 21, 1998. This list included some, but not all, of the five issues before this Tribunal;
- 5) In their request for conciliation dated March 22, 1999, the Applicants listed sixteen items of complaint which included all of the said five issues. Further written comments by Dolores Marchi dated June 12, 1999, respecting the sixteen items listed in the said Applicants' conciliation request, were delivered to the Program's representative at the time of the conciliation inspection on July 15, 1999;
- 6) The Program issued its Conciliation Report on August 5, 1999 which listed two "Items Covered Under Warranty" and nineteen "Items Not Covered Under Warranty", which said nineteen items included all of the said five issues;
- 7) The Program's Decision was issued by the Program on December 16, 1999;

- 8) The request by the Applicants for a hearing before the Tribunal was made on December 30, 1999; and
- 9) The other facts as hereinafter noted relating separately to the five issues of the Applicants' claim.

DECISION AND ORDER:

With respect to the five issues presented by the Applicants to this hearing and pursuant to the authority vested in it by section 16(3) of the Act, the Tribunal makes the following decisions and orders:

Issue One (Item #3 - Audible bang often occurs upon flushing toilet in main bathroom upstairs)

The evidence given by the Applicants is clear that a "loud bang" is audible on many occasions when the flushing mechanism is deployed on the toilet in the main bathroom of the second floor of the residential dwelling. It was unclear and even contradictory as to just when during the flushing process such audible noise occurred on these said occasions. Unfortunately, there was no other evidence given at the hearing respecting the audible noise of the said toilet as it did not occur during the several times that the said flushing mechanism was deployed at the conciliation inspection, nor at any other time in the presence of the only other witness who gave evidence at the hearing. Indeed, Mr. Foresheew gave evidence that the said toilet operated normally in all instances in test flushings with variable loadings conducted during the conciliation inspection.

Mr. Marchi suggested in his evidence that the phenomenon known as "water hammer" could well be the explanation of the said audible noise heard by the Applicants but such could only occur in the supply side of the water delivered under pressure to the toilet at the commencement of the flushing process when the supply water pressure was released. He also suggested that the problem was in the drainage side of the system which is not under pressure and depended on the particular loading condition of the toilet, which would be inconsistent with his "water-hammer" theory.

In any event, this Tribunal does not doubt that the Applicants have heard the said audible noise but it cannot speculate, in the absence of further evidence, what causes the noise, nor indeed, whether or not the noise is the result of faulty workmanship or materials supplied by the Builder.

As explained to and acknowledged by the Applicants, the onus of proof in such a case is upon them to show unacceptable workmanship or materials and without further evidence, technical, expert or otherwise, they have failed to establish any claim against the Builder in this issue. This Tribunal agrees with the Program's Decision on this issue.

This issue was first noted by the Applicants in their conciliation request dated March 22, 1999, but was absent in their deficiency list as of November 20, 1998, more than one year subsequent to the Date of Possession.

Issue Two (Item #10 - Damaged locking mechanism on overhead garage door)

The Applicants, in their deficiency list as of November 20, 1998, noted that the garage door was "not properly tracked - fell off - not fixed properly - wood frame pulled away with damage - gap!". A similar note from the Applicants dated September 10/98, received by the Program prior to one year subsequent to the Date of Possession on September 21, 1998, stated "garage door > collapsed and fell off track. Cable needs correct tightening > did damage to frame. Created gap from Brickwork."

In the request for conciliation dated March 22, 1999, the Applicants noted, "Garage Door fell off track - damaged - not fixed", and at the conciliation inspection noted further in writing "Garage Door - damaged - will be fixed - track/handle, pulled away framing - painted - simple correction".

At the conciliation inspection, Mr. Foreshow noted in his report that "the owners were concerned that the [garage] door could not be unlocked from the interior; ... [and he] explained that the [garage] door can be unlatched at anytime from the interior by pulling the latch cable."

The Applicants gave evidence at the hearing that "every third or fourth time the garage door is opened, the latching mechanism on the interior of the door falls off" and thus one cannot access the garage. Several inconsistent theories were advanced by the Applicants as to the cause of this latest complaint in an effort to connect it to the original event when the garage door fell off the track (which was later repaired by the Builder).

The Tribunal is unable to connect this latest complaint to any breach of warranty by the Builder and agrees with the Program that a defect in workmanship or material is not apparent. At best, this complaint is a matter of maintenance and as admitted by the applicants is simple to repair. This Tribunal agrees with the Program's Decision on this issue.

Issue Three (Item #11 - Installation of Front Door)

In the request for conciliation dated March 22, 1999, the Applicants noted, "Front Entrance door - opens By itself - Oct 4/97". In all previous correspondence and lists of deficiencies initiated by the Applicants there is no mention of this particular complaint. Once again, and without any expert evidence to support their claim, the Applicants suggested in their evidence that this problem was connected to a minor gap of 1/8" to 3/16" between the door leaf and the doorjamb.

In the Conciliation Report, and in the evidence given by Mr. Foreshow at the hearing, it is clear that "a defect in workmanship is not apparent" with respect to this "factory-hung" door. It would therefore, be speculative on the part of this Tribunal to assert the cause of this complaint without some direct evidence of such cause beyond the mere happening of the event of which the Applicants complain. The onus of proof upon the Applicants with respect to this issue has not been discharged.

This Tribunal is in accord with the Observation/Comment and Reason expressed by the Program in the Conciliation Report and in the Program's Decision.

Issue Four (Item #13 - Finished Basement Family Room not completed as agreed by Builder)

The Applicants, in their deficiency list as of November 20, 1998, noted that the finished basement had not been completed as agreed by the Builder and made specific reference that "there was to be no Poles, no cut up/Box ceiling, ...". A similar note from the Applicants dated September 10/98, received by the Program prior to one year subsequent to the Date of Possession on September 21, 1998, stated ">NOT BUILT TO original plan in offer. Made major structural and layout mistakes so Basement was not finished to offer plans. Even though Project MGR, SITE Supervisor were informed of mistake Before finishing done - still went ahead and Built differently! Had to redesign Basement and was told By "Builder" we would be compensated!! question: when? how?" The November 20, 1998 deficiency list also makes note of compensation as follows:

"Doble said to Steve Marchi that we would be compensated for screw ups on Basement. Again - asked what Steve would want!"

The Builder, in a letter to the Applicants dated February 1, 1999, denies that any compensation was offered with respect to the finishing of the basement in the following terms:

"Mr. Doble said he did discuss compensation with Steve, but that was for the closing date extensions (please see attached Release) and the inconvenience it caused your family.

Changes did have to be made to your original finished basement layout, but you were aware of why these changes were necessary. On August 27/98 you faxed via our sales office a basement layout with revisions for Mr. Doble to approve, he did agree on August 28/98 to try to accommodate your requests. Note, I can not find on any document that states there would be no columns in the basement. We feel that compensation is not warranted with regards to your finished basement."

As stated above, the Agreement was modified on two occasions, and it was the second of such modifications on February 8, 1997 which amended the Agreement by the addition of a "finished basement as per sketch" and increased the purchase price by some \$8,310. The sketch was likewise altered on several occasions subsequent to February 8, 1997 in order to accommodate changes which were either required to be made or agreed to by the Parties. The difficulty for this Tribunal in reaching an understanding of the facts was to determine what was, and what was not agreed to upon viewing the several sequential versions of the sketch, all of which were facsimile variations of the original sketch with varying notations, and not only undated but unsigned.

The sequential versions of the original sketch including the notations do, however, show the changes moving in an orderly manner to the final 'as-built' or 'as-finished' basement as shown in photographs filed as Exhibits at the hearing, and this Tribunal concludes that the Applicants were and are more interested in the alleged, but unproven offer of compensation from the Builder than damages due to faulty workmanship or materials on the part of the Builder.

In the request for conciliation dated March 22, 1999, the Applicants noted this issue briefly and in their post-conciliation correspondence once again noted "compensation" as the remedy.

In the evidence of the Applicants given at the hearing, it was unbelievable to attempt to stretch the symbol of an electrical outlet box in the versions of the sketch as a notation for the omission of columns, except perhaps as an after-thought, and this Tribunal can not find any evidence to support this alleged agreement on behalf of the Builder.

This Tribunal is in accord with the Observation/Comment and Reason expressed by the Program in the Conciliation Report and in the Program's Decision.

Issue Five (Item #18 - Colour of Brick and colour contrast not as agreed by Builder)

The Applicants have made it clear from the Date of Possession that they did not receive the brickwork on the exterior of the residential dwelling that was promised by the Builder. From the pre-delivery inspection report dated October 7, 1997, they have consistently complained that not only was the colour of the brick not as agreed, but also the contrast in colour from the brick quoining was not as definite and pronounced as a Victorian House ought to exhibit, and, indeed, as was exhibited by other neighbouring houses in the development constructed by the Builder and shown to the Applicants by the Builder's agent.

The evidence given by both Applicants on this issue was clear and consistent. The documentary evidence including photographs is also consistent and this Tribunal finds as a fact that the Builder breached its warranty in providing a non-contrasting brick for the quoining brick of the residential dwelling. At best, the Builder was careless or insensitive to the wishes of the Applicants in its choice of a non-contrasting colour of brick for use in the quoining and ought to have sought the approval of the Applicants to the colour of brick utilized.

The Builder was made a party to this hearing at the request of the Program. The Builder chose to abandon the hearing before its conclusion and declined to give evidence on this matter which would have been helpful to this Tribunal. Neither the Applicant nor the Program chose to call a representative of the Builder to give an explanation thus depriving this Tribunal of what surely is the 'best evidence' on this issue.

The hearings of the Tribunal are conducted in an atmosphere less formal than that of a Court of Law in an attempt to ascertain the facts, including an explanation of why the contract to build was performed in a peculiar or particular manner. Here, only the Applicants were at the hearing to give first hand testimony as to the contract. The Program did not produce a representative of the Builder to give evidence but rather relied solely on the expert opinion evidence of the Program's Warranty Representative.

The Program's request to have the Builder added as a party to the hearing creates an expectation that the Builder will give evidence at the hearing. Failure of a representative of the Builder to testify could have been dealt with had either party requested the Tribunal to issue a summons to the Builder.

The Applicants have established their claim respecting the colour of the brick and colour contrast. It is therefore the decision and order of this Tribunal that the Program shall arrange or contract for the application of external colouring of the brick quoining in order to achieve the colour contrast to which the Applicants and the Builder's agent had agreed. The application of external colouring by the Program shall include a guarantee that such colouring shall not bleed or otherwise discolour the remaining brickwork of the residential dwelling. Such colouring to be completed within six months of the release of this decision and provided further that the Applicants shall permit the Program and its agents reasonable access to the home to complete such work.

LICENCE APPEAL TRIBUNAL

Terence Wardrop, Q.C.,
Vice Chair, Presiding

Released: December 20, 2000

ANGYLINE MILLAR

Appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: Derek Israel
Presiding Vice-Chair

APPEARANCES: Representative for the Registrar of Motor Vehicles
by Written submission only

Angyline Millar, Applicant
by Written submission only

DATE OF HEARING: December 22, 2000

DECISION RELEASED: December 27, 2000

REASONS FOR DECISION

A written hearing was held to consider the Applicant's appeal pursuant to Section 50.2 of the Highway Traffic Act, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to Section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the Highway Traffic Act, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Angyline Millar (the "Applicant")
Motor Vehicle: 1988 Pontiac 6000 LE, Plate # 662 ZKW (the "vehicle")
Date of Appeal: December 1, 2000

The Applicant filed an appeal of this impoundment order with the Licence Suspension Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the loss of the vehicle will result in exceptional hardship as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on December 22, 2000 and proceeded as a written hearing.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #8) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the order will result in exceptional hardship?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states:

Attached is my written appeal and supporting material. Unfortunately, I can not find my last bank statement so I am attaching a cancelled cheque and green machine statement of my current acct. Limited funds. Also I am enclosing a map of the region where I live to show you how isolated an area CARAMAT is.

P.S. I found my last statement which is enclosed.

November 25, 2000

The Licence Suspension Appeal Board
1 St. Clair Ave. West, 12th floor
Toronto, Ont. M4V 1K6

To whom it may concern,

I am submitting this appeal regarding the impoundment of my vehicle on Thursday evening, November 23rd. on the grounds that the loss of the vehicle will result in exceptional hardship.

As I told Reegit, the agent at the Licence Suspension Appeal Board, yesterday, I made an unsound decision to ask my partner, Don Pattison to drive for me on the wilderness logging road to Caramat that night. By the law I shouldn't have made that choice but I did spontaneously for the following reasons. It was late, about 10:30pm, I was tired and not feeling well enough to drive the icy conditions of the winding and hilly road in the dark. I am not use to driving in such winter conditions on these kinds of roads since I have lived most of my life on the west coast of B.C. and the past 5 years in Collingwood, Ontario. I only recently moved into this wilderness community on October 1st 2000. I had been told by local residents of the close calls and accidents people have had with the fast moving logging trucks along this road.. Also, that afternoon a Hydro truck had been towed out of the ditch because of icy spots along that same road. I was not up to the challenge since I was feeling head achy, muscle soreness and tired like a flu bug was upon me. Under the circumstances, I made the best choice I felt confident doing but a poor decision under the law because I asked my partner with a suspended licence to drive. He was not drinking and I trusted him to drive in these winter conditions better than myself because he has driven his whole life in Ontario.

I had no idea of the consequences of my choice to feel safer in the hands of a competent, sober driver with a suspended licence second to my fear of driving this curvy, icy back road feeling unsafe and not well.

I think it was interesting to see that night the police officer who drove us home and who has lived in the area all his life lost control of the police car on an icy corner and had us sliding all over the road before he gain control again. I know I don't I have the same knowledge of winter driving as this police officer or my partner so when I pulled off the main highway to ask my partner to drive I made the right choice in the present moment of my winter driving ability, health and conditions on this outback road.

Here we are on this dark logging road in the middle of the woods; no houses, no cars, except the odd logging truck and my partner driving the speed limit, and carefully when this police car comes out of the darkness on the side of the road then follows us eventually stopping us because he was doing a sobriety check.

What occurred next as a result of my ill decision to break the law instead of driving under the influence (sic) of fear of a possible accident has created an unbearable situation for my partner and I. The police officer who impounded my car had no compassion for my circumstance. I told him we had recently moved to Caramat. When he told me he was going to impound my car, I was devastated. I told him that we would be stuck in Caramat without a car. I needed to look for work, to buy food and to reach

medical facilities in case of health problems or an accident. There are none of these amenities in this extremely rural community.

The village of Caramat is a community of approximately 50 families. This rural hamlet has no transit system, no post office, banks or grocery stores. So everyone has to drive to Long Lac or Geraldton, 45-75km to the next larger communities to shop and conduct business.

Now, without my car, I can not look for work or start my own business. We have lived here in the north for only 2 months so my neighbours I do not know well enough to burden them with my present situation. My partner, Donald Pattison, can not drive so he has been dependant on me for help to advertise for his small engine repair business he has started. He has very limited opportunities without a driver's licence to get work and supplies without my driving him places.

We have just been scrapping by since we moved here and paying bills has been a struggle. I need to find work in either Long Lac or Geraldton to sustain this poverty level of existence so without my vehicle I hate the option of thinking I will become a welfare case stranded in Caramat without any positive options.

The officer did not want to listen to my plea or even give me the courtesy of telling me that he was impounding my car for 45 days and sending it to Thunder Bay which is a 3-1/2 hour drive one way from Caramat. He gave the notice of impoundment to my partner not me so I didn't understand our severe predicament until we arrived home.

Now I am stuck without any means of transportation in a really desperate situation; to look for work, to pay my telephone and hydro bills, a Visa debt of approximately \$1700.00 and only \$48.00 in my bank account. What a degrading position that I am forced to reveal because I broke the law in the middle of the wilderness. For a person with money having their car impounded for 45 days may not mean too much but there is no way that I can afford to pay the impoundment fees and towing fees besides survive out in this forest community for 45 days without a car to occasionally go to Long Lac to buy some groceries, or network for prospective work in the area..

I really, would appreciate some leniency because of my limited financial situation. I can not afford to buy another car and the extraordinary hardship of living out here in Caramat without a vehicle is a frightening state of affairs for me. Enclosed please find copies of my recent Visa Statement and bank statement.

I have borrowed \$100.00 to make this appeal. With some difficulty I have found an appeal application form at a legal aid clinic in Geraldton, 75km away. The nearest Motor Vehicle Branch in Long Lac, 45km away, told me that they did not have any appeal forms. Living in such an isolated area, I would appreciate an oral hearing in Caramat at the Community Centre which is close enough I can walk to in winter conditions or in Long

Lac which is next closest location to where the incident happened, so that I could find someone to drive me into town.

Enclosed is a copy of the unsigned form the officer did not serve me but gave to my partner, Don Pattison. Also, find the appeal application form. I look forward to an understanding consideration of this appeal and a recovery of my vehicle before Christmas would be a wonderful gift of compassion.

Thank you for your time and caring concern of my isolated case.

Yours truly,

"Angyline Millar"

Angyline Millar

Evidence for the Registrar

A summary of the Registrar's evidence follows.

The documents tendered by the Registrar and admitted into the record were as follows:

- 1) Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
- 2) Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Donald Pattison;
- 3) Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
- 4) Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence impaired driving under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension.
- 5) Copy of Ministry of Transportation records indicating that the Applicant is the registered owner of 1988 Pontiac 6000 LE motor vehicle plate # 662 ZKW.
- 6) Written submissions.

THE LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

(1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;

- (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
- (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of 50.2(3)(d).

With respect to an appeal under section 50.2(3)(d) alleging that the impoundment results in exceptional hardship, the Shorter Oxford Dictionary defines "exceptional hardship" as follows:

Exceptional : Of the nature of or forming an exception; unusual.

Hardship: 1. The quality of being hard to bear; hardness; severity. 2. Hardness of fate or circumstance; severe toil or suffering; extreme privation.

Also, where the owner appeals on the ground of exceptional hardship, subsection 50.2(4) provides:

(4) Clause (3) (d) does not apply if an order to impound under section 55.1 was previously made with respect to any motor vehicle then owned by the same owner.

Further, subsection 55.1(28) of the Act provides that the Lieutenant Governor in Council may make regulations, and specifically provides in clause (h) of subsection 55.1(28),

(h) prescribing criteria to be considered, and criteria not to be considered, by the Tribunal in determining in an appeal under section 50.2 whether exceptional hardship will result from an order to impound that is made under this section.

Section 22 of Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 632/98, provides for criteria to be considered and criteria not to be considered by the Tribunal in determining whether exceptional hardship will result from an order to impound under section 55.1 as follows:

- 22
- (1) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall consider whether no alternative to the impounded motor vehicle is available and, if no alternative is available, whether the impoundment will result in,
 - (a) a threat to the health or safety of any person ordinarily transported by the motor vehicle; or
 - (b) a threat to the public health and safety or to the environment or property of a community in whose service the motor vehicle is ordinarily used.

(2) In determining whether exceptional hardship will result from an order to impound under section 55.1 of the Act, the Tribunal shall not, subject to subsection (3), consider whether the impoundment will result in,

- (a) inconvenience to any person;
- (b) financial or economic loss to any person;
- (c) loss of employment or employment opportunity to any person; or
- (d) loss of education or training or of an educational or training opportunity to any person.

(3) The Tribunal may consider the criteria set out in clauses (2) (b), (c) and (d) if the owner demonstrates that,

- (a) no alternative to the impounded motor vehicle is available;
- (b) the loss will be immediate, significant and lasting;
- (c) the impact of the loss will be upon a person ordinarily transported by the motor vehicle; and
- (d) the impact of the loss,
 - (i) will be upon a person other than the person whose driving while his or her driver's licence was under suspension resulted in the order to impound the motor vehicle, and
 - (ii) will not be a result of a loss by the suspended driver of the type set out in clause (2)(b), (c) or (d).

(4) In order to show that no alternative to the impounded motor vehicle is available under subsection (1) or clause (3) (a), the owner must demonstrate that every reasonable option has been considered and inquired into that could eliminate or adequately mitigate any threat or loss to the person, including using another vehicle to replace the impounded motor vehicle and making arrangements to do without the impounded motor vehicle or a replacement during the impound period.

APPLICATION OF LAW TO FACTS:

FACTS FOUND PROVEN:

The following are the facts found by the Tribunal to be proven:

- 1) The Applicant is the owner of the motor vehicle that was subject to the impoundment order.
- 2) At the time of the motor vehicle's impoundment, it was being driven by Donald Pattison.
- 3) At the time of the motor vehicle's impoundment, Donald Pattison's driver's licence was under suspension due to a conviction under the Criminal Code of Canada for impaired driving.

By Appointment for and Notice of Written ("the notice") hearing dated December 8, 2000, the Tribunal required that the Registrar respond, in writing, by December 15, 2000, to the Appeal of the Applicant in this matter. The notice was sent to both the Registrar and the Applicant by courier on December 8, 2000 and was received by the Registrar in the central mail room at 2680 Keele Street, Downsview, Ontario, on December 11, 2000 but was only delivered to the Driver Improvement Office at that address on December 14, 2000. The party in the Driver Improvement Office responsible for responding to the Applicant's appeal in the matter was not able to file the Registrar's written submissions until December 18, 2000.

The Registrar's written submissions were accordingly filed late, and the Registrar requests that the Tribunal accept the late filing of his submissions.

The Tribunal in terms of Rule 5.2 of its Rules of Practice may extend the time prescribed under the rules on such terms as are just.

The Tribunal accordingly allows the late filing by the Registrar of his submissions and accepts the submissions of the Registrar dated December 18, 2000.

The onus of proof rests upon the Applicant to prove that the order to impound will result in exceptional hardship.

The Applicant did not deny that she is the registered owner of the impounded motor vehicle nor did she deny that the vehicle, at the time of its impoundment, was being driven by Donald Pattison and that the latter's driver's licence was at that stage under suspension.

Section 22 of Regulation 574, R.R.O. 1990, as amended by Regulation 632/98 states that the Tribunal shall consider whether no alternative to the impounded vehicle is available. In examining the Applicant's written reasons in support of her appeal the Applicant has in no way dealt with possible alternatives that she has enquired into. In fact from a perusal of Applicant's credit card statement of November 3, 2000 there is clearly stated thereon that the Applicant has \$2,231.00 "available credit". This credit could be used by the Applicant to rent a motor vehicle while her vehicle remains impounded. The Applicant could, in addition to temporarily renting a motor vehicle, pay the storage charges following upon the motor vehicle's impoundment.

Apart from the foregoing the Applicant has not alleged or placed before the Tribunal any evidence that the impoundment will result in a threat to the health or safety of any person ordinarily transported by the vehicle. Furthermore, there has been no evidence that "the loss will be immediate, significant and lasting".

At best the Applicant may be able to claim that the vehicle's impoundment would result in inconvenience; however inconvenience shall not be considered by the Tribunal in determining whether exceptional hardship will result from the impound order.

The Tribunal finds the Applicant has not established that she has or will suffer exceptional hardship.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the Highway Traffic Act, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Derek Israel, Vice-Chair
Presiding Member

RELEASED: December 27, 2000

EQUIPMENT EXPRESS INC.

EQUIPMENT EXPRESS INC.

IN THE MATTER OF an Application by Equipment Express Inc. dated January 10, 2000, for a hearing before the Licence Appeal Tribunal pursuant to Section 50(1) of the Highway Traffic Act appealing the Suspension Order of the Deputy Registrar February 3, 2000;

AND IN THE MATTER of the Highway Traffic Act R.S.O. 1990, Chapter H.8 as amended;

AND IN THE MATTER of the Commercial Vehicle Operator Registration (CVOR) certificate 089-148-116 issued to Equipment Express Inc.;

AND IN THE MATTER of the Notice of Suspension and Seizure issued to Equipment Express Inc., Cambridge Rigging Central Limited and 1130887 Ontario Inc. o/a Latta Crane Services dated November 22, 1999;

AND IN THE MATTER of the safety record of Equipment Express Inc.;

AND IN THE MATTER of an appeal from the Deputy Registrar of Motor Vehicles Order dated February 3, 2000 pursuant to s. 47 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended.

BETWEEN

EQUIPMENT EXPRESS INC.

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

TO APPEAL A SUSPENSION AND SEIZURE ORDER

TRIBUNAL: Lorraine Bortolussi, Presiding Member
Alan Holbrook, Member
Clarke Wallace, Member

APPEARANCES: Robert B. Warren
Carole McAfee Wallace
Representing the Applicant

Murray Forbes, Counsel
Representing the Respondent

DATES OF HEARING: May 31, 2000, June 1, 2, 30, 2000, July 4, 5, 7 and 17, 2000

GLOSSARY OF TERMS:

CMV	Commercial Motor Vehicle
CVIR:	Commercial Vehicle Inspection Report
CVOR:	Commercial Vehicle Operator's Registration Certificate
HTA:	Highway Traffic Act, R.S.O. 1990, Chap. H.8 (as amended)
MTO:	Ministry of Transportation, Ontario
SPPA:	Statutory Powers and Procedures Act, R.S.O. 1990, Chap. S.22 (as amended)
TRIBUNAL:	Licence Appeal Tribunal
Registrar:	Registrar of Motor Vehicles

LIST OF EVIDENCE:

1. Exhibit # 1 Notice of Appeal - dated January 10, 2000
2. Notice of Suspension and Seizure dated November 22, 1999
3. Respondent's Appeal Book (Volumes 1 and 2: Tabs 1 – 36)
4. Applicant's Appeal Book (Volumes 1 and 2: Tabs 1 – 10)
5. Gough & Associates, International Motor Carrier Consultants Report dated April 24, 2000 – referred to herein as "the Gough Report"
6. Ontario Carrier Safety Rating and Commercial Vehicle Operator's Registration System Public Guideline (replaces tab 35 Exhibit #3)
7. Facility Audit - Drivers (Replaces Tab 6A, Exhibit #3)
8. Summary Equipment Express Hours of Work
– Investigation January 6, 7, & 10, 2000.
9. Curriculum Vitae – Paul A. McMaster
10. Five volumes of documents referred to in Exhibit #5 – "the Gough Report"
11. Collectively – Financial Statements August 31, 1999 and Income Statements for nine months ending May 31, 2000 (in camera and returned to the applicant)

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by Equipment Express Inc. (the "Applicant"), and Cambridge Rigging Central Limited and 1130887 Ontario Inc. o/a Latta Crane Services respecting the decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario) ("HTA"). The Registrar did not proceed against the latter two companies.

Equipment Express Inc. is a for-hire operator based in Ayr, Ontario. The company has a fleet size of 50 vehicles with 30% Ontario travel and an adjusted fleet size of 15. It operates primarily under special permits issued under section 110 of the Highway Traffic Act as an oversize/overweight operator. The officers of the company are Dean W. Merkley, president, and John J. Fitzpatrick, secretary/treasurer.

PRELIMINARY MATTERS:

The respondent wished, as a preliminary matter, to file at the hearing, correspondence between counsel for the parties which was dated subsequent to the correspondence included in the exhibits before the Tribunal and prior to the hearing on issues of disclosure pertaining to evidence that the Applicant had chosen not to present on the hearing and for the purpose of displaying the Applicant's attitude.

The Tribunal held that the ambit of the appeal is to review the Registrar's decision and the Registrar's material upon which the decision is based. The onus is on the Applicant to show why the Registrar should change his decision and it can, at the show cause hearing provide further evidence to the Registrar. The Applicant can, because this appeal is a hearing *de novo*, provide evidence that could have been presented and considered by the Registrar in making his decision or evidence that has a *nexus* to the facts that the Registrar considered or should have considered. The parties are entitled to disclosure and to know the case they must meet, but it is not for the Respondent to seek or require new evidence from the Applicant under the guise of disclosure and fairness. The Applicant has provided the Exhibits he intends to rely on and the documents in support of that. It is the Applicant's appeal/hearing and the onus is on the Applicant to prove that the decision of the Registrar should be altered. The Applicant decides on the case it wishes to present as long as there has been full and fair disclosure of that case to the Respondent.

It is the understanding of the Tribunal that the correspondence sought to be filed by the Respondent now was to display the attitude of the Applicant.

The Tribunal finds that the stance of counsel for the Applicant in properly putting forth his/her client's case is not relevant. It is the attitude of the Applicant regarding safety of the carrier on the highways as presented to the Registrar (or as could have been presented to the Registrar and as is presented through proper evidence on this hearing *de novo*) that is relevant on this appeal. The Tribunal ruled that the additional correspondence sought to be admitted by the Respondent would not be filed.

FACTS:

The Show Cause Proceeding

Cambridge Rigging Central Limited and 1130887 Ontario Inc. are two affiliated companies for which the Suspension and Seizure Order was withdrawn by the Registrar.

After the show cause hearing on December 7, 1999, the initial 15 day Suspension and Seizure Order was changed pursuant to a Fleet Limitation Order dated February 3, 2000 to a 30 day fleet limitation, restricting the number of commercial motor vehicles operated within Ontario by Equipment Express Inc. to thirty (30), effective from 8:00 a.m. on February 21, 2000 to 7:59 a.m. on March 22, 2000. The Fleet Limitation Order also provided that the Applicant's rating would remain conditional for a minimum of 6 months.

The Registrar's Fleet Limitation Order is Set Out Below:

WHEREAS, a notice of suspension and seizure dated 22nd day of November, 1999 was issued proposing a 15 day suspension of the CVOR certificate issued to Equipment Express Inc., Cambridge Rigging central Limited and 1130887 Ontario Inc. o/a Latta Crane Services and seizure of plate portions of permits and number plates.

AND WHEREAS, provided in the notice, you had the opportunity to make submissions at a meeting with the Deputy Registrar on the 7th day of December, 1999 to show cause why the suspension and seizure should not be issued.

AND WHEREAS, I have considered your submissions and your safety record including your record of convictions, accidents, vehicle inspections, history of past dealings with the ministry and investigation summary results of January 10, 2000. I remain concerned for highway safety.

NOW THEREFORE IT IS ORDERED that pursuant to section 47 of the Highway Traffic Act that as of the 21st day of February, 2000, a fleet limitation be imposed for thirty (30) days. This Order restricts the number of commercial motor vehicles operated within Ontario by Equipment Express Inc. to thirty (30).

The fleet limitation will be effective at 8:00 a.m. Eastern Standard Time on the 21st day of February, 1999 [2000] to 7:59 a.m. on the 22nd day of March, 2000.

During the said period, the driver of any commercial vehicle operated by Equipment Express Inc. must carry and surrender upon demand for inspection an(d) ORIGINAL Fleet Limitation Certificate. This is in addition to any other required documentation. Thirty (30) original fleet limitation certificates bearing series numbers AB 9747 to AB 0776 inclusive accompany this order.

FURTHER TAKE NOTICE that your rating will remain Conditional for a minimum of 6 months.

DATED at St. Catharines this 3rd day of February, 1999 [2000].

ISSUES:

1. Is the Order made by the Registrar required to ensure that the Applicant will operate its commercial vehicles safely or in accordance with the HTA, the regulations or other laws related to highway safety?
2. Do the facts as they stood before the Registrar warrant the issuance of the 15 day Fleet Limitation Order for 30 of the Applicant's commercial motor vehicles?
3. Is the Registrar's Order fair?
4. Is the penalty imposed by the Order appropriate?

THE LAW:

47.(1) Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) CVOR certificate, on the grounds of,
- (d) misconduct for which the holder is responsible directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2); or
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

(2) As an alternative to a suspension or cancellation under subsection (1), the Registrar may, subject to section 47.1, restrict the number of commercial motor vehicles that may be operated by a holder of a CVOR certificate during the period that the Registrar stipulates.

.....

(10) The Registrar may, at any time for misconduct or contravention of this Act, the Truck Transportation Act, the Public Vehicles Act or of any regulation thereunder by an owner or lessee of one or more motor vehicles or trailers for which permits have been issued by a jurisdiction or jurisdictions other than the Province of Ontario, order that the permit and number plates issued for the vehicle or vehicles be seized and any police officer or any officer appointed for carrying out this Act or the enforcement of the Public Vehicles Act or the Truck Transportation Act may seize the permit and number plates and deliver them to the Ministry which shall return them to the authority that issued them.

According to Section 22(e) HTA:

- 22.(e) the Lieutenant Governor in Council may make regulations, governing the suspension or cancellation of CVOR certificates under subsection 47(1) or the imposition of a limitation on the fleet size operated under a CVOR certificate under subsection 47(2).

The maintenance requirements under the HTA are found, inter alia, at Regulation 575 (commercial motor vehicle inspections); Regulation 577 (covering of loads); Regulation 587 (re brake push rod travel); Regulation 597 (gross vehicle weights); Regulation 625 (tire standards and specifications); Regulation 762/91 (safety inspections); Regulation 614 (security of loads).

The appeal comes to this Board by virtue of s. 50(1) of the HTA which provides:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Suspension Appeal Board.
- (2) The Board may confirm, modify or set aside the decision of the Minister or Registrar.

Regulation 574 under the Act, also addresses appeals to this Board. Section 3 of that Regulation provides:

3. (3) Upon receipt of a notice of appeal under subsection (1) the Board shall forthwith notify the Minister or Registrar, as the case may be, and the person notified shall forthwith provide the Board with all the relevant documents and other material in his or her possession.

.....

- (6) At any hearing under this section, the person making the appeal has the right to attend and make representations and, subject to subsection (7), to adduce evidence respecting the appeal either personally or through counsel.

- (7) At any hearing under this section, the Board shall hear only such evidence as was submitted to the Minister or the Registrar, as the case may be, respecting the matter in dispute.

THE EVIDENCE:

Margaret Mooney, head of Control and Sanctions for the Ministry of Transportation, testified on behalf of the Respondent and explained generally how the Commercial Vehicle Operator's Registration Certificate ("CVOR") rating system works. She also explained that after June of 1999, all inspections, whether they were "clean" (without defects noted during the inspection) or not, were included in the analysis whereas prior to June of 1999, only inspection identifying defects were included in the analysis.

Ms. Mooney explained that the objective of the Registrar was to keep Ontario highways safe. She reviewed the process of inspections done on commercial motor vehicles under which the results are measured against the standards set under the Highway Traffic Act and regulations, using the National Safety Code (Exhibit 3, Volume 2, Tab 34) and The Commercial Vehicle Safety Alliance (CVSA) (Exhibit 3, Volume 2, Tab 33) criteria. The carrier is given points for accidents, detentions and convictions which are registered against its CVOR.

Ms. Mooney also reviewed the processes used by the Ministry of Transportation, Ontario (the "Ministry") to assess a carrier's safety record, including inspections resulting in a CVIR, a warning letter, facility audits, the interview and the manual analysis of the carrier's history of interventions and CVOR record to ensure that there are no duplicate events, whether the company has affiliates, verification of the fleet size and an analysis of the OOS rates and threshold, a review of the SafetyNet reports which is a record of all defects and OOS defects found on the carrier in Ontario (Tab 21) and the police accident reports.

The evidence referred to by Ms. Mooney can be found at Exhibit 3:

- a) Commercial Vehicle Operator Summary displaying performance data from 1997 09 23 to 1999 09 22: Tab 11, p.168;
- b) SafetyNet Inspection System - CVOR Inspection History and Profile for the period 01-/aor-99 to 31-Aug 99: Tab 12, p. 192;
- c) Police Reports: Tab 13;
- d) Permits: Tab 14 (with specific reference to pages 211, 218 and 223);
- e) Detailed Record Chart at Tab 15– Inspections for four six month periods 1997-09-23 to 1998-03-22, 1998-03-23 to 1998-09-22, 1998-09-23 to 1999-09-22 and 1999-03-23 to 1999-09-22:

OOS at p.242

ACCIDENTS at p. 243

CONVICTIONS at p.244

It is noted that the total defects in the OOS column for the last period was corrected at the hearing to read "2" instead of "11";

- f) CVOR Certificate - Change of Information – dated January 20, 2000 indicating a change in fleet size to 61 commercial motor vehicles that will operate in Ontario which have a gross weight over 4,500 kg.: Tab 30;
- g) National Safety Code Audit dated May 23, 1991 indicating difficulty in the hours of work profile (p.366), no driver incentive program (p.368); Tab 29;
- h) Warning Letter to the Applicant dated November 18, 1991: Tab 28;
- i) Audit done by Paul McMaster January 26, 1994 showing deficiency in driver training: Tab 25, p.339 and some of the same problems in the Hours of Work Profile as found in the 1991 Audit and lots of "no" indications in the Vehicle Maintenance category;
- j) Audit done by Paul McMaster six months later on June 14, 1994 indicated improvement. Monitoring to continue.: Tab 26, p. 349;
- k) Interview on August 11, 1994 required due to unacceptable rate of convictions. An action plan signed by Mr. Merkley submitted at p. 362: Tab 27;

- l) Letter to the Applicant dated May 28, 1997 indicating unacceptable performance in its CVOR in the areas of convictions, accidents and detentions: Tab 24;
- m) Facility Audit Findings – report dated September 5, 1997 indicating a 45% compliance rate for Drivers and an overall Audit Compliance Achieved of 64.50%. Specific driver files reviewed indicated problems with driver logs, hours of work, lack of a monitoring system for drivers, qualification of drivers with a detailed Action Plan with seven listed items and signed by Mr. Merkley. This audit was conducted at the request of another operator after an accident in St. Thomas where the Applicant's trailer broke in two. Tab 23;
- n) Interview dated March 31, 1998 – Mr. Merkley acknowledges that the company management has focused on business and neglected safety, there has been rapid growth, no driver training, no driver discipline, no accident follow-up and policies or processes. An action plan with a strong commitment to improvement is signed by Mr. Merkley: p.296, Tab22;
- o) Safety Action Plan signed by D.J. Adams, Safety Manager in March of 1998 indicates: *“Equipment Express Inc. is committed to ensuring our vehicles are well maintained with a clear line of reporting; drivers are qualified, capable with equipment as well as rules of the road, are alert and rested; in order to follow the addage of “STRIVE TO ARRIVE ALIVE”. We are encouraged by the goal of*
- p) *government and industry to do our part in “Making Ontario's Roads Safer”.: Tab 22, p. 300;*
- q) Bond Audit – October 4, 1999 indicated a driver compliance rate of 24.4% (as compared to the previous audit driver compliance rate of 45% in September of 1997 (see p.332 – Tab23). This audit indicated that the Applicant has not established a monitoring system to identify occasions when drivers violate the provisions of the HTA relating to hours of work and failed to document training for all drivers in the proper completion of daily logs. The operator has failed to demand all records within the twenty days and failed to monitor drivers daily logs for accuracy with the records required to be maintained. Operator has no disciplinary policy or procedure to ensure drivers maintain accurate daily logs or surrender the required documents or records. Also a “no” was indicated for “safety programs and training evaluated”. Odometer readings were not kept for broker vehicles at the time of repair, maintenance or inspection. Accident records/particulars were to be kept on file for not less than two years.

Tab21- p.281,282

Analysis of the CVOR at Tab 10, p.160; dated November 9, 1999 of the Applicant's CVOR for the period 1997-09-23 to 1999-09-22 indicates:

- i) A violation rate for the 24 month period of 95.56% (which did not include 13 points for an accident and 2 convictions occurring in that period and an OOS rate of 80% for the period from April 1, 1998 to March 31, 1999. It was Ms. Mooney's evidence that the violation rate is what translates into “on the road performance” and is calculated based on accidents, convictions and detentions;
- ii) Equipment Express had 5 “pointable” accidents over a 24 month period of the analysis. This is 250% over the standard. Its accident threshold percentage was 154.61%; The applicant had a conviction threshold percentage of 98.54%. Tab 15, p.245 CVOR Performance Analysis Worksheet.

- iii) Ms. Mooney testified that the CVOR program triggers the top 5% carriers or the worst offenders of the safety standards in Ontario.

IN CROSS-EXAMINATION, Ms. Mooney's evidence included the following:

Ms. Mooney did concede that the Applicant undertook to improve its accident record in March of 1998 and had no further "pointable" accidents since April of 1998.

The Applicant's position was that there was no indication in the action plan(s) that 25% improvement was required (which Ms. Mooney says is the minimum over each six month period the MTO requires of a carrier under review) and therefore the Applicant did not have the benefit of the improvement in the accident rate since April of 1998 for the Registrar's analysis.

There was a total of 9 convictions for permit violations out of 6400 loads (.001%),
Tab 10: p. 164

Tab 22, p.321 – the Safety Action Plan Review indicates i) policies and procedures were developed including a *Terms of Reference and Information* package for each member. The Applicant was now developing guidelines as set by WSIB; ii) an *Accident Prevention and Health and Safety Committee* was established with training set for October 17th. The applicant hired a Safety Manager trained as a certified member as at Sept.10/98; iii) *Driver Training Program* – Training began for new company drivers and owner-operators and a quarterly newsletter focusing on sharing information and safety issues was started.

A Safety Manager was hired March 1998, although Mr. Adams could not remember who this was.

There was a significant improvement in the OOS rate immediately following the 80% OOS rate. From April 1, 1999 to August 31, 1999, there was an OOS rate of 14.3%. This rose to 20% for the period spanning a whole year, i.e. Sept.98 to Oct.1999.

The January 6,7 & 10, 2000 audit focussed solely on log books.

Mr. Bond told Adams that in his opinion, it would take 6 months for the log monitoring system implemented by the Applicant to work. The audit clerk, Ms. White, was hired October 18th, 1999, trained and then started her job in November of 1999.

The next witness was Mr. McKay, a facility audit administrator with the MTO's audit program. He oversees audits, quality control and conducts audits himself. He and Mr. Brown did the investigation on the hours of work audit on the Applicant on January 6, 7 and 10, 2000. The scope of the investigation was an analysis over a one month period, since the Applicant's compliance clerk was hired on October 18, 2000. The audit consisted of a review only of paperwork, that is, checking the location of the vehicle when there is a change in duty so that this can be used as a check against other information such as speed, distance, driving times, work cycles (over 60 hours in 7 days; over 70 hours in 8 days and over 120 hours in 14 days). The log records are required pursuant to the regulations so that compliance with hours of work legislation may be verified.

Mr. McKay and Mr. Brown's audit was done in January of 2000 for a period of November and December of 1999. The result was a compliance rate of 24.4%. 55% is a passing compliance rate. None of the 10 driver files reviewed were in compliance for cycles.

Mr. Adams, Mr. Merkley and Ms. White testified for the Applicant.

Mr. Adams is the Safety Manager for the Applicant who was hired in March of 1998. His responsibilities are compliance, safety and training of drivers and vehicles. He testified that he reports to the president and has full authority to stop activity that results in non-compliance and has authority to discipline drivers. His mandate when hired in March of 1998 was to solve the problem regarding accidents identified in the last six months and to review the training of drivers and safety and compliance, but his priority was to address the accident record which was done primarily through the training of drivers.

Mr. Adams testified that upon his review of the CVOR Certificate in March of 1998, he concluded that there was no issue regarding hours of work infractions. This did not surprise him because in his words, "being a heavy haul carrier, there was no pressure on the drivers not to comply with hours of work regulations as could happen for other types of load carriers. He also prepared and implemented policies regarding the hiring process and a training profile in order to meet the Action Plan set out at Exhibit #3, Tab 22, p. 297. This took him 18 months to develop and he has assessed the success of this effort by the fact that there were no "pointable" accidents after March of 1998.

Mr. Adams testified that the audit done by Mr. Bond (Ex. #3, Tab 21) was a surprise to him because he could not detect the problems regarding hours of work and OOS rates from the CVOR or from his own inspection. Pursuant to Mr. Bond's recommendation that a full-time person was needed to review logs, Ms. White was hired. At Exhibit #3, Tab 15 – "Detailed Record Chart", the OOS rates over two years are shown as decreasing (p.242), accidents are shown as decreasing with the last "pointable" accident in February of 1998, and convictions are shown as decreasing.

Mr. Adams testified that there were 10 permit violations in 24 months out of 6400 loads (see p. 164). He also testified that he did not say at the Show Cause meeting that the problem regarding logs was fixed but that he had a system to identify problems so that they could be addressed.

Mr. Adams said he inspected the CVOR of the Applicant in order to prepare the Action Plan (pgs. 298-300) filed with the Ministry, but he did not review the facility audit done by MTO on September 2, 1997. He also testified that until the Bond audit, he did not check logs for falsification of records.

Ms. White testified for the Applicant. She confirmed the date of hire and her mandate as indicated by Mr. Adams. She confirmed that she reported to Mr. Adams and not to Mr. Snobgrass. She also confirmed that she did not work with the dispatcher, and she did not have authority to discipline the drivers. Her evidence included a review of the mechanics of her job. She also confirmed that the software recommended by the MTO in January of 2000 during their audit was purchased and installed on January 11, 2000. A review of the charges laid by the MTO as a result of the January 2000 investigation, as set out at Exhibit 3, Tab 6B was done. Ms. White testified she learned during the audit of some of the problem areas which she was not detecting.

The evidence of Dean Merkley, president and part owner of the Applicant, included an historical review of his involvement in the company. He was first hired to increase sales for the company. His involvement in operations began in 1993 when he and Mr. Fitzpatrick bought into the company. The equipment at that time was in poor shape and a serious problem. In January of 1994, Mr. Merkley participated for the first time in an audit by MTO. It was undertaken at that time to implement a driver training program. Mr. Merkley confirmed that this was not done until March of 1998 when he hired Mr. Adams to set up a program.

He also testified that the logs and hours of work were not addressed for three years after his first involvement with MTO. The hours of work monitoring for accuracy and completeness was outsourced after the audit by Mr. Bond in September of 1997. It was not until the 1999 audit confirmed that the outsourcing of the hours of work monitoring was not working that Ms. White was hired.

Mr. Merkley was then involved in the interview by MTO in August of 1994 (Exhibit #3, Tab 27), and an Action Plan was prepared (Exhibit #3, p. 362) where a commitment was made to address the problem with accidents. Mr. Dietrich was hired. He worked as a dispatch co-ordinator and was responsible for staff training. As the fleet grew, he had less time for training and log monitoring and became overworked.

The audit by Mr. Bond was done in September 1997, and accidents continued to be a problem. The accidents had increased and were more serious. It was apparent that some things were not working, and the logs were outsourced. Finally in March of 1998, Mr. Adams was hired to address this problem and by the time the audit of October 1999 took place, the problem with accidents seems to have been rectified.

Mr. Merkley said the reason for the delay in addressing these problems was that he was allocating resources to up-date equipment and make it safe. Oddly enough, the SafetyNet report for the period April 1, 1998 to March 31, 1999 indicated an increase in the violation rate to 80%. This is the year immediately following the hiring of Mr. Adams.

The audit done by Mr. Bond in October of 1999 showed the log problem to continue. This problem was the same one identified as far back as 1993 when Mr. Merkley became involved in operations and 1994 when he became involved with the MTO interventions and actions plans. The monitoring of the logs was not effective because the underlying documents were not being used to verify and monitor the information on the logs.

The next two witnesses were sworn in and empanelled to testify together with respect to the Gough Report (Exhibit #5). It was held that Mr. Gough and Mr. McMaster would be accepted as expert witnesses on the four points outlined at pages 17 and 18 of Exhibit #5: (reproduced below)

1. Whether the policies, procedures and systems which Equipment Express Inc. now has in place are sufficient to ensure compliance by Equipment Express Inc. with the requirements of the HTA and its regulations;

2. Whether the policies, procedures and systems which Equipment Express Inc. has in place meet the highest industry standards for ensuring compliance with the HTA and its regulations;
3. What changes, if any, in the policies, procedures and systems which Equipment Express Inc. are required to ensure compliance;
4. Whether the system designed to ensure that drivers meet the hours of work requirements is an appropriate one, and second, an assessment of how long it would take the system if operating properly to ensure that drivers comply with the hours of work requirements.

The empanelled witnesses testified as follows:

1. They were hired in March of 2000 to look at the Applicant's system.
2. They spoke to Mr. Adams and to Mr. Merkley about the systems in place. They did not speak to Mr. Snodgrass or to Mr. Tait. They spoke briefly to Mr. Fitzpatrick and did not meet Mr. Dietrich. Their review consisted of identifying the systems that were in place but did not extend to testing any of the systems.
3. No specific overweight infractions were examined.
4. When analyzing the OOS defects and points on the CVOR, the panel members did not look at the CVIRs.
5. They categorized a flat tire as something that could happen anytime without inquiring as to whether there was anything that could have been done to prevent the flat tire. There was no reference back to the prior inspection of this vehicle to see when the last inspection was done and whether tires were a problem.
6. The schedule of training was not cross-referenced to the specific driver files.
7. One accident file was reviewed, but the panel members kept no note of which file it was. They focussed on the fact that an accident review committee was established and that a file was created when an accident occurred.
8. The report was largely based on what the panel members were told as opposed to their own review and testing of the system, including hours of work.
9. There was a visual inspection of the maintenance system by Mr. McMaster. Mr. McMaster has no mechanical background. He did facility audits for 7 years but never did CVSA inspections.

10. The log charges arising from the January 2000 inspection were not looked at because the panel members were not requested to do so and could not therefore assist this Tribunal regarding the nature of the findings.
11. It was the opinion of Mr. Gough that there was no established trend of problems regarding hours of work for the Applicant and, therefore did not see a problem with the hours of work. It was further explained that the mandate for his report was to look at a certain point which does not include the period of the McKay Brown Audit (January 2000) and the Bond Audit (October 1999).

Mr. Merkley testified that his concerns were the loss of revenue during the fleet limitation and even more so, his loss of reputation which was invaluable. He was also concerned that competitors would use the information against them with their customers.

APPLICATION OF THE LAW TO THE FACTS:

Under subsection 47(1) of the *Highway Traffic Act*, the Registrar may suspend or cancel a plate portion of a permit, driver's licence or CVOR and under subsection 47(2) of the *Highway Traffic Act*, restrict the number of commercial motor vehicles operating under a CVOR for a period stipulated by the Registrar.

Throughout the long history of interventions by the Ministry of Transportation of Ontario, since 1991, the Applicant has continually indicated it would take steps to achieve a level of performance that would bring its operating record into compliance. This did occur during the period under review albeit after repeated intervention by the MTO. The evidence of the president of the company was that he acknowledged the company was concentrating on growth and other associated issues and not safety issues until about 1998. He did however, indicate that when he hired Mr. Adams, he gave him complete authority to address the safety issues and was committed to improving the safety record. From the time Mr. Adams was hired, the accident record improved dramatically and driver hiring, training and discipline procedures were implemented.

Mr. Adam's review of the logs did not indicate to him a serious problem, and this remained inadequately addressed. Upon identification again of this problem at the October 1999 audit, Ms. White was hired and a manual monitoring system was implemented. At the time of the hearing before the Tribunal, the applicant took the position that it was not given ample opportunity, in light of the type of carrier it was, to be able to prove that the system would be effective in reducing or eliminating the log problems. The applicant relied heavily on the opinion of an MTO officer who indicated that he estimated that it would take 6 months to see the results of the system implemented due to the nature of the carrier's work.

The Tribunal finds that the Applicant has made the commitment to safety and has taken the necessary steps to ensure that its record comes into and remains in compliance in all respects, its drivers are trained, monitored and disciplined when necessary. Although the results of the January 2000 audit are unsatisfactory, the Tribunal is prepared to give the Applicant the benefit of the doubt based on the evidence of the system implemented and the time that would be required to obtain satisfactory results, that the Applicant is fully committed to rectifying the log problems and that they will

indeed do so and that the Applicant is fully committed to continue working on a good safety record overall.

The Tribunal has given no weight at all to the Gough Report. The period of review of the safety record and commitment of the Applicant considered by the Registrar ended on February 3, 2000 which was the date of the Fleet Limitation Order. The Gough Report does not address the relevant time period and the facts in existence during that time period. Nonetheless, had the Gough Report been based on the appropriate period of time and the facts arising within that period, the Tribunal would give very little weight to the report. The report was vague and did not address the relevant issues. The opinions expressed were based largely on unsubstantiated hearsay and not on documents or facts reviewed and tested by the authors of the report.

DECISION:

Pursuant to the jurisdiction vested in it under subsection 50(2) of the *Highway Traffic Act* and FOR THE REASONS GIVEN ABOVE, the Tribunal orders that the decision of the Registrar to impose a 30 day Fleet Limitation Order restricting the number of commercial motor vehicles operated within Ontario by Equipment Express Inc. to thirty (30) motor vehicles be set aside.

LICENCE APPEAL TRIBUNAL

Lorraine Bortolussi, Presiding Member

Alan Holbrook, Member

Clarke Wallace, Member

RELEASED: December 27, 2000

PLUNKETT

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
PATRICK PLUNKETT

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 3, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

PATRICK PLUNKETT

- and -

Applicant

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Patrick Plunkett, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 21, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

FROM: Patrick Plunkett
373 Gatestone Blvd.
Waterloo, Ontario, N2T 2J6

In accordance with Section 4.1 of the *Statutory Powers Procedure Act*, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, Patrick Plunkett hereafter the ("Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

- 1) I agree, if I am charged in the future, under any law, to immediately notify the Registrar, in writing of the charges or convictions against me. Upon any future convictions, the Applicant's registration will be automatically revoked.
- 2) I agree, if I am charged in the future, under any law, to immediately notify my employer of the charges or convictions against me.
- 3) I agree not to transfer my registration as a motor vehicle salesperson to another dealer without having first obtained the prior written consent of the Registrar.
- 4) I acknowledge that my registration will not prevent the Registrar from taking administrative action, including a proposal to revoke my registration, arising from matters that may have occurred or may occur in the future related to my financial circumstances and honesty and integrity.
- 5) I acknowledge that my registration as a motor vehicle salesperson will not prevent the Registrar from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
- 6) I acknowledge that the disclosure provided by me to the Registrar, MVDA is accurate in all respects and the Registrar is relying upon the veracity of my disclosure in entering into these terms and conditions.
- 7) The Applicant agrees not to invite the public to deal at a place other than the location approved by the Registrar for his employer.

- 8) The Applicant will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Act.
- 9) The Applicant will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser. The Applicant shall ensure that all bills of sale and financing documentation executed by purchasers and/or by himself are co-signed by a registered salesperson in a supervisory capacity at the dealership
- 10) The Applicant will not purchase vehicles without ensuring that the vehicle is registered to the seller.
- 11) The Applicant agrees that he is under a positive obligation to disclose all material facts about the vehicles that he sells to his customers. The Applicant agrees to make reasonable efforts to research the history of all vehicles prior to sale to ensure all material facts are disclosed.
- 12) The Applicant acknowledges that, if, the Registrar has evidence that the Applicant has failed to comply with any of the requirements noted above, the Applicant's registration as a motor vehicle salesperson will be revoked and the Applicant will immediately return all registration certificates to the Registrar.
- 13) I hereby withdraw my appeal to the Licence Appeal Tribunal.
- 14) I acknowledge that I have had the opportunity to obtain independent legal advice with respect to my consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 2000.

Witness
Plunkett

(Signature) Salesperson, Patrick

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.
Date:

MANOS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
KIM PETER MANOS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 30, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

KIM PETER MANOS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Kim Peter Manos, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 21, 2000

TO: The Registrar
Motor Vehicle Dealer Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario M2P 2E9

AND TO: Licence Appeal Tribunal
One St. Clair Avenue West, 12th Floor
Toronto, ON M4V 1K6

FROM: Kim Peter Manos
29 Eileen Street
Dundas ON L9H 7E5

Pursuant to subsection 5(2) of the Motor Vehicle Dealers Act Kim Peter Manos (hereinafter referred to as "the Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereinafter referred to as "the Registrar"), in accordance with section 4.1 of the Statutory Power Procedures Act, do hereby waive the requirements of a hearing and consent to a decision of the Licence Appeal Tribunal based upon the following Terms and Conditions:

1. The Applicant agrees, if he is charged in the future, to immediately notify his employer in writing and to give the Registrar a copy of this written notification signed by his employer.
2. The Applicant agrees if he is convicted under any law of an industry specific offence or if he is convicted under the Criminal Code, with exception to the charges that are currently pending, his registration is automatically revoked.
3. The Applicant agrees not to transfer his registration as a salesperson under the *Motor Vehicle Dealers Act* to another dealer without the prior written consent of the Registrar.
4. The Applicant agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
5. The Applicant agrees that the circumstances surrounding his convictions and/or charges are substantially as disclosed to the Registrar.
6. The Applicant acknowledges that the Registrar may take administrative action, including a proposal to revoke his registration as a motor vehicle salesperson arising from any matters that have occurred or that may occur in the future related to his financial circumstances and his honesty and integrity.
7. The Applicant acknowledges that the Registrar may take legal action, including a Provincial Offences prosecution, arising from his actions related to the sale of motor vehicles that may have occurred in the past or that may occur in the future.
8. The Applicant agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal.

9. The Applicant acknowledges that these terms and conditions will expire at the earlier of 2 years from the date of this order, or upon a finding of not guilty on the charges currently pending.
10. The Applicant will provide a copy of this order to his employer forthwith.
11. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
12. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.
13. The Applicant hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____ this ____ day of December, 2000.

Kim Peter Manos (signature)

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Date:

Carl Compton
Registrar, Motor Vehicle Dealers Act

BYERS, JOHN o/a FLEETWOOD AUTO

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JOHN BYERS O/A FLEETWOOD AUTO

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: November 9, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JOHN BYERS O/A FLEETWOOD AUTO

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by John Byers o/a Fleetwood Auto, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 15, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road, Suite 110
Toronto, Ontario
M2P 2E9

Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1K6

From: John Byers o/a Fleetwood Auto
4934 Highway 90 West
unit 1
Springwater, ON L0M 1T0

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the *Motor Vehicle Dealers Act*, (hereafter the "Act") the parties to the proceeding, John Byers o/a Fleetwood Auto, (hereafter the "Dealer") and the Registrar, *Motor Vehicle Dealers Act*, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions to its registration as a motor vehicle dealer:

1. The Dealer agrees if he is convicted under any law of an industry specific offence or if he convicted under the Criminal Code, his registration is automatically revoked.
2. The Dealer agrees to provide full and complete disclosure on all future applications and discussions with the Registrar, regardless of whether disclosure has been previously provided to the Registrar.
3. The Dealer agrees that the circumstances surrounding his convictions are substantially as disclosed to the Registrar.
4. The Dealer acknowledges and understands that it will not retain the services of a salesperson unless the salesperson is registered as a salesperson to the Dealer.
5. The Dealer further acknowledges that the restrictions concerning the activities of salespersons referred to in these terms and conditions, applies to both buying and selling on behalf of a dealer. "Buying and selling" refers to showing a vehicle to a prospective purchaser or any form of negotiation concerning the purchase or sale of a vehicle and is not limited to the signing of contracts. This further includes attendance at auctions on behalf of the Dealer.
6. The Dealer agrees to maintain a garage register in accordance with the Highway Traffic Act and will maintain all books and records as required. The Dealer further agrees to store its books and records at the location approved by the Registrar.

7. The Dealer will ensure that all advertisements placed by or on behalf of the Dealer will identify their registered name and the address of the location approved by the Registrar.
8. The Dealer agrees not to invite the public to deal at a place other than its approved location.
9. The Dealer agrees to operate exclusively from the location approved by the Registrar. The Dealer agrees to apply for the Registrar's approval, by way of prior written notice, of any change in business location in the form required by the Registrar. The Dealer further agrees to store all books and records at the registered premises and to display a sign that is visible to the public, stating the dealership name.
10. The Dealer will not conduct any purchases or sales with anyone who is in the business of buying and selling motor vehicles without confirming that they are registered as a dealer under the Motor Vehicle Dealers Act.
11. The Dealer will ensure that any vehicles sold are registered in the name of the purchaser before releasing the vehicle to the purchaser.
12. The Dealer will not purchase vehicles without ensuring that the vehicle is registered to the seller.
13. The Dealer agrees to register all vehicles purchased within 6 days in accordance with the Highway Traffic Act.
14. The Dealer agrees that it is under a positive obligation to disclose in writing, all material facts about the vehicles it sells to its customers. Material facts such as; but not limited to, salvage, previous salvage, accidented and repaired, theft recovery, previous taxi cab, previous police car, unibody damage, frame damage and any other material fact that may affect one's decision whether or not to purchase said vehicle. The Dealer agrees to make reasonable efforts to research the history of all his vehicles prior to sale to ensure all material facts are disclosed. The Dealer agrees that should any information come to light, which the Registrar deems to be a material fact concerning a vehicle the Dealer has sold, the Dealer will comply with all reasonable requests made by the Registrar to provide compensation to the purchaser.
15. The dealer agrees that where the odometer of a vehicle has been repaired or exchanged, full disclosure of such will be written on the bill of sale. Disclosure shall be in accordance with Section 2.2 of OMVIC's Standards Of Business Practice.
16. The Dealer acknowledges and understands that its registration will not be used to buy or sell motor vehicles where the Dealer knows or ought to know that the purchase or sale of those motor vehicles will facilitate an illegal or unethical practice.
17. The Dealer acknowledges that the Registrar may take further administrative action, including a proposal to revoke its registration, arising from any matters that have occurred or may occur related to honesty and integrity or financial position.
18. The Dealer hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.

19. The Dealer agrees and acknowledges that should he breach any of the terms and conditions set out herein, in whole or in part, the Registrar is directed to and shall carry out the proposal and the Applicant's registration shall automatically be revoked.
20. The Dealer hereby withdraws his appeal to the Licence Appeal Tribunal.
21. The Dealer hereby acknowledges that he has obtained or has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of _____, this _____ day of _____, 2000.

(Signature) John Byers o/a Fleetwood Auto

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

PIGDEN-DUDI

SHARON IRENE PIGDEN

Appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chap.H.8 as amended (the "Act"), from the Order of the Registrar of Motor Vehicles pursuant to section 55.1(3) of the Act.

TO APPEAL AN ORDER TO IMPOUND A MOTOR VEHICLE ISSUED BY THE REGISTRAR OF MOTOR VEHICLES

TRIBUNAL: NIVES MONTANO
Presiding member

APPEARANCES: KIM BEINTEMA
Representative for the Registrar of Motor Vehicles

SHARON IRENE PIGDEN, Applicant
unrepresented

DATE OF HEARING: December 21, 2000 Toronto

DECISION RELEASED: December 28, 2000 ***By teleconference***

REASONS FOR DECISION

A hearing was held on December 21, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.2 of the *Highway Traffic Act*, R.S.O., 1990, Chap. H.8 amended ("HTA" or the "Act").

THE TRIBUNAL RULED TO CONFIRM the Order to Impound imposed by the Registrar pursuant to section 55.1(3) of the HTA.

BACKGROUND:

This is an appeal under section 50.2 of the *Highway Traffic Act*, R.S.O. 1990, Chapter H.8, as amended (the "Act").

The Registrar of Motor Vehicles (the "Registrar"), made an order under section 55.1 of the Act to impound a motor vehicle. That order has been appealed by the owner. The owner, motor vehicle, and date of appeal are as follows:

Owner: Sharon Irene Pigden (the "Applicant")
Motor Vehicle: 1988 GMC Sierra SLE 1500, plate # 647 8CT (the "vehicle")
Date of Appeal: December 4, 2000

The Applicant filed an appeal of this impoundment order with the Licence Appeal Tribunal (the "Tribunal") together with supporting documentation and the required \$100.00 fee payable to the Minister of Finance.

The owner appeals on the basis that the vehicle owner exercised due diligence to determine that the driver's licence was not suspended as provided in section 50.2(3) of the Act.

This matter came before this Tribunal on December 21, 2000 and proceeded as a teleconference hearing.

The Tribunal asked the parties if they wished to make any submissions prior to the Tribunal commencing the hearing.

There were no preliminary matters in dispute between the parties and the hearing proceeded.

ISSUE:

The Applicant's request for a hearing filed with this Tribunal (Exhibit #1) identifies the basis of the Applicant's appeal.

Should the Tribunal set aside the Registrar's order to impound the vehicle on the basis that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension?

FACTS:

The Tribunal heard the evidence given in support of the Applicant and the Respondent.

Evidence for the Applicant

A summary of the Applicant's evidence follows.

Applicant's written submission filed with the Tribunal in support of appeal states (Exhibit #2):

To: Registrar and Board

I knew that Mr. Baldwin had a license but did not know that there was an unpaid fine which suspended his license. With no notice, people do not realize this.

I am asking for a telephone conference as I have no transportation there and cannot afford to take time off of work as I work for a temp. service and need every shift I can get.

The following is a summary of the Applicant's affirmed testimony.

The Applicant has been dating/living with Mr. Baldwin, the driver of the impounded vehicle, for the past 3 months. The Applicant indicated that she had seen Mr. Baldwin's driver's licence strewn on a table and just glanced at it. She did not examine it in any way or make any inquiries with regard to its validity.

On the day the vehicle was impounded, Mr. Baldwin was visiting family in Toronto and was stopped by police on his return home to Belleville. He was impaired and was ultimately incarcerated. The Applicant was advised of what had transpired by a voicemail message left on her answering machine at 2 a.m. on November 18, 2000.

In the Applicant's testimony, Mr. Baldwin drove "quite a bit" even though he was not to have care and control of a vehicle until January 16, 2002 due to a Criminal Code conviction dated February 11, 1999 for driving while disqualified.

Evidence for the Registrar

A summary of the Registrar evidence follows.

The documents tendered by the Registrar and admitted into the record on consent of the Applicant were as follows (Exhibit #4):

1. Copy of the Ministry of Transportation records indicating that, among other things, the impounded motor vehicle herein is registered in the name of the Applicant as owner;
2. Copy of Notice to the Registrar indicating, among other things, that the vehicle at the time it was detained was being driven by Rodger Baldwin;
3. Copy of the Order by the Registrar of Motor Vehicles to impound the vehicle;
4. Copy of the Ministry of Transportation records indicating that the driver at the time of impoundment had been convicted of the offence of driving while disqualified or prohibited under the *Criminal Code of Canada* pursuant to which the driver's licence of the driver was then under suspension until January 16, 2002.

LAW:

Section 55.1 of the Act provides that the Registrar may make an order that a motor vehicle be impounded, and section 50.2 provides the motor vehicle owner's right of appeal to the Tribunal. The Tribunal on the appeal may, pursuant to subsection 50.2(5) of the Act, confirm or set aside the order to impound, and the decision of the Tribunal is, pursuant to subsection 50.2(8) final and binding.

Subsection 55.1(3) of the Act states:

(3) Upon notification under subsection (2), the Registrar may, without a hearing, issue an order to release the motor vehicle or issue an order to impound the motor vehicle that was being driven by the driver whose driver's licence is under suspension, as follows:

1. For 45 days, if an order to impound under this section has not previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
2. For 90 days, if one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.
3. For 180 days, if more than one order to impound under this section has previously been made, within a prescribed period, with respect to any motor vehicle then owned by the owner of the vehicle currently being impounded.

Ontario Regulation 574 R.R.O. 1990, as amended by Ontario Regulation 631/98 provides that the prescribed period, referred to above, is two years.

The right of the owner to appeal to this Tribunal where that owner's motor vehicle has been impounded is provided in section 50.2 of the Act, with subsection 50.2(1) stating:

- (1) The owner of a motor vehicle that is subject to an order to impound under section 55.1 may, upon paying the prescribed fee, appeal the order to the Tribunal.

By subsection 50.2(2) of the Act, the parties to an appeal are the owner and the Registrar. The "owner" for the purposes of the section is defined in subsection 50.2(11) as:

"Owner" means the person whose name appears on the certificate of registration for the vehicle, and, where the certificate of registration for the vehicle consists of a vehicle portion and plate portion, means the person whose name appears on the vehicle portion.

The owner may appeal the Registrar's order on only four specific grounds set out in subsection 50.2(3):

- (3) The only grounds on which an owner may appeal under subsection (1) and the only grounds on which the Tribunal may set aside the order to impound are,
- (a) that the motor vehicle that is subject to the order was stolen at the time in respect of which the order was made;
 - (b) that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension;
 - (c) that the owner of the motor vehicle exercised due diligence in attempting to determine that the driver's licence of the driver of the motor vehicle at the time in respect of which the order was made was not then under suspension; or
 - (d) that the order will result in exceptional hardship.

The Applicant here appeals on the basis of subsection 50.2(3)(c).

With respect to an appeal under subsection 50.2(3)(c) alleging that the owner exercised due diligence prior to releasing the vehicle to the driver, the Shorter Oxford Dictionary provides the definition of "due diligence" as follows:

Due: A. adj. 1. That is owing or payable, as a debt. 2. Belonging or falling to by right. 3. That ought to be giving or rendered; merited. 4. Such as ought to be; fitting; proper; rightful. 5. Such as is requisite or necessary; adequate. 6. To be ascribed or attributed; owing to, caused by, in consequence of. 7. Under engagement or contract to be ready or arrive (at a defined time).

Diligence: 1. The quality of being diligent; industry, assiduity. 2. Speed, dispatch. 3. Careful attention, heedfulness, caution. 4. *Law.* The attention and care due from a person in a given situation....

Also, "due diligence" in Black's Law Dictionary (sixth edition) at page 457 is as follows:

Due diligence: Such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case.

APPLICATION OF LAW TO FACTS:

The issue to be considered in this appeal is whether the Applicant exercised due diligence in attempting to determine that Mr. Baldwin's driver's licence at the time in respect of which the order was made was not then under suspension.

The Applicant testified that she is the owner of the vehicle that has been impounded and at the time of impoundment Mr. Baldwin was driving the vehicle.

The onus of proof is on the Applicant to establish that due diligence was performed which is required under Section 50.2(3)(c) of the Act.

The evidence before the Tribunal, in the Applicant's own testimony, was that the Applicant at no point in time asked Mr. Baldwin if he possessed a valid driver's licence. She merely assumed that Mr. Baldwin had a valid driver's licence and the thought never crossed her mind to check. She relied on his honesty and integrity. Unfortunately, the Applicant did not take any measures to ensure that he had a valid driver's licence. By merely viewing a driver's licence does not constitute the necessary step to ensure its validity. Furthermore, there was no evidence heard that would confirm the Applicant's actions were anything but passive in nature.

The Tribunal therefore has no evidence that the Applicant exercised due diligence as required by section 50.2(3)(c) of the Act.

DECISION:

After considering the evidence, pursuant to the authority vested in the Tribunal under section 50.2(5) of the *Highway Traffic Act*, R.S.O. 1990, Chap. H8 as amended, the Tribunal confirms the Order of the Registrar of Motor Vehicles to impound the Applicant's motor vehicle.

LICENCE APPEAL TRIBUNAL

Nives Montano, Presiding Member

RELEASED: December 28, 2000

McLAREN

ONTARIO NEW HOME WARRANTIES PLAN ACT
Revised Statutes of Ontario, 1990 Chapter 0.31

IN THE MATTER OF a CLAIM by
DAVID LARRY McLAREN

AND IN THE MATTER OF the DECISION of
the Ontario New Home Warranty Program
(the Corporation designated for the purposes of the
Ontario New Home Warranties Plan Act),
made pursuant to section 14 of the Act
TO DISALLOW A CLAIM

AND IN THE MATTER OF a requirement for a hearing respecting
the said Decision pursuant to section 16(2)

DAVID LARRY McLAREN

Applicant

-and-

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent

ADJOURNMENT

WHEREAS the Tribunal appointed a time and place for a hearing in the above matter on January 8-10, 2001;

TAKE NOTICE, upon consent of the parties, the Tribunal adjourns the hearing *peremptory against the Applicant* to commence at the Ramada Inn Sudbury, Courtview Room, 85 Saint Anne Road, Sudbury, Ontario, at 9:30 a.m., on Monday, February 5, 2001, and to continue February 6 and 7, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 29, 2000

CANADIAN WILDERNESS PROGRAM

APPEAL FROM A PROPOSAL OF THE DIRECTOR,
UNDER THE *CHILD AND FAMILY SERVICES ACT*

TRIBUNAL : HUGH HANSON, Presiding member
 JOE HEWITT, Member
 JOAN GENTLE, Member

APPEARANCES: GREG DUCHARME, Counsel, representing, Canadian Wilderness
 Program and Robert Fairbridge
 KATHARINE RENISON, Counsel, representing the Ministry of
 Community and Social Services

DATES OF December 18, 19 and 20, 2000 North Bay
HEARING:

ORDER

FOLLOWING attendances on December 18, 19 and 20, 2000 at a hearing before this Tribunal in North Bay, of Greg DuCharme, Counsel on behalf of Canadian Wilderness Program and Robert Fairbridge (the "Applicants"), and Katharine Renison, Counsel on behalf of the Director, under the *Child and Family Services Act* ("Director");

WHEREAS, the hearing commenced on December 18, 19 and 20, 2000;

AND WHEREAS, upon completion of the last day of the hearing scheduled on December 20, 2000, the matter was not yet concluded;

AND WHEREAS, the parties on consent agreed to further adjourn the matter to schedule more days for the completion of the hearing;

NOW THEREFORE, the Tribunal on consent of the parties orders that:

1. The hearing in this matter is adjourned to reconvene at the Best Western, 700 Lakeshore Drive, North Bay, Ontario, at 9:30 a.m., on Monday, February 12, 2001, and to continue at 9:30 a.m. on February 13, 14 and 15, 2001, if necessary.

LICENCE APPEAL TRIBUNAL

Hugh Hanson,
Presiding Member

Joe Hewitt,
Member

Joan Gentle,
Member

RELEASED: December 29, 2000

PRESCOD, WINSTON ROSS and 1006525 ONTARIO LTD. d/b/a FLAMBOROUGH
AUTO WRECKERS

**1006525 ONTARIO LIMITED D/B/A FLAMBOROUGH AUTO WRECKERS-
AND WINSTON PRESCOD**

**IN THE MATTER OF the *Highway Traffic Act*,
R.S.O. 1990 Chapter H.8 as amended**

AND IN THE MATTER OF an Application by Winston Prescod and 1006525 Ontario Limited d/b/a Flamborough Auto Wreckers dated July 11, 2000 for a hearing before the Licence Appeal Tribunal pursuant to Section 95 of the *Highway Traffic Act* appealing the Notice of the Director of Vehicle Inspection Standards dated May 25, 2000;

AND IN THE MATTER OF Motor Vehicle
Inspection Station Licence Number 23-35915
in the name of 1006525 Ontario Limited d/b/a
Flamborough Auto Wreckers;

AND IN THE MATTER OF the registration of
Motor Vehicle Inspection Mechanic, Winston
Prescod holding Trade Certificate Number
310S-059177.

PANEL MEMBERS: Stuart Cork, Presiding Member
 Malcolm Fealing, Member

APPEARANCES: MURRAY FORBES
Counsel for the Director of Vehicle Inspection Standards

Winston Prescod, appearing for himself and for 1006525
Ontario Limited d/b/a/ Flamborough Auto Wreckers

DATE OF HEARING: December 13, 2000 Toronto

DECISION AND REASONS

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal by the licensee 1006525 Ontario Limited d/b/a Flamborough Auto Wreckers and by the Registrant Winston Prescod

collectively referred to herein as (the "Applicant") respecting a proposal by the Director of Vehicle Inspection Standard to revoke:

- a) Motor Vehicle Inspection Station Licence No. 23-35915 issued to 1006525 Ontario Limited d/b/a Flamborough Auto Wreckers, and
- b) the registration of Motor Vehicle Inspection Mechanic, Winston Prescod who holds a Trade Certificate No. 310S-059177.

EXHIBITS:

- Exhibit #1: Proposal to Revoke dated May 24, 2000 issued by the Registrar of Motor Vehicles.
- Exhibit #2: Notice of Appeal Form received at the Tribunal July 13, 2000, filed by the Applicant.
- Exhibit #3: Adjournment Order released October 10, 2000.
- Exhibit #4: Adjournment Order released November 17, 2000.
- Exhibit #5: Directors Hearing Record, MTO submissions filed by the Respondent.
- Exhibit #6: Photos of 1986 Chevrolet filed by Respondent.
- Exhibit #7: Photos of 1982 Oldsmobile filed by Respondent.
- Exhibit #8: Section of parking brake actuator cable from 1986 Ford filed by the Respondent.
- Exhibit #9: Photos of 1986 Ford.

PRELIMINARY MATTERS:

This appeal had been scheduled to be heard by the Tribunal on October 18, 2000. On October 10, 2000 an Adjournment Order was issued by the Tribunal indicating that with the consent of both parties, this appeal would be heard on November 17, 2000.

On November 17, 2000 the hearing was commenced and, with the consent of both parties, the Tribunal granted an adjournment pursuant to the request of the Applicant, in order that he may retain counsel. The Tribunal issued an Order indicating that the hearing would reconvene on December 13, 2000.

FACTS:

The Director's Grounds for Revocation:

By Notice dated May 24, 2000, the Director of Vehicle Inspection Standards revoked pursuant to subsection 91(8)(a) and (e) and section 93(a) and (c) of the *Highway Traffic*

Act R.S.O. 1990, Chap. H8 as amended:

- (a) Motor Vehicle Inspection Station Licence No. 23-35915 in the name of 1006525 Ontario Limited d/b/a Flamborough Auto Wreckers, and;
- (b) the registration of Motor Vehicle Inspection Mechanic, Winston Prescod who holds a Trade Certificate No. 310S-059177.

on the grounds that the licensee and registrant have made false statements and failed to comply with the act and regulations in the issuance of safety standards certificate as follows:

- 1. Certificate number 7809331 issued on or about April 7, 1998 concerning a 1983 Pontiac.
- 2. Certificate number 0187742 issued on or about January 13, 2000 concerning a 1986 Chevrolet.
- 3. Certificate Number 0187744 dated on or about January 18, 2000 concerning a 1982 Oldsmobile.
- 4. Certificate Number 01287745 dated on or about January 19, 2000 concerning a 1981 Chevrolet.
- 5. Certificate Number 0187754 dated on or about February 8, 2000 concerning a 1986 Ford.
- 6. Certificate Number 0187756 dated on or about February 18, 2000 concerning a 1986 Ford.

AND FURTHER ON THE GROUNDS that the licensee has failed to comply with the Act and regulations in operation of its station, in failing to maintain proper equipment in the station indicated in a report dated May 27, 1997, and dated February 18, 2000 and in the issuance of Certificate Number 6933298 dated January 23, 1998 concerning a 1981 GMC

(b) to revoke effective 21 days after service of this Notice, the registration of Motor Vehicle Inspection Mechanic, Winston Prescod who holds Trade Certificate Number 310S-059177

AND FURTHER ON THE GROUNDS that the mechanic has failed to comply with the Act and regulations in the issuance of Safety Standard Certificates as follows:

- 7. Certificate Number 6861908 dated on or about May 1, 1997 concerning a 1986 Ford.
- 8. Certificate Number 7809331 dated on or about April 7, 1998 concerning a 1983 Pontiac.
- 9. Certificate Number 0187742 dated on or about January 13, 2000 concerning a 1986 Chevrolet.

10. Certificate Number 0187744 dated on or about January 18, 2000 concerning a 1982 Oldsmobile.
11. Certificate Number 0187745 dated on or about January 19, 2000 concerning a 1981 Chevrolet.
12. Certificate Number 0187754 dated on or about February 8, 2000 concerning a 1986 Ford.
13. Certificate Number 0187756 dated on or about February 18, 2000 concerning a 1986 Ford.

The Respondent called several inspectors for the Ministry of Transportation that were involved in the investigation of the Applicant.

MTO Inspector, Larry Grimaldi, testified that in response to a complaint (exhibit #5 page 40), he performed several facility audits of the Applicant's premises, and initiated an investigation of several of the vehicles for which Safety Standards Certificates ("SSC's") had been issued by the Applicant (exhibit #5 page 38). Subsequent charges and convictions were also recorded.

The audits determined that the Applicant was consistently missing specific equipment and measuring devices that were necessary for the performance of safety inspection on vehicles as required under the regulations. It was also determined that the Trade Certificate for the Applicant had expired in 1995. Inspector Grimaldi summarized the intervention history of the Director with the Applicant, and noted that convictions for violations relating to the Applicant's operations in issuing SSC's had also been recorded in 1978, 1982, 1984, 1986 and in 1988.

MTO Inspector Andrew Soutar acting on the above mentioned complaint, performed an inspection at the owners request, on a 1986 Ford. The owner, Mr. Paul Murray, had purchased the vehicle for his daughter's use. While driving the vehicle, the daughter was flagged down by another motorist who noticed that a wheel was loose. Inspector Soutar testified that this vehicle had traveled 62 kilometers since being issued an SSC by the Applicant. Numerous safety related defects were found on the vehicle by Inspector Soutar relating to brakes, wheels, and steering items. Inspector Soutar also inspected the Applicants premises, and testified that the Applicant had missing or inoperable specific tools and measuring devices that were necessary for the performance of safety inspections on vehicles as required under the Regulations. Inspector Soutar also recovered the inspection station copy of the SSC issued for the above mentioned vehicle from the Applicant (exhibit #5 page 49), and it bears the Applicant's signature. Inspector Soutar determined that all the defects found on this vehicle were present at the time the SSC was issued by the Applicant.

MTO Inspector Donald Rutherford testified that he performed a routine CVSA inspection on a 1981 GMC truck that had been issued an SSC by the Applicant 15 days and 417 kilometers prior. The vehicle was found to have several leafs of one of its leaf spring assemblies broken (exhibit #5 page 61), and the vehicle was declared unfit and had its plates removed by Inspector Rutherford. Inspector Rutherford determined that all the defects found on this vehicle were present at the time the SSC was issued by the Applicant.

MTO Inspector Gary Spence testified that he performed an inspection (exhibit #5 page 73) on a 1983 Pontiac some 44 days and 81 kilometers since the SSC had been issued by the Applicant. It was found to have severe defects relating to parking brake, control arms, chassis and frame integrity, and brake system.

MTO Inspector Mark Horton testified that he performed a follow up investigation at the premises of the Applicant, and found that there had been no work order for the issuance of the SSC for this vehicle, and that the Applicant was lacking several tools required for the performance of SSC inspections.

Upon another complaint from a vehicle owner, MTO Inspector Gordon Waldron performed an inspection (exhibit #5 page 105) on a 1986 Chevrolet at the owner's home. The vehicle had been purchased through an auction with an SSC from the prior owner. The vehicle was un-drivable as it was found to have a forward sub frame assembly that had separated from the rest of the vehicle due to severe corrosion damage (exhibit #6). 11 days and 269 kilometers had elapsed since the SSC was issued. It was also determined by Inspector Waldron, that the SSC for this vehicle bearing the date of January 13, 2000 had come from an SSC book that had been purchased by the Applicant from the MTO head office on January 21, 2000. Inspector Waldron concluded that the SSC issued for this vehicle had in fact been back-dated by the Applicant.

MTO Inspector Peter Dodsley testified that he performed an inspection on a 1982 Oldsmobile some 44 days and 2,545 kilometers after it's SSC had been issued by the Applicant (exhibit #5 page 127). The vehicle was found to have numerous rust perforations as well as brake and exhaust defects (exhibit #7). The SSC for this vehicle was found to have been back-dated, in that it was dated January 18, 2000, yet came from a book of SSC's issued by MTO head office on January 21, 2000.

Inspector Dodsley also performed an inspection on a 1981 Chevrolet (exhibit #5 page 136), that was found to have numerous and severe safety related defects, and the vehicle was declared unfit and its plates were removed. Inspector Dodsley also noted that the SSC for this vehicle had been back-dated, and that the mileage indicated on the odometer of the vehicle was less than the mileage recorded on the SSC.

Inspector Dodsley also performed an inspection on a 1986 Ford at the premises of its owner. The vehicle had numerous safety related defects and had an SSC issued for it by the Applicant dated February 8, 2000, yet the vehicle was reported by the owner to have not been moved from the owner's garage since December of 1999 when it was purchased.

MTO Inspector Cheryl Flynn testified that she performed an inspection on a 1986 Ford some 16 days and 920 kilometers since an SSC had been issued for it by the Applicant (exhibit #5 page 146) that was found to have various safety related defects, including a severely corroded parking brake actuator cable that snapped when applied by the owner during the inspection (exhibit # 8).

The Applicant appeared on his own behalf. He did not call any witnesses. The Applicant testified that he has been a licenced mechanic since 1979, and he has operated his present business in Hamilton for 15 years. He has recently been working for a car dealer in Woodstock Ontario, and has recently been receiving various complaints but has been unable to contact this dealer.

The Applicant has numerous private customers, and has also sold some of the vehicles mentioned by the MTO inspectors. The Applicant stated that the 1981 GMC truck referred to by Inspector Rutherford did not have the broken leaf springs when it was certified and sold by the Applicant.

The Applicant also indicated that there was a possibility that vehicles may have been certified that were not the vehicles as shown by their ownerships. He stated that he did not always check the vehicle identification numbers of vehicles he inspects. The Applicant also denied certifying the vehicles that were discussed in the testimony of the MTO inspectors.

FACTS FOUND PROVEN:

The following are the facts found to have been proven:

1. 1006525 Ontario Limited d/b/a Flamborough Auto Wreckers (the "Applicant") was registered as a motor vehicle inspection station under the *Highway Traffic Act* and Regulations to issue Safety Standard Certificates in respect of motor vehicle's.
2. Winston Prescod (the "Applicant") was at all relevant times employed as an Inspecting Mechanic under the *Highway Traffic Act* and Regulations and was authorized to inspect motor vehicles prior to the issue of SSC's and to sign and complete such certificates.
3. The aforementioned vehicles as described by the Notice of the Director of Vehicle Inspection Standards (exhibit #1) and listed herein, were issued Safety Standard Certificates by the Applicant, and contained various safety defects that were present at the time of the issuance of their respective SSC's.
4. The Applicant issued SSC's for several of the aforementioned vehicles that bore inaccurate dates, and mileage entries.
5. The Applicant, after repeated cautions through the course of several facility audits, was found to have consistently lacked the necessary tools in operable condition for performing safety inspections.

ISSUES:

The issues in this case may be summarized as follows:

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Station licence be carried out?

Should the decision of the Director of Vehicle Inspection Standards to revoke the Motor Vehicle Inspection Mechanic licence be carried out?

LAW:

The *Highway Traffic Act*, R.S.O. 1990 Chap H.8 as amended, provides as follows:

Motor Vehicle Inspection Station Licence:

- 91(1) No person shall establish, operate or maintain a motor vehicle inspection station except under the authority of a licence issued by the Director under this Act and the Director may issue a licence for a motor vehicle inspection station subject to the conditions that the Director may specify in the licence.
- 91(2) Subject to subsection (3), any person who applies in accordance with this Act and the regulations for a licence to establish, operate or maintain a motor vehicle inspection station and who meets the requirements of this Act and the regulations and who pays the prescribed fee is entitled to be issued the licence

Revocation of a Licence

- 91(8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,
- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
 - (b) any inspection authorized by the licence is incompetently performed;
 - (c) the licensee or any motor vehicle inspection mechanic employed in the motor vehicle inspection station has misrepresented the condition of a vehicle with respect to the standards of equipment and performance prescribed by the regulations upon an inspection of the vehicle in the station for the purpose of determining whether or not to issue a safety standards certificate, sign a vehicle inspection record or affix a vehicle inspection sticker;
 - (d) there is a breach of condition of the licence;
 - (e) the licensee does not comply with this Act or the regulations;
 - (f) the inspections that can be performed by the motor vehicle inspection station are misrepresented; or
 - (g) a change in the officers or directors of any corporation that is a licensee would afford grounds for refusing to issue a motor vehicle inspection station licence under clause (3)(a)

Motor Vehicle Inspection Mechanic:

- 92(1) No person shall sign a vehicle inspection record as mechanic or certify in a safety standards certificate that a vehicle complies with the standards of equipment and performance prescribed by the regulations unless the person is registered by the Director as a motor vehicle inspection mechanic in a motor vehicle inspection station and the Director may so register any person for whom application is made under subsection (2).
- (2) Where a licensee or an applicant for a motor vehicle inspection station applies for the registration as a motor vehicle inspection mechanic in the motor vehicle inspection station of the licensee or in the proposed motor vehicle inspection station of the applicant

for a licence, as the case may be, of any person who meets the requirements of this Act and the regulations, the person is entitled to be registered as a motor vehicle inspection mechanic in the motor vehicle inspection station.

93 The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
- (b) any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or
- (c) the registrant does not comply with this Act or the regulation.

Appeal before the Licence Appeal Tribunal:

95(1) Where the Director proposes,

- (a) to refuse to issue or renew a licence;
- (b) to refuse to make a registration; or
- (c) to revoke a licence or registration,

the Director shall serve notice of his or her proposal, together with written reasons therefor,

- (d) in the case of a proposal to refuse to issue a licence, upon the applicant;
- (e) in the case of a proposal to revoke or to refuse to renew a licence, upon the licensee;
- (f) in the case of a proposal to refuse to make a registration, upon the applicant or licensee and upon the proposed registrant; and
- (g) in the case of a proposal to revoke a registration, upon the registrant and the licensee of the motor vehicle inspection station in which the registrant is employed.

(2) A notice under subsection (1) shall inform the person who is the applicant, licensee, registrant or proposed registrant, as the case may be, that the person is entitled to a hearing by the Tribunal if the person mails or delivers, within fifteen days after receiving service of the notice under subsection (1), notice in writing to the Director and the Tribunal requiring a hearing by the Tribunal and the person may so require the hearing.

(4) Where the applicant, licensee, registrant or proposed registrant requires a hearing by the Tribunal in accordance with subsection (2), the Tribunal shall appoint a time for and shall hold the hearing and may by order direct the Director to carry out his or her proposal and to take the action that the Tribunal considers the Director ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Director.

APPLICATION OF THE LAW TO THE FACTS:

Under the HTA, the relevant sections dealing with revocation state:

91 (8) The Director may revoke or refuse to renew a motor vehicle inspection station licence where,

- (a) any person has made a false statement in the application for the licence or a renewal thereof or in any safety standards certificate signed by the licensee or a person authorized in writing by the licensee or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the motor vehicle inspection station;
- (e) the licensee does not comply with this Act or the regulations;

93. The Director may revoke the registration of a motor vehicle inspection mechanic where,

- (a) the registrant or the licensee has made a false statement in the application for registration of the registrant or in a safety standards certificate or in any report, document or other information required to be furnished by this Act or the regulations or any other Act or regulation that applies to the registrant;
- (b) *any inspection performed under the authority of the mechanic's registration is incompetently performed by the registrant; or*
- (b) the registrant does not comply with this act or the regulations.

As to the revocation of the motor vehicle inspection licence, in this case the evidence has established that the facilities of the Applicant have been shown to have lacked various tools and equipment necessary under the regulations for the performance of safety inspections.

As to the revocation of the registration of the motor vehicle inspection mechanic, in this case the evidence has established that the vehicles that have been shown to have had SSC's issued by the Applicant have all had safety defects present at the time of their inspections and SSC issuance. Furthermore, the veracity of the testimony of the MTO inspectors has been well supported by photographic evidence and a sample component from one of the subject vehicles. These defects were of a very serious nature, and include defects in braking and control systems, as well as vehicle structural integrity. In the Tribunal's opinion, these defects constitute an immediate safety hazard to both the vehicle owners, and to the motoring public. Furthermore, the Applicant has been shown to have made false entries for dates and mileage on the SSC's themselves.

The Tribunal finds that the Director has shown the Applicant to have acted in a manner that defeats the integrity of the MVIS system, and misled the public, in an apparent quest for profit. The Tribunal rejects the notion as presented by the Applicant, that he did not certify the vehicles in question, or that some of the defects described were not present on the vehicles at the time of inspections. The Tribunal heard no evidence that would support this position.

Each SSC bears the statement above the Applicant's signature: *"We hereby certify that the above described motor vehicle has been inspected in accordance with the provisions of Sections 88 to 100 of the Highway Traffic Act and Regulations issued*

thereunder, and that the items inspected met the prescribed standards on the Date of Inspection."

In this case the Director has shown that the Applicant, in signing SSC's for vehicles which have been shown to have had numerous and serious safety defects at the time of issuance, has made a false statement on each of the SSC's that Winston Prescod issued. This gives the Director the necessary grounds for the revocation of the Appellants MVIS Licence under sections 91(8)(a) and 93(a) and (c) of the *Highway Traffic Act*.

Furthermore, the Tribunal finds that the Director has demonstrated justification for his Order on the grounds that the actions of the Applicant have clearly shown that *"the past conduct of the applicant or, where the applicant is a corporation, is of its officers or directors affords reasonable grounds for belief that the motor vehicle inspection station will not be operated in accordance with the law and with honesty and integrity;"* as described by section 91(3)(a).

DECISION:

IT IS THE DECISION OF THE TRIBUNAL to confirm the Order of the Director to revoke the MVIS License of Winston Prescod and 1006525 Ontario Limited d/b/a Flamborough Auto Wreckers, and to revoke the registration of Winston Prescod as a Motor Vehicle Inspection Mechanic.

LICENCE APPEAL TRIBUNAL

Stuart Cork, Presiding Member

Malcolm Fealing, Member

RELEASED: December 29, 2000

MED - 320

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: Kyle M. Biel, Respondent
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF HEARING: December 20, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

- Exhibit #1 A** Notice of Suspension dated February 17, 2000 issued by the Registrar of Motor Vehicles.
- Exhibit #1 B** Notice of Suspension dated August 18 ,2000 issued by the Registrar of Motor Vehicles.
- Exhibit # 2** Notice of Appeal Form received at the Tribunal October 31, 2000. Filed by the Applicant.
- Exhibit # 3** Letter from Physician # 1 dated December 7, 2000 filed by Applicant.
- Exhibit # 4** Driver's Information from Ministry dated November 9, 2000.
- Exhibit # 5** Tabulated documents (1-49) received from the Registrar of Motor Vehicles, Dated December 5, 2000.

FACTS:

The Applicant, a 54 year old lawyer had his licence suspended on February 17, 2000 after the Ministry received a letter, dated January 25, 2000, from Physician # 1, a neurologist who had been treating the Applicant for the past seven years. He reported the Applicant had a complex partial seizure while cross-examining a witness in court on January 24, 2000. The Applicant, who normally consumed one or two glasses of wine a week, on January 21, 2000, had three glasses of wine, four bottles of beer and one shot of vodka, over the course of eight hours. Physician # 1 felt the seizure was the result of a combination of alcohol withdrawal and fatigue.

The Applicant was first diagnosed as having epilepsy in 1993 and has suffered a few sporadic seizures since that time. He was controlled on Dilantin 400 mg. daily for a long periods of time and then had a couple of breakthrough seizures, associated with drinking wine. His last seizure had been on March 27, 1997. Following this episode, Physician # 1 changed his medication to Tegretol 200 mg., three times daily.

The Applicant's drivers licence had been suspended a number of times since 1993, following each reported seizure. Physician # 1 had repeatedly advised the Applicant to restrict wine to one to three glasses a week; but not necessarily to abstain because he did not consider him an alcoholic.

The last EEG report on March 30, 2000 reported a borderline abnormality and the Tegretol dose was increased to 200 mg, four times daily.

The Medical Advisory Committee interviewed the Applicant July 21, 2000 and recommended his licence remain suspended until his case could be reconsidered after a one year alcohol/seizure free period. This decision was reported to the Applicant on August 18, 2000, by the Registrar.

The Applicant was infuriated, because he had been seizure free for seven months and abstaining from alcohol had never been mentioned before. This meant he could not drive for another whole year. Without his licence he was losing all of his out of Toronto referrals. He fully understood his problem and had learned to modify his drinking habits to avoid further seizures.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and

- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
 - (b) a driver's licence; or
 - (c) a CVOR certificate,
- on the grounds of,
- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
 - (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
 - (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
 - (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

- 50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.
- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar of Motor Vehicles to "-----suspend or cancel" a driver's licence for "any---sufficient reason---". The Registrar originally suspended the Applicant's licence after receiving an unsolicited letter dated January 25, 2000 from Physician # 1, advising that the Applicant had a complex partial seizure on January 24, 2000, which he attributed to alcohol withdrawal and fatigue.

The alcohol factor was noted in the Deputy Registrar's letter of suspension, but there was no mention of refraining from alcohol. An Alcohol Assessment Form was requested and completed by Physician # 1. He stated twice that the Applicant was not an alcoholic. His score was that of a social drinker. The MRI, Haematology, Biochemistry and EEG tests were all reported as normal.

The Applicant testified that he has continued to drink wine in moderation. as his neurologist has recommended and has been seizure free, since January 24, 2000. The Medical Review Committee, however, followed the C.M.A.'s "Determining Medical Fitness to Drive" 3.2, and categorized him as an alcohol abuser. The decision was to continue the suspension until the Applicant had completed a 12 month alcohol/ seizure

free period. The Registrar concurred with this decision and the Applicant was notified on August 18, 2000. The Applicant has now been seizure-free for eleven months and alcohol free for four months.

The Tribunal finds that the eleven month seizure-free period, while drinking very moderately, should be taken into account and little could be gained by demanding abstinence for a further eight months, when the alcohol was not having any apparent effect.

DECISION:

Upon the application by the Applicant to appeal the decision dated August 18, 2000, by the Registrar of Motor Vehicles ("Registrar") to further suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: December 28, 2000

MED - 357

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: ANTOINE AOUAD, M.D., Presiding Member
ROBERT EHRLICH, M.D., Member

APPEARANCES: F. CLAIRE ROWETT
Representative for the Registrar of Motor Vehicles

Applicant,

Solicitor for Applicant

DATE OF HEARING: December 19, 2000 Toronto

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

By the Applicant:

- a) Exhibit #1 Letter of Suspension dated August 11, 2000, issued by the Registrar of Motor Vehicles.
- b) Exhibit #2 Notice of Appeal Form – received at the tribunal November 20, 2000

By the Respondent:

- a) Exhibit #3 Ministry of Transportation submissions – Tabs 1 – 6 –
- received December 8, 2000

PRELIMINARY MATTERS:

There were no preliminary matters and the hearing proceeded

FACTS:

The Applicant is appealing the suspension of his driving privileges effective 00 08 25 as per Exhibit # 1.

The Applicant came to the attention of the Ministry as a result of an unsolicited letter dated June 16, 2000, from Physician # 1, informing the Ministry that the Applicant "...has been diagnosed with untreated alcohol dependence. He has admitted to drinking and driving. He has failed to return for follow-up...". (Exhibit # 2 Tab 2)

Exhibit # 2 Tab 6, a Ministry of Transportation driving Record for the Applicant since 1970, shows two impaired driving convictions in 1976 and in 1981.

At the hearing the Respondent, relied on the information contained in the documents presented for the hearing, entered as Exhibit # 2, tabs 1 through 6.

The Respondent confirmed that the Applicant's driver's license remained under suspension according to Sections 14(a) and (b) of Regulation 340/94.

During cross-examination by the Applicant's solicitor, the Respondent admitted to not having any knowledge as to when or by whom the diagnosis of "alcohol dependency was made." Nor was the Respondent aware as to the last time that the Applicant drank and drove.

In reply to Applicant's solicitor's questions, the Respondent emphasized that section 47.1(g) allows the suspension of a driver's license for "...any ...*sufficient reason*...".

In closing, the Respondent cited Section 14(a), contending that the Applicant's alcohol dependency is a physical disability; quoted several Guidelines requiring one year abstinence in cases of alcohol addiction; and asked the Tribunal to uphold the suspension.

Applicant's solicitor offered no evidence on behalf of his client. In closing, Applicant's solicitor cited "...lack of evidence..." to continue the suspension. He reiterated his previous comments that there is no evidence as to when and by whom the diagnosis was made. Applicant's solicitor, also questioned Physician # 1's qualifications.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (f) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) unquestionably empowers the Registrar to "...suspend or cancel" a driver's license for "any ...sufficient reason...". The Applicant came to the attention of the Ministry as a result of an unsolicited letter from Physician # 1, (Exhibit # 2 Tab 2). The letter dated June 16, 2000 consists of one paragraph which states:

"Please be advised that the Applicant has been diagnosed with untreated alcohol dependence. He continues to be in pre-contemplation. He has admitted to drinking and driving. He has failed to return for follow-up."

No other evidence respecting the medical condition of the Applicant was before this Tribunal.

The Respondent considers alcohol dependency a medical condition and relies on section 14(a) of Regulation 340/94 under the HTA, as grounds for maintaining the suspension.

The Tribunal notes that section 14(a) does not refer to a “medical condition”, it specifically details the criteria to be considered as: “...a *mental, emotional nervous or physical disability*...”

The Respondent argues that alcohol dependency is a “physical disability”. The Tribunal disagrees. Albeit a possible disability, alcoholism cannot be viewed as a physical disability.

Section 14(b) of Regulation 340/94 under the HTA, also relied on by the Respondent as being applicable, states:

“An applicant for or a holder of a driver’s license must not,

- b) be addicted to the use of alcohol or drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.”*

The premise put forth by Physician # 1, that the Applicant is alcohol dependent, has been challenged by Applicant's solicitor. The Tribunal concurs with Applicant's solicitor, that there is no supporting basis for Physician # 1's allegation before this Tribunal. Thus, the Tribunal finds that there is no evidence to substantiate the Ministry's determination that the Applicant is at the present time, addicted to alcohol.

The Tribunal views Physician # 1's comment that the Applicant “...admitted to drinking and driving...” as vague. The Tribunal cannot presume the context in which the Applicant may have admitted to Physician # 1 to drink and drive. It is not possible to determine from this statement, whether the drinking and driving is past or present. There is no evidence to corroborate that any drinking and driving is current. According to the Applicant's Driver's Record, his last conviction for impairment was in 1981. (Exhibit # 2 Tab 6)

The Respondent alluded to the guidelines of the Ministry of Transportation Medical Advisory Committee and the National Safety Code for Motor Carriers. The Tribunal notes that these guidelines are only policy not legislation, and must be shown to apply to the Applicant on the basis of evidence before the Tribunal.

Under section 47 of the *Highway Traffic Act*, the onus is on the Respondent to establish that the Registrar has sufficient reason to suspend the Applicant's licence. The Respondent decides on how best to gather evidence to support the Respondent's case, including using statutory authority given the Respondent, including the right to request that a witness be given a summons to testify at the hearing. The only evidence the Respondent relied on to establish the Respondent's case is Physician # 1's letter. Physician # 1 was not called as a witness. No other corroborative evidence was presented by the Respondent.

Based on the evidence before the Tribunal, on a balance of probabilities the Tribunal can not find that the Applicant is currently suffering from a medical condition or an alcohol addiction which is likely to significantly interfere with his ability to drive a motor vehicle as described by Regulation 340/94 section 14(a) and (b) of the HTA.

DECISION:

Upon the application by the Applicant to appeal the decision dated August 25, 2000 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar **be set aside**.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

Robert Ehrlich, M.D.,
Member

RELEASED: December 28, 2000

MED - 315

Appeal under Section 50(1) of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 47(1) of that Act.

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: Claire Rowett
Representative for the Registrar of Motor Vehicles

Applicant,
Counsel for Applicant

DATE OF HEARING: December 13, 2000 Peterborough

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the *Highway Traffic Act* (Ontario).

EXHIBITS:

Exhibit #1 Notice of Suspension dated February 26, 2000 issued by the Registrar of Motor Vehicles.

Exhibit # 2 Notice of Appeal Form received at the Tribunal October 23,2000.
Filed by the Applicant.

Exhibit #3 Tabulated documents received from the Registrar of Motor Vehicles.

THE FACTS:

The Applicant, 39 years old, had his drivers licence suspended March 5,1999 after the Registrar of Motor Vehicles received an unsolicited medical report, dated December 18, 1998, from Physician # 1, the Applicant's family physician. The report alleged the Applicant admitted to consumption of alcohol prior to driving, but denied it had any

effect on his driving. Physician # 1 noted a strong odour of alcohol on his breath on his last 3 visits to her office.

The Applicant, a dry-waller and plasterer, gave evidence that he had been working on a rush job that had started at 1900 hours the evening prior to his doctor's visit, and he had worked all night. During this period of time he consumed a 6 pack of beer. The last bottle was at 0530 hours, after which he slept on the floor for an hour or so. He had attempted to cancel the appointment, which had been requested by the physician to check his blood pressure, but he was told she wanted to see him. He was upset because he did not have an opportunity to clean up or change his clothes.

When the Applicant went into the office, Physician # 1 asked if he was still smoking and then commented that she could smell beer. He stated he explained the 16 hour shift he had just completed and that he had consumed some beer. She then replied that "North American Indians are recognized as heavy drinkers". The Applicant, who is an Aboriginal, responded that "was her opinion, but each nationality other than Natives have a problem with drugs and alcohol".

Physician # 1 then took out a form, asked some personal questions, circled some things on the form and told him she was going to notify the Ministry. She neither checked his blood pressure nor took any blood tests. He never felt he and Physician # 1 had ever formed a good relationship, but it was difficult to change doctors in Peterborough.

He subsequently phoned in a complaint to the College of Physicians and Surgeons. Later she notified him she did wish to treat him any longer.

Counsel for the Applicant stated she believed the comment about Indians was discriminatory and the notification to the Ministry was vindictive. She also believed the issue was not drinking and driving, but simply drinking. There was no evidence to prove the Applicant was impaired at any time. Physician # 1 simply said there was a strong odour of alcohol. There is no law against any person having a drink and smelling of alcohol and then driving, unless their blood alcohol is over 80 mg %.

The Ministry apparently based the suspension on two previous convictions in 1988 and 1998 for having an elevated blood alcohol while driving and a GGT level of 258, reported in May 1999. The normal range is up to 65. The Applicant stated that the two alcohol offences occurred when he was young, but he has since matured and settled down. His Counsel submitted that the GGT liver test is not specific for excessive alcohol consumption, but could indicate hepatitis or cancer and many other liver diseases.

On March 24 and April 6, 1999 the Applicant attended the Four Counties Addiction Services Team in an effort to have his licence reinstated. The Counsellor's recommendations and summary were as follows:

"Name's drinking has been problematic or heavier at various times of his life with an impaired charge, high liver count, drinking to cope with loneliness, boredom and pain, possible correlation to his high blood pressure. From what Name reports now, his drinking is within moderate range of no more than 12 drinks maximum weekly. It is recommended he have some non drinking days and definitely no driving after drinking. If Name finds it difficult to think of alternatives to drinking when he is

stressed then I would recommend that he attend addictions counselling to further develop his coping strategies".

The Applicant stated in evidence that he no longer uses alcohol to cope with any stress he might have and he limits his drinking to 1-3 beers during an evening after work and never drives after drinking.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (g) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47(1) empowers the Registrar to "-----suspend or cancel" a driver's licence for "any sufficient reason----". The Registrar originally suspended the Applicant's licence, upon receipt of an unsolicited letter from the Applicant's family physician, Physician # 1, informing the Ministry that she had smelled alcohol on the Applicant on three separate occasions. This statement was not supported by any evidence that even suggested the Applicant was impaired or addicted to alcohol to an extent likely to significantly interfere with his ability to drive safely as stated in Reg. 340/94 14 (b).

The Tribunal feels this was insufficient cause for suspending the Applicant's licence without further investigation or follow-up, which apparently was not done. The Tribunal can not conclude that the smelling of alcohol on a person, warrants the finding that a person as "suffering from any mental, emotional, nervous or physical disability likely to significantly interfere with his ability to drive a motor vehicle safely", as stated in Reg. 390/94 14(a). Also, an elevated GGT test is a non specific diagnostic test and requires further investigation before it should become a factor.

If criteria such as these are used without any investigation whatsoever, a large percentage of the population of the province could be in danger of having their licences suspended.

Physician # 1's letter stated "Strong odour of ETOH with last three office visits" and "patient admits to consumption of ETOH prior to driving, but denies any effect on driving" (Exhibit # 3, tab # 1). The Tribunal did not feel this is sufficient to warrant suspension of a licence, especially when a truck is essential for his work.

The Tribunal agrees with the Applicant's Counsel who stated this was not a question of drinking and driving, but simply drinking. The Applicant impressed the Tribunal as being forthright and credible. He thought he was being treated unfairly by the Ministry and could not understand why there were so many demands put upon him, when he did not do anything. He sought help at the Ministry to find a physician who specialized in addiction medicine, but no one could tell him.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 26, 2000, by the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: December 20, 2000

MED - 336

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member

APPEARANCES: Claire Rowett
Representative for the Registrar of Motor Vehicles

Applicant,

DATE OF
HEARING: December 15, 2000 Hamilton

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

Exhibit #1 Notice of Suspension dated February 10, 2000 issued by the Registrar of Motor Vehicles.

Exhibit # 2 Notice of Appeal Form received at the Tribunal November 10, 2000. Filed by the Applicant.

Exhibit #3 Tabulated documents received from the Registrar of Motor Vehicles Dated November 23, 2000.

THE FACTS:

The Applicant is a 51 year old retired heavy equipment operator, whose licence was suspended after the Ministry received an unsolicited letter from Physician # 1, the Applicant's family physician, reporting that the Applicant has a history of alcoholism and a remote history of a seizure disorder. Physician # 1 had reported in 1994 that the Applicant suffered from alcoholism and was on Antabuse.

The Applicant retired in 1995 after suffering three Myocardial Infarctions. Along with Arteriosclerotic Coronary Artery Disease, he has Chronic Obstructive Lung Disease, Alcoholism, a recent Gastro-intestinal bleed and three compression fractures of his vertebrae. He is presently taking Vasotec, Lipitor, Nitrospray, Nitropatches, Amitriptyline, ASA, Theodur, Ventolin Salbutamol, Atrovent, Flovent and Pulmocort. He had a Coronary Artery Bypass in May 2000 and a recent stress E.C.G..

Physician # 2, a neurologist at McMaster University wrote to the Ministry on February 1, 2000 after examining the Applicant at the request of Physician # 1 to assess an episode of loss of awareness. The Applicant's brother died and following this he began drinking very heavily from June until December 28, 1999, when this episode occurred. In five days he consumed 120 ozs. of alcohol. Within 48 hours of stopping, he was observed by a nephew to grab his chest and collapse. He was taken to a hospital, examined and released. There is no evidence whether he convulsed or not, but he stated he was neither incontinent nor did he bite his tongue. He told Physician # 2 it was similar to an episode he had in 1976, when epilepsy was diagnosed and he was put on Dilantin for an indefinite period.

The Applicant has no insight into any of his medical conditions. He has been a heavy smoker for years and only cut down recently despite his serious respiratory problems. Since this episode he has stopped "heavy " drinking, but still drinks about 20 ozs. on the week-ends.

In the hearing, the Applicant's main statement was " I don't think it was a seizure. I fainted from lack of food while drinking, because I only had 2 sandwiches in 5 days. The doctors only think it was a seizure, they said they really don't know. I think it was my heart, because I grabbed my chest".

A blood alcohol level was sent to Physician # 2 which is recorded as 61.9. He states in his letter the toxic level is apparently greater than 17, so he had an incredibly high level of alcohol in him. It is not certain when this blood was taken.

Physician # 2's impression is that the Applicant has a lower seizure level and is likely to suffer from seizures and alcohol plays a substantial role in his symptomatology. It is possible that alcohol withdrawal will trigger the seizure, and he should completely refrain from drinking. He added this man certainly should not be driving.

Following the Respondent's report, which was all inclusive, the Applicant did not ask one question.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (h) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

- (2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS :

Section 47(1) empowers the Registrar of Motor Vehicles to "-----suspend or cancel" a driver's licence for "any---sufficient reason---". The Registrar originally suspended the Applicant's licence after receiving an unsolicited letter dated January 10, 2000 from Physician # 1 advising that the Applicant had a history of alcoholism; a remote history of seizure disorder and recently experienced an episode of what might be a seizure. This was followed by a letter from Physician # 2, a neurologist, February 1, 2000 outlining more history and stating it was either an epileptic seizure or a seizure triggered by alcohol withdrawal. He further stated the Applicant should not be driving.

The Tribunal finds the Ministry acted properly and in accordance with the Regulation, in suspending the Applicant's driver's licence, based on the information received from Physician # 1 and Physician # 2.

The Applicant's only argument was that it was not a seizure, it was his heart. The Tribunal felt it matters little whether it was a seizure or his heart, since he was rendered unconscious. There is a history of a seizure in 1976 and he stated the two were similar. He also has severe Arteriosclerotic Cardiovascular Disease which caused three Myocardial Infarctions and a Coronary Artery Bypass.

The Tribunal is satisfied that the criteria in Regulation 340/94 section 14(a) of the *Highway Traffic Act* applies to the Applicant. Thus, the Tribunal concurs that the Applicant's driver's licence remain under suspension.

DECISION:

Upon the application by the Applicant to appeal the decision dated February 10, 2000, by the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be confirmed.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D., Presiding Member

RELEASED: December 21, 2000

MED - 225

**Appeal under Section 50(1) of the Highway Traffic Act,
R.S.O. 1990, Chap. H.8 as amended, from a Decision of
the Registrar of Motor Vehicles pursuant to Section
47(1) of that Act.**

TO APPEAL A SUSPENDED LICENCE

TRIBUNAL: Ross C. Bennett M.D., Presiding Member
Johanne Morissette, Vice-Chair

APPEARANCES: F. Claire Rowett, Respondent
Representative for the Registrar of Motor Vehicles

Applicant,

Solicitor for Applicant

DATE OF
HEARING: December 5, 2000 Sudbury

DECISION AND REASONS

This is an appeal to the Licence Appeal Tribunal by the Applicant respecting a decision of the Registrar of Motor Vehicles (the "Respondent") pursuant to section 47(1) of the Highway Traffic Act (Ontario).

EXHIBITS:

- 1) Notice of Suspension
Dated April 12, 2000 issued by the Registrar of Motor Vehicles
- 2) Notice of Appeal Form received by the Tribunal August 21, 2000
Filed by the Applicant
- 3) Alcohol Assessment Form completed by Physician # 1
- 4) Book of Tabulated Documents from the Ministry - 6 tabs

PRELIMINARY MATTERS:

Counsel for the Applicant objected to a reference in the material presented by the Ministry regarding an Administrative Driver's Licence Suspension on April 25, 1998 for which the Applicant was acquitted.

FACTS:

The Applicant gave evidence that he usually was a beer drinker, but at a birthday party in November 1998 he drank 14-15 Rum drinks. The following day, while with two friends, he complained of feeling terrible and they suggested he should have a beer and it would help. As soon as he drank it, he felt light headed and collapsed. The friends said he was unconscious for approximately 30 seconds. He was incontinent, but did not bite his tongue. He was unsure whether he had convulsed.

He was taken to the hospital, examined and referred to a neurologist. The ER physician notified the Ministry November 7, 2000, "new onset seizure". No action was taken on this notification until April 12, 1999, when the Applicant's licence was suspended.

Physician # 2, the neurologist sent in a report dated May 6, 1999 (Exhibit 4, tab 3), which outlined the involvement of alcohol. This report provided a complete physical and neurological examination, including all the tests required by the Ministry. The previously unknown alcohol factor prompted the Ministry to continue the suspension and demand additional information and tests (Exhibit 4, tab 4).

Physician # 1, the Applicant's physician for 35 years, completed a Ministry's Alcohol Assessment Form, dated October 26, 2000 (Exhibit 3).

The Respondent stated the form was rejected because it was incomplete and inaccurate. His signature was not on the document, and the question regarding "seizures related to alcohol" was answered in the negative. The 1982 conviction for impaired driving was also not mentioned.

The Applicant responded that he believed the questions asked related to the interval between his seizure and October 26, 2000 when the assessment form was being completed, and Physician # 1 simply forgot to ask the Applicant to sign the document. He also stated that the seizure had really frightened him and he abstained from alcohol for a thirteen (13) month period until Christmas 1999.

The Applicant has worked as a welder at a steel company for five years and has never lost time because of drinking or sickness. He never drinks during the week and often does not drink for a month at a time. When he drinks he might have 4-5 beers on a week-end, but no more.

ISSUES:

Should the decision of the Registrar to suspend the Applicant's licence be confirmed, modified or set aside?

LAW:

Regulation 340/94, Section 14 states:

An applicant for or a holder of a driver's licence must not,

- (a) suffers from an mental, emotional, nervous or physical disability likely to significantly interfere with his or her ability to drive a motor vehicle of the applicable class safely; and
- (b) be addicted to the use of alcohol or a drug to an extent likely to significantly interfere with his or her ability to drive a motor vehicle safely.

Section 47(1) states:

Subject to section 47.1, the Registrar may suspend or cancel,

- (a) the plate portion of a permit as defined in Part II;
- (b) a driver's licence; or
- (c) a CVOR certificate,

on the grounds of,

- (d) misconduct for which the holder is responsible, directly or indirectly, related to the operation or driving of a motor vehicle;
- (e) conviction of the holder for an offence referred to in subsection 210(1) or (2);
- (f) the Registrar having reason to believe, having regard to the safety record of the holder or of a person related to the holder, and any other information that the Registrar considers relevant, that the holder will not operate a commercial motor vehicle safely or in accordance with this Act, the regulations and other laws relating to highway safety; or
- (g) any other sufficient reason not referred to in clause (d), (e) or (f).

Section 50 of the Act states:

50.(1) Every person aggrieved by a decision of the Minister under subsection 17(2) or (3) or subclause 32(12)(b)(i) or a decision of the Registrar under section 47 may appeal the decision to the Licence Appeal Tribunal.

(2) The Tribunal may confirm, modify or set aside the decision of the Minister or the Registrar.

APPLICATION OF THE LAW TO FACTS:

Section 47 of the *Highway Traffic Act* gives the Registrar of Motor Vehicles the authority to suspend the Applicant's licence for sufficient reason and the Registrar suspended the Applicant's driver's licence. Section 14(1) of Regulation 340/94 under the Act, states that the holder of a driver's licence must not suffer from a disability likely to significantly interfere with the driver's ability to drive a motor vehicle.

When the Ministry was notified by a physician that a seizure had occurred the Registrar suspended the Applicant's driver's licence. It took five months before the Applicant was notified of the suspension. During this period, the Applicant had been examined twice by a neurologist; had undergone a series of tests which were all normal. Shortly after the suspension, the neurologist notified the Ministry that all of the required tests were normal, and he considered the event to be related to alcohol withdrawal and the chance of recurrence was not very high.

The guidelines contained in the "National Safety Code for Motor Carriers" states - "An individual whose seizures are clearly precipitated by alcohol should not drive any motor vehicle until at least a twelve month seizure-free period while also abstinent from alcohol."

The Tribunal finds the Applicant to be a creditable witness who has attempted to do what was required to regain his licence. The Applicant has fulfilled the requirements under the "National Safety Code for Motor Carriers".

The Tribunal accepts the Applicant's testimony that he has abstained from alcohol following his seizure for thirteen months until Christmas 1999 and his evidence as to the amount of his consumption of alcohol thereafter.

DECISION:

Upon the application by the Applicant to appeal the decision dated April 23, 1999 of the Registrar of Motor Vehicles ("Registrar") to suspend his driver's licence pursuant to Section 47(1) of the *Highway Traffic Act* ("HTA"), and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

IT IS THE DECISION OF THE TRIBUNAL pursuant to the authority vested in it under section 50(2) of the Act that the decision of the Registrar be set aside.

LICENCE APPEAL TRIBUNAL

Ross C. Bennett M.D.,
Presiding Member

Johanne N. Morissette,
Vice-Chair

RELEASED: December 12, 2000

ADLS- 348

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: ANTOINE AOUAD, M.D.,
Presiding Member

APPEARANCES: KYLE M. BIEL
Representative for the Registrar of Motor Vehicles

Applicant

Solicitor for Applicant
by written submissions

DATE OF
HEARING: December 15, 2000

DECISION
RELEASED: December 20, 2000

Toronto

REASONS FOR DECISION

A Written hearing was held on December 15, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of a written hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic Act* was dated October 31, 2000, and was received by the Tribunal on November 16, 2000, together with the prescribed fee of \$100.00, paid by certified cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice to Registrar to suspend dated October 7, 2000
- b) Exhibit #2 Notice of Appeal Form - received November 16, 2000
- c) Exhibit #3 Medical report from Physician # 1 – dated October 10, 2000
- d) Exhibit #5 Applicant's additional submissions - 13 pages –
- received December 11, 2000

By the Respondent:

- a) Exhibit #4 Ministry of Transportation submissions – received December 5, 2000

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

(a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

(b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Tribunal may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

(a) the name, telephone number and address, with the postal code, of the medical practitioner;

(b) the name, date of birth and address of the person who is the subject of the report;

(c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;

(d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;

(e) whether the medical practitioner is the family physician of the person who is the subject of the report; and

(f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant's driver's licence was suspended "October 07, 2000" as per Notice of Appeal (Exhibit # 2)

Page 2 of Notice of Appeal, dated October 31, 2000, was prepared by Physician # 2 (ING), the Applicant's physician for "96 years 9 months". (?) Physician # 2 writes: "*hx of chronic bronchitis recurrent posterior/anterior chest pain increased with breathing ...chest pain non-specific type ...chest x ray Oct 10 00 - normal.*" (Exhibit # 2)

The Applicant's last visits to the physician were on "Oct 10, 17, 31" (Exhibit # 2)

In a handwritten note, dated Oct 10 00, Physician # 2 confirms that the Applicant "*...is under ...care ...for chest pain which increases with breathing ...is going to have chest x ray ...unable to take deep breaths due to chest pain.*" (Exhibit # 3)

The Applicant's solicitor, from the firm of Harvey Katz and Associates, in a brief prepared for the appeal, submitted a copy of the documents above stated and argued as follows:

Summary:

"The Appellant's first language is Cambodian. His second language is Vietnamese and he has very limited use or understanding of the English language" (Exhibit 5 - 1. Statement of Facts paragraph 2)

"The Appellant was requested to provide a breath sample and he attempted to do so at least 12 times. He blew as hard as he could and for as long as he could. The Appellant is unable to take deep breaths due to chest pain he experienced and he was therefore unable to blow for 10 full seconds." (Exhibit 5 - 1. Statement of Facts paragraph 7)

"The Appellant tried to explain to the police officer conducting the test that he was unable to blow for any longer duration." (Exhibit 5 - I. Statement of Facts paragraph 8)

In "II. ARGUMENTS", the Applicant's solicitor confirms the Applicant's position that he did not provide a breath sample due to medical reasons. She refers to Physician # 2's handwritten note to substantiate her assertion, and writes: "*...the Appellant submits that the words "chest pain nonspecific type" were not stated as the medical reason for the Appellant's inability to provide a breath sample. Instead, these words were used to describe the history of the Appellant's condition...*" (Exhibit 5 - II. Arguments paragraph 12 & 15 respectively.)

Further the Applicant's solicitor disputes the Respondent's claims in "*...paragraphs 4 and 47...*" regarding the Applicant's understanding of the English language. (Exhibit 5 - II. Arguments paragraph 16)

In paragraph 19 of her submission the Applicant's solicitor advises that the "*...Appellant disagrees with the allegation made in paragraph 54 of the*

Respondent's report which states that Physician # 2 failed to link the Appellant's chest pain and chronic bronchitis to the lack of sample obtained ...namely, Physician # 2 states that the Appellant was unable to take deep breath, which is required when providing a breath sample, due to chest pain." Exhibit 5 - II. Arguments paragraph 19)

The Respondent provided the following Documents:

1. Part I - The Facts: points 1-41
2. Part II - The Law: points 42-44
3. Part III - Argument of the Registrar: points 45-67
4. Part IV - Order Requested
5. Certified Copy of October 7, 2000 Notice to the Registrar, sealed November 24, 2000
6. Certified Copy of the Applicant's Driving Record, sealed November 24, 2000
7. Certified Copy of Vehicle Search from Occurrence date, sealed November 24, 2000
8. Sworn Affidavit of Police Officer # 1, Burlington Ontario Provincial Police, sworn November 21, 2000
9. Sworn Affidavit of Police Officer # 2, Burlington Ontario Provincial Police, sworn November 22, 2000
10. Medical report of Physician # 3, MB, ChB, FRCP(UK),FRCP(C)FCCP, dated November 28, 2000
11. Decision of Licence Suspension appeal Tribunal, Re: V. Stechyshn, ADLS/96/12/30/T/04 dated February 5, 1997 Frank Wolman, Presiding Member
12. Decision of Licence Suspension appeal Tribunal, Re: S. W. Chung, ADLS/98/09/15/HA/110 dated October 5, 1998 Chris Hacio, Presiding Member

A summary of the Respondent's "Part I - THE FACTS " follows:

- the Applicant *"...made several feeble attempts to provide a sample of his breath that were inadequate..."* when asked by Police Officer # 1 to do so at the side of the road. (Exhibit 4 - Part I - point 10)
- the Applicant understood the request being made to provide a breath sample as he replied "yea yea" to Police Officer # 2's query (Exhibit 4 - Part I - point 23)
- The Applicant failed to provide an adequate breath sample after fourteen attempts. (Exhibit 4 - Part I - points 25 - 33)

Police Officer # 1, gives a general account of the events leading up to the attempts to obtain a breath sample from the Applicant.

A summary of an Affidavit sworn on November 21, 2000, Police Officer # 1 indicates that:

- *"I asked the Applicant if he understood this demand. He seemed not to understand so I said to him, "you have to blow like me." I then demonstrated*

to him how to successfully blow into the Alcotest device.” (Exhibit 4 - Affidavit. of Police Officer # 1 paragraph. 14)

- *the Applicant “...made several feeble attempts to provide a sample of his breath that were inadequate...” (Exhibit 4 - Affidavit. of Police Officer # 1 paragraph. 16)*
- *“...attempted to explain ...without success...” (Exhibit 4 - Affidavit. of Police Officer # 1 paragraph. 22)*
- *“...at 9:50 pm ...turned over the Applicant to a Qualified Intoxilyzer Technician...” (Exhibit 4 - Affidavit. of Police Officer # 1 paragraph. 30)*
- *“Police Officer # 2 returned the Applicant to my custody...” (Exhibit 4 - Affidavit. of Police Officer # 1 paragraph. 32)*
- *“The Applicant did not indicate to me that he was suffering from a medical problem and did not appear to be in pain or discomfort. He never requested medical treatment and I observed no reason why medical attention would be required.” (Exhibit 4 - Affidavit. of Police Officer # 1 paragraph. 36)*

The following is a summary of the Affidavit sworn on November 22, 2000, by Police Officer # 2 wherein he attests:

- *“...police officer with the Ontario Provincial Police ...for 16 years...” (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 1)*
- *“...qualified breath technician since 1987.” (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 2)*
- *“I asked the Applicant ‘Is there any reason you are not able to provide a breath sample?’ The Applicant ‘No, I had test 5 years ago.’ (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 9)*
- *“...asked him if he understood and the Applicant replied ‘yea yea’” (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 11)*
- *“On the first attempts the Applicant puffed out his cheeks and there was no tone ...second attempt the Applicant again puffed out his cheeks and there was no tone ...third attempt the Applicant again puffed out his cheeks and no tone was activated” (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 13)*
- *“On the forth attempt the Applicant activated the tone for 2 seconds and then stopped blowing...” (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 14)*
- *“On the fifth and sixth attempts the Applicant again just puffed out his cheeks without activating the tone...” (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 15)*

- *“On the seventh attempt the Applicant did activate the Intoxilyzer for 1 second and then stopped blowing...”* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 16)
- *“On the eight, ninth and tenth attempt the Applicant again puffed his cheeks without activating the Intoxilyzer.”* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 17)
- *“On the eleventh attempt the Applicant now sucked in his cheeks.”* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 18)
- *“The twelfth attempt he again puffed his cheeks out without activating “* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 19)
- *“On the thirteenth attempt the Applicant activated ... but stopped blowing after 1 second”* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 20)
- *“The fourteenth attempt the Applicant again puffed our his cheeks without activating...”* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 21)
- *“The Applicant informed me that his back hurt and that it why is why he could not blow...”* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 24)
- *“At no time did the Applicant request medical treatment or appear to be in pain or discomfort...”* (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph 25)

In a letter dated November 28, 2000, Physician # 3, MB,ChB, FRCP(UK)FRCP(C) FCCP, Director of Program in Respiratory Rehabilitation - University of Toronto, states that he is a *“...consultant respiratologist in practice since 1979 with particular interest in chronic respiratory conditions such as: asthma, emphysema and chronic bronchitis ...Director of the University of Toronto, Respiratory Divisional Program in Rehabilitation, ...medical advisor to the pulmonary function laboratories for over 16 years ...familiar with the Alcotest and the Intoxilyzer 5000C...”* .

After assessing *“...the medical report of Physician # 2, as well as the Affidavits of Police Officer # 1 and Police Officer # 2...”*, Physician # 3 asserts that *“From the information provided ...cannot conclude that the Applicant's failure to provide a breath sample related to medical grounds...”* (Exhibit 4)

As the Argument, the Respondent contends in Part III, that *“The appellant ...appealed under Section 50.1(2)(b) of the Highway Traffic Act...”* (Exhibit 4 - Part III - point 45)

The Respondent evaluated the documentation provided for the hearing and *“submits that the appellant was very capable of providing a suitable sample of breath at all relevant times...”* (Exhibit 4 - Part III - point 49)

In support of its position the Respondent cites precedent decisions, and disputes the medical evidence available in this matter:

- *“Physician # 2 fails to link the appellant’s chest pain and/or his chronic bronchitis ...to ...refusal to provide a sample... Physician # 2’s sparse description of ...ailments provide no insight or conclusive evidence as to why the Applicant was unable to complete the test...”*(Exhibit 4 - Part III - point 54)
- *“Physician # 2 to provide any history of testing done on the appellant ...no test results are presented...”* (Exhibit 4 - Part III - point 58)
- *“...lack of specialist’s report ...no mention of a referral ...suggests ...appellant’s condition is so minor ...does not require treatment...”* (Exhibit 4 - Part III - point 59)

In closing, the Respondent alludes to *“...any possible language barrier ...any imaginable communication difficulties are not ground for appeal...”* (Exhibit 4 - Part III - point 61)

In conclusion the Respondent emphasizes that *“...the appellant has not provided any evidence of his own detailing any breathing difficulties on October 7, 2000.”* (Exhibit 4 - Part III - point 64)

APPLICATION OF THE LAW TO FACTS:

Prior to setting out the reasons for the decision, The Tribunal must point out that although noted as part of the documentation available, the Applicant’s Driver Record does not form part of Exhibit 4, the Respondent’s submissions.

The omission of the Applicant’s driving record is not relevant as at issue is, how does the medical condition of the Applicant relate to Section 50.1 (2) (b), and did this medical reason cause him to fail or not comply with the breath demand.

The onus is on the Applicant to provide the Tribunal with a medical reason as to why he was unable to provide a breath sample.

The Tribunal reviewed all evidence submitted by both parties. The Applicant proffers no explanation as to why he failed to provide a breath sample when demanded to do so. The Applicant’s solicitor maintains that the Applicant was not able to provide a breath sample due to medical reasons.

This Tribunal finds the Applicant’s solicitor takes certain contradictory liberties in presenting her interpretation of Physician # 2’s reports. Her arguments are somewhat ambiguous if not negating. It is not possible to argue that *“...the words ‘chest pain non specific type’ are not stated as the medical reason for the Appellant’s inability to provide a breath sample ...these words were used to describe the history of the Appellant’s condition in the medical report of Physician # 2 ”* and that *“...Physician # 2 states that the Appellant was unable to take deep breath, ...due to chest pain.”* (Exhibit 5 - II. Arguments paragraph 15 & 19 respectively)

The Notice of Appeal prepared by Physician # 2, reports a *“hx of chronic bronchitis ...posterior/anterior chest pain increased with breathing ...chest pain non-specific type ...chest x ray Oct 10 00 - normal.”* (Exhibit # 2)

The only other medical evidence tendered by the Applicant, other than the information contained in the Notice of Appeal, is a handwritten note from Physician # 2, "...is under ...care ...for chest pain which increases with breathing ...unable to take deep breaths due to chest pain." (Exhibit # 3)

The Tribunal concurs with the Respondent that there is insufficient evidence to substantiate the Applicant's appeal on medical grounds as "Physician # 2 *fails to link the appellant's chest pain and/or his chronic bronchitis ...to ...refusal to provide a sample...*" (Exhibit 4 - Part III - point 54).

Further, in reviewing both medical reports provided for the hearing, by the Applicant the Tribunal finds that neither of the reports submitted by Physician # 2 complies with the requirements of Sections 15(1) and (2) of Regulation 574 which provides:

15 (1) (c)

" that the medical practitioner had prepared the report or is aware that the report may be used, in support of an appeal to the Tribunal from the suspension of a driver's licence under section 50.1 of the Act."

15 (2)

"The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath sample including the results of any related tests."

Physician # 2's reports simply state the Applicant's present condition, and in no way offer any reason as to why the Applicant could not provide a breath sample.

There is no indication as to whether the Applicant sought medical assistance at the time of the incident. Physician # 2, notes that the Applicant's first visit was on "Oct 10. 2000", three days after the Applicant was stopped by Police Officer # 1. (Exhibit # 3)

The Tribunal has taken into consideration that the Applicant's chest x ray taken on October 10th was "*normal*". Further, as the Respondent contends it appears that Physician # 2 did not access the problem as being severe enough, in nature, to warrant a referral to a specialist.

As to the issue of language, there may be some doubt as to whether the Applicant understood Police Officer # 1. Nonetheless, the Applicant's answer Police Officer # 2 question shows unequivocally that he understood not only the question but the process: "*I asked the Applicant 'Is there any reason you are not able to provide a breath sample?' The Applicant ' No, I had test 5 years ago.'*" (Exhibit 4 - Affidavit. of Police Officer # 2 paragraph. 9)

The Applicant's reply to Police Officer # 2 further establishes that the Applicant did not advise of any medical condition preventing him from providing a breath sample.

Physician # 2 suggests that the Applicant is unable to take deep breaths because of chest pains. Yet there is no indication that the Applicant was suffering from chest pains at the time he was asked to provide a breath sample.

The Tribunal must also rely on the eyewitness testimony offered by both officers. At no time did either officer observe the Applicant to be suffering any physical discomfort. (Exhibit # 4)

The onus being on the Applicant to establish the merit of his appeal, the Tribunal finds that the Applicant has failed to do so. Thus, the Tribunal finds that the Applicant does not meet the criteria of Section 50.1 (2) (b), in that he was not able to demonstrate that he suffers from a medical condition which would prevent him from providing a breath sample.

The Tribunal finds that there is insufficient medical reasons as to why the Applicant was unable to comply with the request to provide breath sample.

DECISION:

Upon the application by the Applicant to appeal the suspension order dated October 7, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Antoine Aouad, M.D.,
Presiding Member

RELEASED: December 20, 2000

ADLS - 356

Appeal under section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to Section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: DR. JEFFREY LEE
Presiding Member

APPEARANCES: KYLE BIEL
Representative for the Registrar of Motor Vehicles

Applicant

Agent for Applicant

DATE OF HEARING: December 13, 2000 Toronto

DECISION

A hearing was held on December 13, 2000, at Toronto, Ontario, by way of an oral hearing to consider the Applicant's appeal pursuant to Section 50.1 of the Highway Traffic Act, R.S.O. 1990, Chap. H.8 amended ("HTA"). The Tribunal makes the following Order, with Reasons to follow:

THE TRIBUNAL CONFIRMS the suspension imposed by the Registrar pursuant to Section 48.3 HTA.

LICENCE APPEAL TRIBUNAL

Dr. Jeffrey Lee
Presiding Member

RELEASED: December 14, 2000

Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 as amended, from a Decision of the Registrar of Motor Vehicles pursuant to section 48.3(2) of that Act;

TO APPEAL A 90-DAY ADMINISTRATIVE DRIVER'S LICENCE SUSPENSION

TRIBUNAL: Jeffrey M. Lee, D.C.
Presiding Member

APPEARANCES: Kyle Biel
Representative for the Registrar of Motor Vehicles

Applicant
Agent for Applicant

DATE OF
HEARING: December 13, 2000

DECISION
RELEASED: December 14, 2000 Toronto

REASONS FOR DECISION

A hearing was held on December 13, 2000, at Toronto, Ontario, to consider the Applicant's appeal pursuant to section 50.1 of the *Highway Traffic Act*, R.S.O. 1990, Chap. H.8 amended ("HTA").

The Tribunal released its Decision on December 14, 2000, with Reasons to follow.

THE TRIBUNAL RULED TO CONFIRM the suspension imposed by the Registrar pursuant to section 48.3 HTA for the following reasons.

REASONS

BACKGROUND:

Notice of Appeal and Prescribed Fee

This appeal comes before the Tribunal on behalf of the Applicant, by way of a Notice of Appeal under section 50.1 of the *Highway Traffic Act*, R.S.O. 1990 as amended, chapter H.8. The Applicant elected that his appeal be decided by the Tribunal by way of an oral hearing. The form of Notice of Appeal under section 50.1 of the *Highway Traffic*

Act was dated November 23, 2000, and was received by the Tribunal on November 24, 2000, together with the prescribed fee of \$100.00, paid by cheque.

Reason for the Appeal

The reason for the appeal cited by the Applicant was stated as follows in the said notice:

"I was unable to provide the required breath sample because of a medical reason."

Preliminary Matters

There were no preliminary matters and the hearing proceeded. Documents were then entered into evidence with the consent of both parties.

Submissions of Written Material

By the Applicant:

- a) Exhibit #1 Notice to Registrar dated November 15, 2000
- b) Exhibit #2 Notice of Appeal Form received November 24, 2000
- c) Exhibit# 3 Medical Letter from Physician # 1, received November 24, 2000

By the Respondent

- a) Exhibit # 4 MTO Submission 21pages

ISSUE:

Having established that this appeal falls within subsection 50.1(2)(b) of the *Highway Traffic Act*, and the Tribunal thereby having jurisdiction, the question to be answered is: Did the Applicant fail or refuse to comply with a demand made to provide a sample of breath because he was unable to do so for a medical reason?

LAW:

The legislation governing the Administrative Drivers Licence Suspension (ADLS) under subsection 50.1(1) and (2) of the *Highway Traffic Act* ("HTA") states:

50.1 (1) "A person whose driver's licence is suspended under Section 48.3 may appeal the suspension to the Tribunal.

(2) The grounds on which a person may appeal under subsection (1) and the only grounds on which the Tribunal may order that the suspension be set aside are,

- (a) that the person whose licence was suspended is not the same individual to whom a demand for a sample of breath or blood was made, or from whom a sample of breath or blood was taken, as the case may be, under or pursuant

to the provisions of the Criminal Code (Canada) referred to in subsection 48.3(3); or

- (b) that the person failed or refused to comply with a demand made under section 254 of the Criminal Code (Canada) to provide a sample of breath or blood because he or she was unable to do so for a medical reason".

The HTA states under Section 50.1(4):

The Board may confirm the suspension or may order that the suspension be set aside.

Regulation 574 (amended), *Highway Traffic Act* at subsection 15(1),(2) and (3) requires that a medical report must contain:

15. (1) "a report of a legally qualified medical practitioner that is to be submitted in evidence shall clearly state,

- (a) the name, telephone number and address, with the postal code, of the medical practitioner;
- (b) the name, date of birth and address of the person who is the subject of the report;
- (c) that the medical practitioner has prepared the report, or is aware that the report may be used, in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act;
- (d) the length of time and frequency with which the medical practitioner has attended upon the person who is the subject of the report, including the date of the most recent examination of the person that supports the findings set out in the report;
- (e) whether the medical practitioner is the family physician of the person who is the subject of the report; and
- (f) whether the medical practitioner is a specialist and, if so, the field of speciality.

(2) The report shall provide the details of any present condition, diagnosis and history of the condition that precludes the person who is the subject of the report from providing a breath or blood sample including the results of any related tests.

(3) The report shall be signed by the medical practitioner."

Finally, section 13 of Regulation 574 (amended) provides:

"A person appealing a suspension has the onus of establishing the merit of the appeal".

FACTS:

The Applicant, was sworn and took the stand. He testified that on the night in question, a friend of his called him and asked that he pick him up because he had car trouble. The Applicant agreed to pick up his friend. He testified that he was driving on Markham Rd. at which time he was pulled over by police. He believed that he may have run a yellow light and that is why he was being stopped. He testified that he was pulled out of the car by a policeman. The Applicant was asked to stand on the sidewalk. He obeyed the officer. His car was searched by plain clothes policeman and nothing was found. According to the Applicant, an officer, identified as Police Officer # 1 took him and put

him into the back seat of his car. He claims that he stated to the officer that he had previously been injured in motor vehicle accident and had injured his neck, chest and back. According to the Applicant, he was not asked any questions, nor was he read the demand for a breath sample. According to the Applicant, he was charged and then released.

The Applicant testified that he was seen by his family physician, Physician # 1 on November 10, 2000 for examination and treatment of injuries received as a result of a motor vehicle accident. Physician # 1's report (Exhibit # 3) noted that the Applicant complained of severe chest and neck pain. The last noted visit was on November 21, 2000 and according to his physician, was still complaining about chest and neck pain.

The Applicant was asked if he was taking therapy and he responded "yes".

When asked if the officer, identified as Police Officer # 1, read anything to him from his notepad, he replied "yes" he did. The Applicant had no further testimony to give and was excused from the stand.

Police Officer # 1 took the stand and was affirmed. He testified that the Applicant, was stopped by Metro Toronto Police on Wednesday, November 15, 2000. The Applicant was questioned by Police Officer # 1 who formed the opinion that the Applicant, was most likely to be operating a motor vehicle with alcohol in his body. Police Officer #1 asked the applicant when he had his last drink, and the Applicant responded "one hour ago, beer". According to Police Officer # 1, he cautioned the driver, read the demand for a breath sample. The officer testified that he also demonstrated the use of the device,

According to Police Officer # 1, the driver stated " I am not doing it, I don't want to." The officer explained the consequences of not providing a breath sample. According to the officer, the driver continued to say: "No, I don't want to" when asked to provide a sample of his breath. The Applicant was subsequently charged with dangerous driving and failure to provide a breath sample and released.

Police Officer # 1 stated that he is not a medical doctor but he is a trained observer. He stated that he did not observe any respiratory distress. He also stated that the driver did not request any medication and did not request any medical attention.

The Tribunal accepts the evidence as presented by Police Officer # 1. The Tribunal recognizes that Police Officer # 1 is not a trained medical person but a trained observer, and the Tribunal accepts his evidence that at no time did the Applicant exhibit any form of respiratory distress or indicate to him that he had a medical condition which would not allow him to provide a sample of his breath.

The report of Physician # 1, the Applicant's medical practitioner, fails to meet the specific requirements of Section 15(1) and Section 15(2) of Regulation 574 of the *Highway Traffic Act*. Physician # 1 does not indicate that she is aware that the report will be used in support of an appeal to the Board from the suspension of a driver's licence under section 50.1 of the Act. Physician # 1's report does not indicate what condition the Applicant suffers from nor how that condition would affect the Applicant's ability to provide a breath sample.

There is no indication in the report as to what treatment(s) have been afforded to the Applicant with respect to physical therapy or drug therapy. The only tests indicated are X-rays, however no radiological report has been included.

APPLICATION OF THE LAW TO FACTS:

In an appeal of this nature, the onus is upon the Applicant to substantiate his position. The documents submitted by the Applicant do not substantiate his claim to the effect that he had a medical condition which precluded him from providing a breath or blood sample.

After reviewing the foregoing facts, the Tribunal finds that the Applicant has not related any medical condition to Regulation 574 and Section 50(1)(2) (3) of Act.

The evidence is clear that the Applicant failed to provide a suitable sample for no established medical reason. In fact the evidence is quite clear that the Applicant flatly refused to provide a sample when requested to by police. In the testimony of Police Officer # 1, the Applicant refused to even attempt to provide a sample. The evidence submitted suggests that the actions of the Applicant were such as to lead this Tribunal to believe that he had no intention of providing a proper breath sample.

The Tribunal concludes from the evidence that there was no medical reason for not providing a suitable breath sample.

The Applicant has not discharged the onus under section 50.1 of the HTA to establish a valid medical reason for his failure to provide a breath sample following a demand made under Section 254 of the Criminal Code (Canada).

DECISION:

Upon the application by the Applicant to appeal the suspension order dated November 15, 2000 of the Registrar of Motor Vehicles pursuant to section 48.3 of the *Highway Traffic Act* ("HTA") and having considered the evidence filed with the Tribunal, and the submissions of the Registrar and of the Applicant;

Pursuant to the authority vested in it under section 50.1(4) of the HTA, the Tribunal confirms the suspension.

LICENCE APPEAL TRIBUNAL

Jeffrey M. Lee, D.C.
Presiding Member

RELEASED: December 20, 2000

LANGIS

MOTOR VEHICLE DEALERS ACT
Revised Statutes of Ontario 1990, Chapter M.42

IN THE MATTER OF
JEAN PAUL LANGIS

AND IN THE MATTER of the PROPOSAL by
the Registrar, *Motor Vehicle Dealers Act*
TO REFUSE REGISTRATION
- Proposal dated: October 10, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

JEAN PAUL LANGIS

Applicant

- and -

REGISTRAR, *MOTOR VEHICLE DEALERS ACT*

Respondent

CONSENT ORDER

Upon the application to the Tribunal by Jean Paul Langis, Applicant, and the Registrar under the *Motor Vehicle Dealers Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act* R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Motor Vehicle Dealers Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 29, 2000

TO: The Registrar
Motor Vehicle Dealers Act
Ontario Motor Vehicle Industry Council
36 York Mills Road Suite #110
Toronto, Ontario
M2P 2E9

AND TO: Licence Appeal Tribunal
12th Floor
1 St. Clair Ave West
Toronto ON M4V 1k6

FROM: Jean Paul Langis
632 Marks Street South
Thunder Bay ON P7E 1M8

In accordance with Section 4.1 of the Statutory Powers Procedure Act, and subsection 5(2) of the Motor Vehicle Dealers Act, (hereafter the "Act") the parties to the proceeding, Jean Paul Langis (hereafter the "Applicant") and the Registrar, Motor Vehicle Dealers Act, (hereafter the "Registrar MVDA") waive the requirement of a hearing and consent to an Order of the Licence Appeal Tribunal (hereafter the "Consent Order") based on the following terms and conditions:

1. The Applicant agrees not to transfer his registration as a motor vehicle salesperson to another dealer without the prior written consent of the Registrar, MVDA.
2. The Applicant agrees to provide the Registrar with a copy of his Bankruptcy Discharge Papers.
3. The Applicant agrees not to be a partner, shareholder, officer, director or sales manager of a motor vehicle dealership.
4. The Applicant agrees not to be the final signatory on any sales contracts on behalf of the dealer.
5. The Applicant agrees to make full payment or make an arrangement for payment of any and all outstanding debts, judgements, fines or other financial obligations, not forgiven by the bankruptcy pursuant to the Bankruptcy and Insolvency Act.
6. The Applicant acknowledges that his registration will not prevent the Registrar, MVDA from taking administrative action, including a proposal to revoke his registration, arising from matters that may have occurred or may occur in the future related to his financial circumstances and honesty and integrity.
7. The Applicant acknowledges that his registration as a motor vehicle salesperson will not prevent the Registrar, MVDA from taking legal action, including a Provincial Offences prosecution, arising from matters that may have occurred or that may occur in the future.
8. The Applicant agrees that he has 60 days to enrol into and successfully complete the OMVIC certification course and that all fees associated are the responsibility of the Applicant.
9. The Applicant hereby consents to an order of the Licence Appeal Tribunal, which may include the Terms and Conditions set out herein.
10. The Applicant hereby withdraws his appeal to the Licence Appeal Tribunal.

11. The Applicant agrees that should he breach any of the terms and conditions set out herein, in whole or in part, that the Registrar, MVDA is directed to, and shall carry out the proposal to revoke, and his registration will automatically be revoked.
12. The Applicant agrees to give a copy of this Order to his employer forthwith.
13. The Applicant acknowledges that he has had the opportunity to obtain independent legal advice with respect to his consent to the terms and conditions set out in this document.

Signed in the City of Toronto, this day of 2000.

(Signature) Jean Paul Langis

These Terms and Conditions are accepted by the Registrar, Motor Vehicle Dealers Act.

Carl Compton, Registrar.

Date:

IMPACT TRAVEL GROUP INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
IMPACT TRAVEL GROUP INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 25, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

IMPACT TRAVEL GROUP INC.

Applicant

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Impact Travel Group Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 21, 2000

BETWEEN:

IMPACT TRAVEL GROUP INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS

BACKGROUND

1. Impact Travel Group Inc. (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel agent under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **November 12, 1997**.
2. On **November 12, 1997**, the Registrant agreed to comply with the terms and conditions for all registrants under the Act and Regulation 806/93 made under the Act (hereinafter referred to as "the Regulation"). Among the terms and conditions of registration to which Ms Finn agreed were the requirement, under section 24 of the Regulation, to file financial statements reviewed by a licenced public accountant at fiscal year end or more frequently depending on the Registrant's sales volume, the requirement, under section 25 of the Regulation, to maintain a minimum working capital level that is dependent on the Registrant's sales volume, and the requirement to comply with the trust accounting provisions and section 36 of the Regulation.

WORKING CAPITAL – GROUNDS FOR THE PROPOSAL

3. On **November 30, 1999**, TICO received the Registrant's financial statements for the year ended **January 31, 1999**, which were due on **April 30, 1999**. The Registrant's financial statements revealed a working capital deficiency of \$155,338.00.
4. By letter dated **January 12, 2000**, TICO advised the Registrant that the financial statements for the year ended **January 31, 1999** revealed a working capital deficiency of \$155,338.00. The Registrant was reminded of the obligation, under the Regulation, to maintain a minimum positive working capital. Based on the Registrant's reported sales of \$763,000.00, a minimum working capital of \$5,000.00 was required. TICO advised the Registrant that in order to comply with

the Regulation, an improvement of \$160,338.00 in working capital was required by **January 31, 2000**.

5. On **February 3, 2000**, TICO conducted an inspection of the Registrant. The inspection revealed that the working capital deficiency remained outstanding, despite TICO's **January 12th** letter. The Registrant claimed not to have received the letter. The inspector left a copy of the letter with the Registrant and advised that a second request would be issued giving an approximate deadline of late February to address the working capital deficiency. The inspection also revealed that the Registrant was not adhering to the Act's requirement for trust accounting.
6. By letter dated **February 7, 2000**, the Registrar of TICO ("the Registrar") requested that the Registrant correct the working capital shortfall of \$160,338.00 and advised the Registrant that it was in contravention of subsection 25(1) of the Regulation. The Registrar also informed the Registrant that if TICO did not receive a reply and evidence of correction by **February 23, 2000**, the Registrar would have no alternative but to initiate administrative action, including a possible proposal to revoke registration under the Act.
7. The working capital deficiency was not corrected by the **February 23, 2000** deadline. Therefore, on **February 25, 2000**, pursuant to section 6 of the Act, the Registrar issued a Notice of Proposal to Revoke Registration on the grounds that the Registrant was in contravention of the Act and regulations by maintaining a working capital shortfall of \$160,338.00.

Events After the Issuance of the Proposal

8. By letter dated **March 1, 2000**, the Registrant gave written notice of the Registrant's desire to appeal the Proposal to Revoke Registration.
9. On **April 17, 2000**, the Registrant advised TICO that it expected to be purchased by another company and that the transaction was expected to close on or before **May 31, 2000**. The Registrant anticipated that the sale would address TICO's concerns about the Registrant's working capital shortfall.
10. By **May 10, 2000**, the Registrant, who has a fiscal year end of **January 31st**, had not submitted its financial information for the year ended **January 31, 2000**, as required under section 15 of the Act and section 24 of the Regulation, despite a request for such information from TICO on **February 3, 2000**.
11. On **December 8, 2000**, the Registrant provided its financial statements for the year ended **January 31, 2000**, which were due on **April 30, 2000**. A review of these statements revealed that the Registrant's working capital deficiency had not been corrected.
12. To date, the Registrant has not been sold due to delays in the purchaser obtaining approval from the Securities Exchange Commission and the NASDAQ.
13. The Registrant's working capital deficiency has not been corrected.
14. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated **February 25, 2000**;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - (a) The Registrant shall correct any and all working capital deficiencies and provide proof of such correction, to the satisfaction of the Registrar, by **February 28, 2001**. At all times thereafter, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of the Regulation or such subsequent provision as may be in force from time to time, and which it has acknowledged in its Terms and Conditions of Registration;
 - (b) The Registrant shall file complete financial statements for the fiscal year ended **January 31, 2001** no later than **April 30, 2001**;
 - (c) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - (d) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time on or before the legislated due date;
 - (e) If any of the Registrant's future financial statements reveal a working capital deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.
 - (f) The Registrant shall maintain a proper trust account and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
 - (g) The Registrant shall submit a monthly trust account reconciliation to the Registrar on or before the last business day of each month for the preceding month, beginning on **February 28, 2001**, for the month of **January, 2001**, for so long as the Registrar shall so require; and
 - (h) If the above-noted trust account reconciliations as filed according to (ii)(g) are incomplete or reveal a customer deposit deficiency, the Registrant will

have **ten (10) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. TICO shall send notice of the deficiency, if any, by courier or registered mail to the Registrant.

- (iii) Should the Registrant fail to comply with any of the above conditions (ii) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- (iv) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of December, 2000

Mr. Lawrence Finn
Impact Travel Group Inc.
Act
I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry*

GOLFPLUS VACATIONS INC.

TRAVEL INDUSTRY ACT
Revised Statutes of Ontario, 1990 Chapter T.19

IN THE MATTER of the REGISTRATION of
GOLFPLUS VACATIONS INC.
as a travel agent

AND IN THE MATTER of the PROPOSAL of the
Registrar under the *Travel Industry Act*
made pursuant to section 6 of the *Travel Industry Act*
TO REVOKE REGISTRATION
- Proposal dated: February 25, 2000

AND IN THE MATTER of a requirement for a hearing respecting the said Proposal

GOLFPLUS VACATIONS INC.

- and -

REGISTRAR, *TRAVEL INDUSTRY ACT*

Applicant

Respondent

CONSENT ORDER

Upon the application to the Licence Appeal Tribunal by Golfplus Vacations Inc., the Applicant, and counsel for the Registrar under the *Travel Industry Act* for issuance of a Consent Order of the Tribunal without a hearing pursuant to section 4.1 of the *Statutory Powers Procedure Act*, R.S.O. 1990, chapter S.22; and

Having reviewed the written settlement signed by the Applicant and the Registrar under the *Travel Industry Act* as to the disposition of these proceedings which is filed and attached hereto as Schedule AA@;

NOW THEREFORE, upon the consent of the parties, this Tribunal orders that the proceedings in this matter are disposed of without a hearing on the basis of the terms set out in the said Schedule AA@.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

Released: December 21, 2000

BETWEEN:

GOLFPLUS VACATIONS INC.

Applicant

- and -

REGISTRAR, TRAVEL INDUSTRY ACT

Respondent

WAIVER AND CONSENT

In accordance with section 4.1 of the *Statutory Powers Procedure Act*, the parties hereto waive the requirement of a hearing and consent to a Decision in writing based upon the following Agreed Statement of Facts and Joint Submission.

AGREED STATEMENT OF FACTS **BACKGROUND**

1. Golfplus Vacations Inc./Vacances Golfplus Inc. (hereinafter referred to as the "Registrant") is a company incorporated pursuant to the laws of Ontario and has been registered as a travel wholesaler under the *Travel Industry Act*, R.S.O., c. T-19, as amended (hereinafter referred to as "the Act") since **August 12, 1998**.
2. On **July 22, 1998**, the Registrant agreed to comply with the terms and conditions for all registrants under the Act and Regulation 806/93 made under the Act (hereinafter referred to as the "Regulation"). Among the terms and conditions of registration to which the Registrant agreed were the requirement, under section 24 of the Regulation, to file financial statements reviewed by a licenced public accountant at fiscal year end or more frequently depending on the Registrant's sales volume, the requirement, under section 25 of the Regulation, to maintain a minimum working capital level that is dependent on the Registrant's sales volume, and the requirement to comply with the trust accounting provisions and section 36 of the Regulation.
3. On **August 12, 1998**, the Registrant agreed to additional terms and conditions of registration in which and further acknowledged that it read, understood, and would ensure compliance with the terms and conditions under the Act and the Regulation.

WORKING CAPITAL – GROUNDS FOR THE PROPOSAL

4. On **November 30, 1999**, TICO received the Registrant's Financial Statements for the period from **July 6, 1998** (Date of Incorporation) to **January 31, 1999**, which were due on **April 30, 1999**. The Registrant's Financial Statements revealed a working capital deficiency of \$77,349.00.

5. By letter dated **December 15, 1999**, TICO advised the Registrant that the financial statements for the year ended **January 31, 1999** revealed a working capital deficiency of \$77,349.00. The Registrant was reminded of the obligation, under the Regulation, to maintain a minimum positive working capital. Based on the Registrant's reported sales of \$160,938.00, a minimum working capital of \$5,000.00 was required. TICO advised the Registrant that in order to comply with the Regulation, an improvement of \$82,349.00 in working capital was required by **January 6, 2000**.
6. By letter dated **January 12, 2000**, the Registrant was again requested to address the working capital deficiency.
7. On **February 3, 2000**, TICO conducted an inspection of the Registrant. The inspection revealed that the working capital deficiency remained outstanding at the time of the inspection, despite the two letters from TICO. The Registrant claimed that they did not receive TICO's requests. The inspector left a copy of the request with the Registrant and advised the Registrant that the Registrar for TICO ("the Registrar"), would issue a third request giving an approximate deadline of late February to address the working capital deficiency. The inspection also revealed that the Registrant was not adhering to the Act's requirement for trust accounting.
8. By letter dated **February 7, 2000**, the Registrar requested that the Registrant correct the working capital shortfall of \$82,349.00 and advised the Registrant that it was in contravention of subsection 25(1) of the Regulation. The Registrar also informed the Registrant that if TICO did not receive a reply and evidence of correction by **February 23, 2000**, the Registrar would have no alternative but to initiate administrative action, including a possible proposal to revoke registration under the Act.
9. The working capital deficiency was not corrected by the **February 23, 2000** deadline. Therefore, on **February 25, 2000**, pursuant to section 6 of the Act, the Registrar issued a Notice of Proposal to Revoke Registration on the grounds that the Registrant was in contravention of the Act and regulations by maintaining a working capital shortfall of \$82,349.00.

Events After the Issuance of the Proposal

10. By letter dated **March 1, 2000**, the Registrant gave written notice of the Registrant's desire to appeal the Proposal to Revoke Registration.
11. On **April 17, 2000**, the Registrant advised TICO that it expected to be purchased by another company and that the transaction was expected to close on or before **May 31, 2000**. The Registrant anticipated that the sale would address TICO's concerns about the Registrant's working capital shortfall.
12. By letter dated **August 10, 2000**, TICO reminded the Registrant of its obligation to submit its financial information under section 15 of the Act and section 24 of the Regulation. TICO required the information on or before **November 30, 2000**.
13. On **December 8, 2000**, the Registrant provided its financial statements for the year ended **January 31, 2000**, which were due on **April 30, 2000**. A review of

these statements revealed that the Registrant's working capital deficiency had not been corrected.

14. To date, the Registrant has not been sold due to delays in the purchaser obtaining approval from the Securities Exchange Commission and the NASDAQ.
15. The Registrant's working capital deficiency has not been corrected.
16. The parties agree that the facts set out in the above-noted document are true.

JOINT SUBMISSION

Accordingly, the parties consent to an order of the Licence Appeal Tribunal under subsections 6 (4) and (5) of the *Travel Industry Act* directing that:

- (i) the Registrar refrain from carrying out the Proposal to Revoke Registration dated **February 25, 2000**;
- (ii) the Registrant's registration is to be subject to the following conditions:
 - (a) The Registrant shall correct any and all working capital deficiencies and provide proof of such correction, to the satisfaction of the Registrar, by **February 28, 2001**. At all times thereafter, the Registrant shall maintain a minimum working capital as required pursuant to section 25 of the Regulation or such subsequent provision as may be in force from time to time, and which it has acknowledged in its Terms and Conditions of Registration;
 - (b) The Registrant shall file complete financial statements as required pursuant to section 24 of the Regulation, for the fiscal year ended **January 31, 2001** no later than **April 30, 2001**;
 - (c) If the above-noted financial statements as filed are incomplete and/or reveal an insufficient working capital amount, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency, if any, shall be sent by registered mail to the Registrant;
 - (d) In future, the Registrant shall file any and all interim and final financial statements for every year of registration as required by section 24 of the Regulation or such subsequent provision as may be in force from time to time on or before the legislated due date;
 - (e) If any of the Registrant's future financial statements reveal a working capital deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.

- (f) The Registrant shall maintain a proper trust account and comply with the trust accounting requirements as stipulated in section 36 of the Regulation or such subsequent provision as may be in force from time to time;
- (g) The Registrant shall submit a monthly trust account reconciliation to the Registrar on or before the last business day of each month for the preceding month, beginning on **February 28, 2001**, for the month of **January, 2001**, for so long as the Registrar shall so require;
- (h) If the above-noted trust account reconciliations as filed according to (ii)(g) are incomplete or reveal a customer deposit deficiency, the Registrant will have **ten (10) days** from the date of the notice of the deficiency to fully and completely address any deficiency and produce proof of the correction acceptable to the Registrar in his sole discretion. Notice of the deficiency, if any, shall be sent by courier or registered mail to the Registrant; and
- (i) If any of the Registrant's future financial statements reveal a working capital deficiency, the Registrant will have 30 days from the date of notice of the amount of the deficiency to fully and completely address any deficiency and produce proof of such correction to the Registrar. Notice of the working capital deficiency will be sent by registered mail to the Registrant.
- (iii) Should the Registrant fail to comply with any of the above conditions (ii) (a) to (c) inclusive, the Registrar shall revoke the Registrant's registration on five (5) days written notice sent via hand delivery or by registered mail.
- (iv) This order shall enure to the benefit of and be binding upon the respective successors and assigns of each of the parties to this order.

INDEPENDENT LEGAL ADVICE

The Registrant further acknowledges by its signature below that it has obtained or has had the opportunity to obtain independent legal advice with respect to its consent to the terms and conditions set out in this document.

DATED at Mississauga this ____ day of December, 2000

Mr. Dan Langevin, President
Golfplus Vacations Inc.
Act

I have authority to bind the corporation

Mr. Michael Pepper
Registrar, *Travel Industry*

SADOWSKI

RYSZARD SADOWSKI

APPEAL FROM A DECISION OF THE CORPORATION
DESIGNATED FOR THE PURPOSE OF THE
ONTARIO NEW HOME WARRANTIES PLAN ACT

TO DISALLOW A CLAIM

TRIBUNAL: WILLIAM McINTOSH, Vice-Chair

APPEARANCES:

No one appearing for the Applicant
ANDREA YORK, Counsel, on behalf of the Ontario New Home
Warranty Program
JEFF SHORE AND ABE SHORE, Agents representing the Added
Party, Sun Shore Homes Ltd.

DATE OF
HEARING: November 27, 2000 Toronto

ORDER

PURSUANT to the provisions of the *Ontario New Home Warranties Plan Act* R.S.O. 1990, Chapter 0.31 as amended, Ryszard Sadowski (the "Applicant") appealed a Decision of the Ontario New Home Warranty Program (the "Program") set out in a Decision Letter dated April 28, 2000;

WHEREAS, this matter was scheduled for hearing from Monday, November 27, 2000 until November 30, 2000 at the Tribunal and recommencing on December 11, 2000 until December 14, 2000;

AND WHEREAS, a facsimile message was received by the Tribunal on Saturday, November 25, 2000 at 12:34 p.m. from the agent for the Applicant stating that she had not received the Appointment for and Notice of Hearing and that she would not be attending on the appointed date and requesting that an adjournment be granted;

AND WHEREAS, the agent for the Applicant was notified by telephone on the appointed date prior to the commencement of the hearing requesting her appearance and that request was refused;

AND WHEREAS, a review of the file indicates that the agent for the Applicant was sent an Appointment for and Notice of Hearing by courier on September 25, 2000 and was contacted by telephone as a reminder on November 23, 2000;

AND WHEREAS, objection was taken to the granting of an adjournment by both counsel for the Program and agent for the Added Party;

ON READING the Appointment for and Notice of Hearing and the documentation confirming service of the Appointment for and Notice of Hearing on the Applicant's agent and on hearing submissions of the counsel for the Program and the agent for the Added Party, no one appearing for the Applicant although duly notified; this Tribunal finds that due to the non-attendance and failure to proceed on the part of the Applicant, the Applicant has abandoned these proceedings.

PURSUANT to the authority vested in it under section 16(3) of the *Ontario New Home Warranties Plan Act*, this Tribunal Orders and directs the Ontario New Home Warranty Program to disallow the Applicant's claim.

LICENCE APPEAL TRIBUNAL

William McIntosh
Vice-Chair

Released: December 1, 2000

**HIGHWAY TRAFFIC ACT,
R.S.O. 1990, CHAP. H.8 AS AMENDED, SECTION 50(1)**

IN THE MATTER of an application by the
Applicant to appeal the decision of the
Registrar of Motor Vehicles pursuant to section
47(1) of the *Highway Traffic Act*;

AND IN THE MATTER of

APPLICANT

APPLICANT

and

THE REGISTRAR OF MOTOR VEHICLES

RESPONDENT

ADJOURNMENT

WHEREAS an oral hearing in the above matter was scheduled to be held on Thursday, December 21, 2000 at the Tribunal;

AND WHEREAS a letter dated December 8, 2000 was filed by the Applicant requesting an adjournment;

TAKE NOTICE, upon consent of all parties, the Tribunal Orders:

- (1) this matter is adjourned;
- (2) the appeal shall be heard at 9:30 a.m. on Monday, January 29, 2001 at the Tribunal's Chambers, 1 St. Clair Avenue West, 12th Floor, Toronto, Ontario.

LICENCE APPEAL TRIBUNAL

G. Kent McClure, Q.C.
Chair

RELEASED: December 15, 2000

SUPERIOR COURT OF JUSTICE
(Divisional Court)

Court File No. 223/99

Between:

Vito Auciello

Appellant(s)

And

Commercial Registration Appeal Tribunal
Registrar – Real Estate and Business Brokers Act,
Real Estate Council Of Ontario and
Ministry of Consumer and Commercial Relations

Respondent(s)

NOTICE OF ABANDONMENT

The Appellant Abandons This Appeal.

Date: September 27, 2000

Vito Auciello
248 Havelock St
Toronto, Ont. M6H-3B9
Tel: (416) 534-6712

cc to: Commercial Registration Appeal Tribunal
1 St. Clair Avenue West, 12th Floor
Toronto, Ont. M4V 1K8
Tel: (416) 314-4260

cc to: Registrar – Real Estate and Business Brokers Act, RECO
3250 Bloor Street West, East Tower, Suite 600
Toronto, Ont. M8X 2X9

cc to: The Ministry of Consumer and Commercial Relations
Legal Services Branch
33rd Floor, The Eaton Tower
250 Yonge Street
Toronto, Ont. M5B 2N5
tel: (416) 326-8440

ONTARIO SUPERIOR COURT OF JUSTICE
(Divisional Court)

Appeal Book

Court File No. 106/2000

KRZYSZTOF MAZUR

AND

REGISTRAR OF THE CONSUMER REPORTING AGENCIES UNDER SECTION
14(1)(2) TO THE CONSUMER REPORTING ACT

Before: Southey J., Kuzak J., Lederman J.

Date : Dec. 6/00

The appellant failed to put forward any cogent evidence that the decisions of the Registrar, dated March 11/99 and May 5/99 were inaccurate for failed to comply with the provisions of the Consumer Reporting act or regulations. He appealed to CRAT, but again failed to produce any evidence. Indeed, he did not appear at the second hearing on January 25, 2000. CRAT was justified in dismissing his appeal, and we find no error in the decision of CRAT. The appeal is dismissed. In the circumstances, there will be no order as to costs.

"Southey J."

ONTARIO SUPERIOR COURT OF JUSTICE
(Divisional Court)

Appeal Book

JACOBS SALES & SERVICE et al.

v.

REGISTRAR OF MOTOR VEHICLE DEALERS AND SALESMEN

Court File No. 558/98

Before: Gravely J., Matlow J., Marchand J.

Date : Nov. 23/00

We are not satisfied the Tribunal was in error. There was ample evidence to allow it to reach the conclusion it did. Nor was the penalty overly severe. Integrity of odometer readings is fundamental to the proper governing of a motor vehicle dealer and the appeal by both appellants must be dismissed.

The evidence is that Mr. Jacobs has made sincere efforts to reform his business practices. He no longer employs the salesperson who was involved in at least some of the odometer tampering. He no longer deals in T.M.U. vehicles and has not reoffended. He may then wish to reapply for registration. To allow him to do so or take whatever steps may be necessary to reorganize his business affairs we agree to temporarily stay the Tribunal decision.

The appeal is dismissed. The Decision of the Tribunal is stayed for a period of 60 days.

Costs are fixed @ \$1500.

I agree

I agree

"Gravely J."

"Matlow J."

"Marchand J."

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

O'DRISCOLL, MARCHAND and AITKEN, JJ.

BETWEEN:

JOHN EDMUNDS and
DIANA LINKLATER

Applicants (Appellants)

and

ONTARIO NEW HOME WARRANTY
PROGRAM

Respondent

Helen A. Daley, for the Applicants (Appellants)

Peter Balasubramanian, for the Respondent

HEARD at Toronto: January 25, 2000

O'DRISCOLL J. (orally)

[1] The appellants/applicants appeal to this Court under the provisions of s.11(1) of the *Ministry of Consumer and Commercial Relations Act*, R.S.O. 1990, c. M.21 from the decision of the Commercial Registration Appeals Tribunal (CRAT), dated May 14, 1998, directing the Ontario New Home Warranty Program (Program) to disallow the appellants' claim.

[2] The appellants each contracted with Buckingham Estates Limited for the purchase of a new condominium. The condominiums in question were located in Niagara Falls. Pursuant to two (2) contracts entered into by Edmunds and Buckingham, Edmunds agreed to purchase and the developer agreed to sell two (2) units of the condominium. The appellant, Linklater, entered into a similar agreement with Buckingham for the purchase of one (1) unit. The three (3) contracts required the payment of a deposit of \$17,900 per condominium, which was to be applied to the purchase price. Both appellants paid all required deposits under the contracts. According to the agreements, the date of possession of all three (3) units was June 1, 1989. The agreements allowed for an extension of the dates of possession until June 1, 1992. The appellants submit that a further term of the three agreements required the vendor, Buckingham, to provide mortgage financing to Edmunds and Linklater for the balance of the purchase price due upon closing.

[3] In February 1991, Buckingham's principal became bankrupt, and, as a result, Buckingham abandoned the condominium project. According to the CRAT decision, by

the terms of their agreements, the appellants agreed and undertook to accept the transfer of the title of their respective units from Coventry. According to the appellants, however, Coventry made it clear that it would not provide the mortgage financing, an essential term of the contracts between the appellants and Buckingham and would not complete those contracts pursuant to their terms.

[4] A written notice was given by Coventry and received by the appellants toward the end of September 1991. The notice required the appellants to make payments of outstanding interim occupancy charges and it advised the appellants of Coventry's readiness to honour the agreements between the appellants and Buckingham and to close the transactions by November 1, 1991. The appellants did not comply with Coventry's request for payment of the occupancy fees and did not make any payments with respect to any amounts due and owing under the said agreements.

[5] Subsequently, Coventry sold the three (3) units in question to third parties and reduced the purchase price of each unit so sold to the new purchasers by the amount of the deposits that were paid to Buckingham by the appellants.

[6] The appellants argued before CRAT that they did nothing to forfeit their right to the return of the deposits under the purchase agreements with Buckingham. As a result, they submitted a claim to the Program for compensation for the loss of their deposits. *The Ontario New Home Warranties Plan Act*, states:

"14.(1)Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;

.... the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations."

[7] We are of the view that,

1) the principal of the vendor went bankrupt and, thereafter, Buckingham breached the contract between Buckingham Estates and the appellants/purchasers;

2) there was no new or second agreement between the appellants and Coventry. At pages 84-85 of the transcript, the witness, called by the Program before CRAT, a lawyer named Mr. Paul Heath, who was acting for Coventry, gave evidence as follows:

THE CHAIR: So is there - do you feel that this is possibly a variation of the agreement?

THE WITNESS: From our perspective, from Coventry's perspective, we had no agreement.

[8] We are also of the view that there was no agency relationship as between Buckingham Estates and Coventry. We are also of the view that the appellants have fulfilled the conditions of s. 14(1) of the Act and are entitled to be paid out of the fund. Moreover, we are of the view that s. 14(2) of the Act:

(2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person or owner from any source.

is not applicable to the facts of this case.

[9] In the result, the appeal is allowed, the decision on appeal is set aside. The appellants are entitled to be paid out of the Fund the amounts of the deposits, namely, three times \$17,900 plus interest as set out in:

- 1) Regulation 892 under the *Ontario New Home Warranties Plan Act*,
- 2) Section 53 of the *Condominium Act*, R.S.O. 1990, c.C.26, and
- 3) Section 35 and s.53 of Regulation 96 made under the *Condominium Act of Ontario*.

[10] After hearing submissions and then consulting with my colleagues, I have endorsed the back of the Appeal Book as follows:

"This appeal is allowed for the oral reasons given for the Court by O'Driscoll J.
Costs of this appeal are fixed at \$5,000.00 payable by the Respondent to the Appellants."

"O'Driscoll J."
O'Driscoll J.

"Marchand J."
Marchand J.

"Aitken J."
Aitken J.

Released: April 7, 2000

ONTARIO
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

O'LEARY, HARTT and SWINTON JJ.

BETWEEN:

JOSEPH FLORIO

Applicant (Appellant)

- and -

ONTARIO NEW HOME WARRANTY
PROGRAM

Respondent (Respondent in Appeal)

- and -

753907 ONTARIO INC.

Added Party (Respondent)

Jeffrey D. Gray, for the Applicant (Appellant)
Peter J Mitchell, for the
Respondent
(Respondent in
Appeal)
Brian A. Campbell, for
the Added Party
(Respondent)

HEARD: April 4, 2000

O'LEARY J.: (Orally)

[1] Florio is the original purchaser and registered owner of property municipally known as 48 Eldorado Street, Richmond Hill, Ontario. He purchased the property by way of an agreement of purchase and sale dated May 6, 1997, and took possession of the home on August 28, 1997.

(2) He appeals from a decision of the-Commercial Registration Appeal Tribunal, overturning certain decisions of the Ontario New Home Warranty Program.

(3) The most significant issue raised by Florio on this appeal is the alleged failure of the Tribunal to apply the *contra proferentem* rule against the builder vendor in dealing with an ambiguity in the agreement of purchase and sale.

[4] One clause in the agreement provided the vendor was to construct a bungalow of a type chosen by the purchaser and identified by way of a sketch, the plans for

which when prepared disclosed a nine foot ceiling. Another clause provided the "bungalow" (meaning the standard bungalow usually built by the vendor) was to have a ten foot ceiling.

[5] It is doubtful in our view that in the circumstances existing here that the *contra proferentem* rule applies to such an ambiguity for it is not just a question of interpreting a particular clause but of deciding which of two clauses reflects the agreement of the parties. As well, it cannot be said that the purchaser was faced with an agreement "with no opportunity to modify its wording", (see *Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd.* (1986), 25 D.L.R. (4th) 649 @ p. 657.

[6] Indeed, the purchaser did alter the wording of the agreement by providing that the vendor build a bungalow in accordance with a sketch he produced, the very alteration that created the ambiguity. In resolving the ambiguity and deciding that the parties had understood the height of the ceiling was to be nine feet, the Tribunal took into account that the purchaser knew before closing, that the bungalow had been constructed with a nine foot ceiling, made no complaint and closed the transaction. We see no error in that finding.

[7] Virtually all the other issues raised relate to findings of fact made by the Tribunal. There was, in our view, evidence to support all of those findings and they cannot be disturbed by us.

[8] In summary, we find no errors in law or misapprehension of the evidence by the Tribunal. The appeal is, therefore, dismissed.

[9] For reasons given orally, the appeal is dismissed with costs to Ontario New Home Warranty fixed at \$2,000.00 and 753907 Ontario Inc. fixed at \$1,000.00.

"O'Leary J."
O'LEARY J.

"Hartt, J."
HARTTJ.

"Swinton J."
SWINTON J.

Released: April 18, 2000

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

REGISTRAR OF GAMING CONTROL ("APPELLANT")

and

ANDREW FERRUSI ("RESPONDENT")

BEFORE: MacFarland, Lang, Ground

DATE: October 6, 2000

DISPOSITION – THIS APPEAL is dismissed

While the tribunal made no specific finding that the appellant's past conduct – in its view – did not afford reasonable grounds for a belief that he would not carry on business in accordance with law and with integrity and honesty – it is implicit that it did so.

That the tribunal was aware of the proper test is clear from its reasons. At page 2 thereof it states the Registrar's findings, at page 7 the Brenner case.

The tribunal analyzed the evidence which the Registrar had relied upon and found it wanting at page 8 thereof: "Having reviewed all the evidence and the principles of law to which I have referred, I have come to the conclusion that the Tribunal should direct the Registrar to grant registration to the applicant".

It is implicit that the tribunal found the Registrar in error in her finding that the past conduct did afford reasonable grounds for a belief that he would not carry on business in accordance with law and with integrity and honesty and in effect failed to appreciate the evidence before her.

Moreover, there is no error and the appeal is dismissed.

"MacFarland J."

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

THE HONOURABLE MR. JUSTICE KENT
THE HONOURABLE MR. JUSTICE CUNNINGHAM
THE HONOURABLE MR. JUSTICE McKINNON

MONDAY, THE 15TH DAY OF MAY, 2000

BETWEEN:

ELGIN CONDOMINIUM CORPORATION NO. 4

Applicant
(Appellant)

and

ONTARIO NEW HOME WARRANTY PROGRAM

Respondent
(Respondent in Appeal)

ORDER

THIS APPEAL by the Appellant for an order setting aside the Order of Mr. Dennis J. Condos, Vice-Chair of the Commercial Registration Appeals Tribunal dated July 6, 1998 made at Toronto, Ontario, was heard this day at London, Ontario.

ON READING the Notice of Appeal, Appeal Book and the Factum of the Appellant, the Factum of the Respondent, Ontario New Home Warranty Program, and on hearing the submissions of counsel for the Appellant and the Respondent,

1. THIS COURT ORDERS that the appeal be dismissed.
2. THIS COURT ORDERS that the Appellant is to pay costs of the appeal to the Respondent fixed in the amount of \$2,000.00

THIS ORDER BEARS INTEREST at the rate of 7.0 per cent per year commencing on May 15, 2000.

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

O'DRISCOLL, WHALEN AND J.W. QUINN JJ.

BETWEEN:

ONTARIO NEW
HOME WARRANTY
PROGRAM

Appellant (Respondent)

- and -

DONNA G. GOURLAY

Respondent (Applicant)

- and -

TOWN-WOOD HOMES LIMITED

Appellant (Added Party)

HEARD at Toronto: September 13, 2000

TJ Hill, for the Program
Donna Gourlay and Glen Gourlay In Person
M.A. Cohen, for the Town-Wood Homes Limited

THE COURT:

I. Nature of the Proceedings

[1] The Ontario New Home Warranty Program (Program) appeals to the Divisional Court under the provisions of s. 1 (1) of the *Ministry of Consumer and Commercial Relations Act*, R.S.O. 1990, c. M. 21.

s. 11(1) Any party to proceedings before the Tribunal may appeal from its decision or order to the Divisional Court in accordance with the rules of court

(5) An appeal under this section may be made on questions of law or fact or both and the court may exercise all the powers of the Tribunal, and for such purpose the court may substitute its opinion for that of the Registrar or of the Tribunal, or the court may refer the matter back to the Tribunal for rehearing, in

whole or in part, in accordance with such directions as the court considers proper.

[2] The appeal is from a decision of the Commercial Registration Appeal Tribunal (CRAT), dated September 17, 1998, ordering the Program to obtain title to certain property on behalf of Donna Gourlay or, in the alternative, to pay to Ms. Gourlay \$4,889.12, being CRAT's estimate of the value of the property alleged to be in dispute.

[3] At the opening of the appeal, an order was made under rule 13.03 of the Rules of Civil Procedure adding Town-Wood Homes Limited as a party to this appeal.

The appeal fails.

II. Background and Chronology

[4] On June 3, 1996 Ms. Gourlay signed a Purchase and Sale Agreement (Agreement) with Town-Wood Homes Limited (Town-Wood) to purchase Lot 108-40, Unit, 1, Plan 43 M-1175, Brampton, known municipally as 49 Yellow Brick Road, The Agreement states:

The undersigned Donna G. Gourlay (the "Purchaser") hereby agrees to and with Town-Wood Homes Limited (the "Vendor"), to purchase all and singular the premises on the East side of Yellow Brick Road in the City/Town of Brampton (the "Municipality"), in the Regiona.1 Municipality of Peel (the "Region") and being (part of) Lot No. 108 according to Registered Plan No. 43M-1175 (the "Plan of Subdivision") having a frontage of about per schedule "L" metres, more or less, by a depth of XXXXXXXX metres more or less, (the "Real Property") for the sum of One Hundred and Twenty-Four Thousand Nine Hundred----- DOLLARS (\$124,900,00)

[5] Unit 40 and Unit 37 share a side yard which gives each of those units access to its main entrance. The side yard for Unit 40 and Unit 37 is fully owned by the owner of Unit 37. Ms. Gourlay has an easement over the side yard. Schedule "L" (supra) depicts Lots 106, 107 and 108. Schedule "L" shows the division of the lots into separate parts and gives approximate dimensions. However, Schedule "L" does not indicate which property is owned by each of the individual units on the given lot. Thus, Schedule "L" is helpful as an overall site plan of Lot 108 but did not describe the property Ms. Gourlay was purchasing. Before CRAT, Ms. Gourlay so admitted.

[6] To identify what property Ms. Gourlay was purchasing according to The Agreement, it was necessary to examine the description set out in the Transfer Deed and compare that description with the registered plan.

[7] The plan of subdivision was deposited with the Land Registrar for Land Titles Division of Peel on September 9, 1996 and became Plan 43R21797. The north half of Lot 108 is shown to have four (4) parts:

Part 35: a 40 cm. strip bordering the north wall of Unit 40

Part 36: a 1.2 m. irregularly-shaped strip of the Side Yard, bordering
Part 35 and 37

Part 37: the property occupied by Unit 40, the patio and driveway

Part 38: the property occupied by Unit 37, the patio, the driveway and all the Side Yard, save for Parts 35 and 36.

Parts 35 and 36 represent the Side Yard.

[8] In a letter, dated September 12, 1996, the solicitor for the vendor, Town-Wood sent to Ms. Gourlay's solicitor a reproduction of that part of Registered Plan of survey 43R21797 showing Lot 108. Town-Wood's solicitor in the same letter sent to Ms. Gourlay's solicitor a draft transfer deed. It showed that Part 37 was being conveyed to Ms. Gourlay along with an easement over Part 35 and Part 36 (Side Yard) and that no title in Parts 35 and 36 was being conveyed to Ms. Gourlay.

[9] Ms. Gourlay's solicitor made no objections to title. The transaction closed on September 27, 1996.

[10] One year later, by letters of September 12, 1997 and September 24, 1997, Ms. Gourlay asserted that she should have received legal title (rather than an easement only) to a 25.564 square meter area of land at the side of her fourplex (the Side Yard).

[11] The Program contacted Town-Wood's president, Antonio Guglietti.

[12] On August 6, 1997, Mr. Guglietti wrote to Ms. Gourlay and acknowledged that TownWood had accidentally failed to include a right of way for access with the transfer deed and advised Ms. Gourlay that Town-Wood had obtained a right of way for access and enclosed a copy of the document providing access. The form was ready for registration, Ms. Gourlay has never registered the document granting access to the Side Yard.

[13] In his affidavit, sworn August 27, 1998, Antonio Guglietti, president of Town-Wood Homes Limited, deposed:

14. It was always the intention of Town-Wood to convey ownership of the access route to the rear-unit owner.

15. In order to complete Donna Gourlay's title, on or about October 31, 1997, I delivered to Donna Gourlay a Transfer of Access Right-of-Way (the "Transfer"), executed by the rear unit owner, Lori Cullen, to be registered by Donna G. Gourlay's solicitor. Attached hereto to this my affidavit and marked as **Exhibit "G" (Tab 9)**, is a true copy of my correspondence to Donna G. Gourlay, and a true copy of the enclosed form of transfer.

16. The Ontario New Home Warranty Program was satisfied with this solution as can be seen in its letter dated May 21, 1998, to Donna Gourlay. Attached hereto to this my affidavit and marked as **Exhibit "H" (Tab 10)** is a true copy of this letter,

17. Out of the 65 quattroplex units sold to purchasers who were represented by solicitors, only Donna Gourlay has taken the position that there is a defect in title involving their quattroplex unit.

18. 35 out of 65 quattxoplexes have *front entrances* for each of the two front-unit owners. Accordingly, each of the rear-unit owners have an exclusive side entrance. Of the 30 quattroplex buildings with front-units having side entrances, one of which contains the Gourlay unit, access was reconfigured to the side of the building rather than the front, resulting in an access route over the side-yard for the front-unit owner, This access route is achieved by way of an easement, as the side-yard is owned by the rear unit owner.

22. It is apparent from By-law 151-88 and from the photographs of the Gourlay quattroplex, that the quattroplex was built in compliance with the By-law's requirements. Attached hereto to this my affidavit and marked as **Exhibit "K" (Tab 13)** are true copies of photographs of the Gourlay quattroplex, taken August 15, 1998.

22. Also apparent from Schedule "L" to the Agreement is that the 1.2 meter side yard exists adjacent to the front unit, though it was intentionally deeded to the rear unit owner, rather than to the front-unit owner who was to receive an easement.

[14] Ms. Gourlay continued to claim that she should have obtained title to the Side Yard.

[15] Ms. Gourlay's claim is based on the fact that Schedule "Q" was appended to the Agreement. It is an artist's depiction of Lot 108 - it does not set out metes and bounds and does not divide Lot 108 into parts. Schedule "Q" was not appended to define/show property limits – that was done by the documents sent to her solicitor by the solicitor for Town-Wood.

[16] On April 15, 1998, Ms. Gourlay completed a Conciliation Request Form and claimed compensation from the Program for "Financial loss" resulting from Town-Wood's alleged failure to convey to her title to the Side Yard.

[17] In its letter of May 21, 1998, the Program denied Ms. Gourlay's Claim under s.14 of the *Ontario New Home Warranties Plan Act* (the Act). The Program took the position that:

- (a) Pursuant to the Agreement, the Survey and the Transfer Deed, Town-Wood was only required to transfer Part 37 to Ms. Gourlay. Therefore, Ms. Gourlay received exactly what she had agreed to purchase and Town-Wood had agreed to sell.
- (b) In any event, the doctrine of merger applied.
- (b) Ms. Gourlay was an "owner" within the meaning of the Act and thus was not entitled to make a claim under s. 14(1)(a) of the Act and, because of the nature of the claim, it did not fall under s.13(1)(a) of the Act.

[18] By letter, dated May 26, 1998, Ms. Gourlay appealed the Program's decision to CRAT. The appeal was heard on September 9, 1998.

[19] As a result of the words/actions of the Gourlays, Town-Wood commenced an action (Toronto - 98BN03252) against the Gourlays for defamation. In that action, the

Gourlays counterclaimed and claimed the same relief as claimed against the Program. Town-Wood moved for summary judgment to dismiss the counterclaim.

[20] On September 17, 1998, Ferrier J., dismissed Gourlay's counterclaim; he held:

"...it is apparent from the agreement of purchase and sale, schedule L and the survey (all of which were reviewed by her solicitor prior to closing) she [Gourlay] appears to have got what she bargained for.

Alternatively, if the document identified as "schedule Q" amounts to a representation... the doctrine of merger nevertheless applies."

[21] On the same day as Ferrier J. dismissed the Gourlay counterclaim (September 17, 1998), CRAT allowed the appeal from the Program and ordered it to acquire "the transfer of title to Parts 35 and 36 to the applicant (Gourlay), or, if unable to acquire such title by a date that is 60 days from the date of release of this Decision, to pay to the Applicant the sum of \$4,889.12, plus any applicable taxes. Either action shall fully discharge the Program's obligations under this order."

III. The Applicable Section of the Ministry of Consumer and Commercial Relations Act (the Act)

s. 14. (1) - Where,

- (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
- (b) an owner has a cause of action against the vendor for damages resulting from a breach of warranty; or
- (c) the owner suffers damage because of a major structural defect as defined in the regulations for the purposes of section 13, and the claim is made within four years after the warranty expires or such longer time under such conditions as are prescribed,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

[22] CRAT's decision correctly held that s. 14(1)(b) and (c) of the Act do not include any warranty for deficiencies in the amount of land sold or conveyed. Thus, the claim, if any, must fit into s. 14(1)(a).

IV. Conclusion

[23] Section 14(1)(a) of the Act is intended to protect those who contract with a vendor and suffer financial loss where the vendor/builder never completes the transaction. Here, CRAT erred in applying s. 14(1)(a), to a situation where the transfer

had been completed. The claim of Ms. Gourlay is for an alleged deficiency in the quantity of land conveyed.

[24] CRAT in making the impugned order is compensating for alleged deficiencies in matters of title.

[25] In the following cases, CRAT had previously correctly held that s. 14(1)(a) of the Act was not intended to compensate any and every breach of contract but was intended to cover "financial loss" when the vendor had failed to complete the contract:

Re Lu, [1994] O.C.R.A.T.D. No. 86

Re Armstrong, [1995] O.C.R.A.T.D. No. 32

Re Legacy, [1991] O.C.R.A.T.D. (1991) C.R.A.T. 790

Re Greenberg, [1997] O.C.R.A.T.D. No. 148 affirmed (Nov. 22, 1993) Div. Ct.

Re Kaminski, [1994] O.C.R.A.T.D. No. 126

[26] It is our view that CRAT erred in concluding that the Gourlay claim fell under s.14(1)(a) of the Act.

[27] On the record before us, we -echo what Ferrier J. said on September 17, 1998: "Ms. Gourlay got what she bargained for and that if Schedule "Q" amounts to a representation, the doctrine of merger applies".

See:

1. *Fraser-Reid et al. v. Droumtsekas et al.* (1979), 103 D.L.R. (3d) 385, 394, 397 (S.C.C.)
2. *Thompson v. Trepil Realty Ltd.*, [1962] O.R. 956, 958 (H.C.J.) per Fraser J.
3. *Richview Construction Co. Ltd. v. RASPA* (1975), 11 O.R. (2d) 377, 387 (O.C.A.)
4. *DiCenzo Construction Co. Ltd. v. Glassco et al.* (1978), 21 O.R. (2d) 186, 199 (O.C.A.); leave to appeal to S.C.C. refused:

"Finality and certainty in business requires that this be the case, The acceptance of the conveyance marks the transition from an executory to an executed contract."

V . Result

[28] The appeal is allowed, the decision of CRAT, dated September 17, 1998, is set aside and the decision of the Program as set out in its letter of May 21, 1998 to Ms. Gourlay is restored.

VI. Costs

[29] The Respondent, Ms. Gourlay, shall forthwith pay to the Program costs of this appeal in the sum of \$3,000.00 and to Town-Wood Homes Limited the sum of \$1,000.00.

Released: October 3, 2000

**DIVISIONAL COURT
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE MADAME JUSTICE RATUSHNY

Thursday, the 27th day of July, 2000

MICHEL R. GOULET

Respondent

and

ONTARIO NEW HOME WARRANTY PROGRAM
and RICHCRAFT HOMES LTD.

Appellants

ORDER

THIS Motion by the Respondent Michel R. Goulet as heard this day at Ottawa.
On Consent of the parties:

1. THIS COURT ORDERS that the within Appeal be and the same is hereby dismissed without costs.

"Signature"